DOCUMENT RESUME

ED 282 814 SO 018 232

TITLE	This Constitution: A Bicentennial Chronicle.
SPONS AGENCY	National Endowment for the Humanities (NFAH), Washington, D.C.
PUB DATE	86
NOTE	734p.; Published by Project '87, a joint undertaking dedicated to commemorating the Bicentennial of the United States Constitution. Photographs may not reproduce clearly.
PUB TYPE	Collected Works - Serials (022) -- Historical Materials (060) -- Guides - Classroom Use - Guides (For Teachers) (052)
JOURNAL CIT	This Constitution; n1-13 1983-86
EDRS PRICE	MF04/PC30 Plus Postage.
DESCRIPTORS	*Constitutional History; Constitutional Law; Elementary Secondary Education; Instructional Materials; Learning Activities; Primary Sources; *United States Government (Course); *United States History
IDENTIFIERS	Bicentennial; Supreme Court; *United States Constitution

ABSTRACT

Providing a link between constitutional scholars and the planners of school and public programs observing the Bicentennial of the United States Constitution, this series of the Bicentennial Chronicles features articles that provide a link between scholars of the Constitution and the people who will be planning programs for the public and for the schools in observance of this historical occasion. Each issue features three distinct sections that provide ideas, resources, and practical information for program planners. The first section, written by specialists, contains essays designed to suggest themes and topics for Bicentennial programs. Thirteen constitution issues that can serve to organize an examination of the constitution, its evolution and meaning, are discussed. These issues are: (1) national power--limited and potential; (2) federalism--the balance between nation and state; (3) the judiciary--interpreter of the Constitution or shaper of public policy; and (4) civil liberties--the balance between government and the individual; (5) criminal penalties--rights of the accused and protection of the community; (6) equality--its definition as a constitutional value; (7) the rights of women under the Constitution; (8) the rights of ethnic and racial groups under the Constitution; (9) presidential power in wartime and in foreign affairs; (10) the separation of powers and the capacity to govern; (11) avenues of representation; (12) property rights and economic policy; and (13) constitutional change and flexibility. The second section of each journal highlights documents relating to the Constitution, accompanied by an explanation of their content and an analysis of their importance; and the third section contains information on Bicentennial events planned at colleges, museums, libraries, state and national archives, and government agencies throughout the country. (EDS)

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THIS CONSTITUTION: A BICENTENNIAL CHRONICLE

Issues: 1, 2, 3, 4, 5
September 1983, Spring 1984, Fall 1984, Winter 1984

Issues: 6, 7, 8, 9
Spring 1985, Summer 1985, Fall 1985, Winter 1985

Issues: 10, 11, 12, 13
Spring 1986, Summer 1986, Fall 1986, Winter 1986

Project '87 of the
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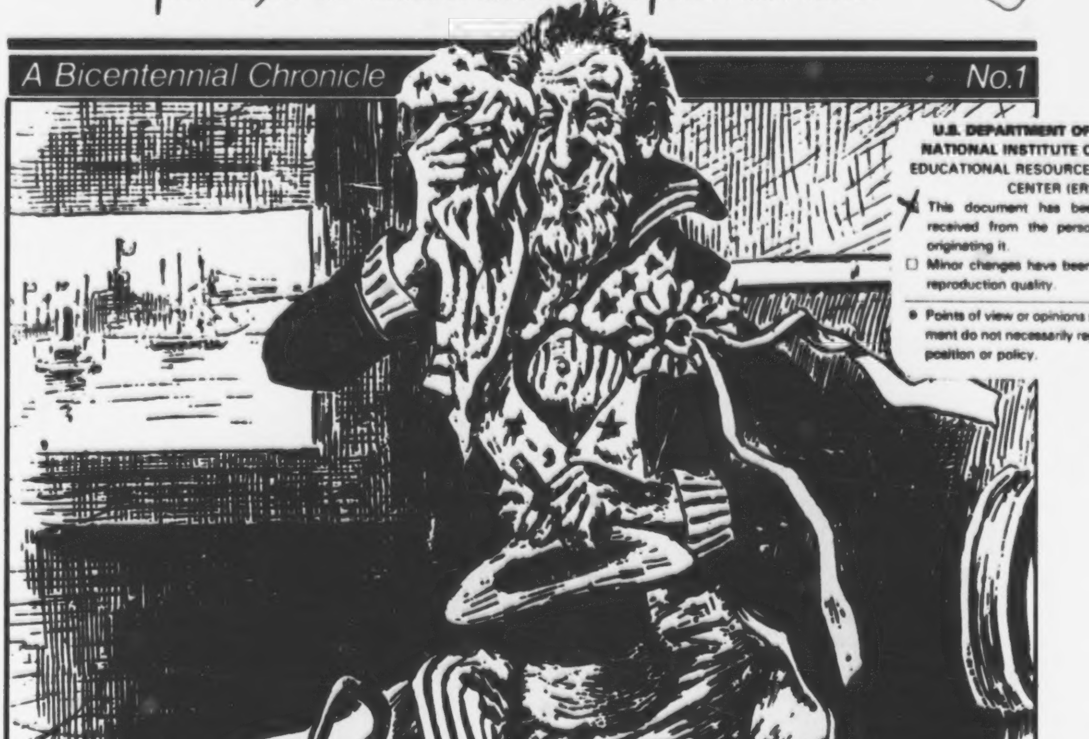
A Bicentennial Chronicle No.1



UNCLE SAM. "Whe-ew!! And what will the tew hundredth be?"

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OCT 1983

Project '87

Chronology of Bicentennial Dates from the End of the American Revolution to the Ratification of the Bill of Rights

After the Continental Congress voted in favor of independence from Great Britain on July 2, 1776, and adopted the Declaration of Independence on July 4, it took up the proposal of Richard Henry Lee for a "plan of confederation." On July 12, 1776, a congressional committee presented "Articles of Confederation and Perpetual Union," which the Congress debated for more than a year. The body adopted the Articles of Confederation on November 15, 1777, and submitted them to the thirteen states for ratification, which had to be unanimous. By March 1, 1781, all the states had given their assent. The Articles of Confederation gave limited powers to the federal government; important decisions required a super-majority of nine states. Congress could declare war and compact peace,but could not levy taxes, or regulate trade between the states or between any state and a foreign country. All amendments had to be adopted without dissenting votes. In 1786, James Madison described the Articles as "nothing more than a treaty of amity and of alliance between independent and sovereign states." As attempts to amend the Articles proved fruitless, and interstate disputes over commercial matters multiplied, the weaknesses of the Articles of Confederation as a fundamental charter became apparent. The march toward a new form of government began.

September 3, 1783: Articles of Peace ending hostilities between Great Britain and the United States are signed by Britain in Paris.

November 25, 1783: British troops evacuate New York City.

December 23, 1783: George Washington resigns his commission as Commander-in-chief of American forces and takes leave "of all the employments of public life."

March 28, 1785: MOUNT VERNON CONFERENCE. George Washington hosts a meeting at Mount Vernon of four commissioners from Maryland and four from Virginia to discuss problems relating to the navigation of the Chesapeake Bay and the Potomac River. After negotiating agreements, the commissioners recommend to their respective legislatures that annual conferences be held on commercial matters, and that Pennsylvania be invited to join Maryland and Virginia to discuss linking the Chesapeake and the Ohio River.

January 16, 1786: Virginia's legislature adopts a statute for religious freedom, originally drafted by Thomas Jefferson and introduced by James Madison. The measure protects Virginia's citizens against compulsion to attend or support any church, and against discrimination based upon religious belief. The law serves as a model for the First Amendment to the United States Constitution.

January 21, 1786: Virginia's legislature invites all the states to a September meeting in Annapolis to discuss commercial problems.

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Sources: Richard B. Morris, ed. *Encyclopedia of American History* (New York: Harper & Row, 1976); Samuel Eliot Morison, *The Oxford History of the American People* (New York: Oxford University Press, 1965).

...do ordain and establish
# this Constitution
for the United States of America.

A Bicentennial Chronicle

No. 1 **September, 1983**

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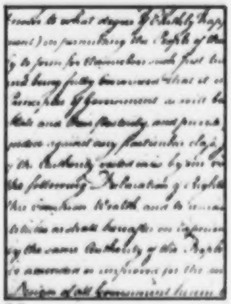

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Adaptation of an 1889 cartoon, origin unknown. *Division Political History, Smithsonian Institution, Washington, D.C.*

this Constitution **is published with the assistance of a grant from the National Endowment for the Humanities as part of its special initiative on the Bicentennial of the United States Constitution. Editorial offices are located at 1527 New Hampshire Avenue, N.W., Washington, D.C. 20036. All material in this publication may be photocopied if attributed as follows: "Reprinted from *this Constitution: A Bicentennial Chronicle,* September, 1983, published by Project '87 of the American Historical Association and the American Political Science Association." Project '87 would appreciate notification from those who photocopy material in this issue for use in presentations to other groups.** **© Copyright 1983 by the American Historical Association and the American Political Science Association**

this Constitution

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From the Editor

Introducing ***this Constitution:* *a Bicentennial Chronicle***

The magazine you hold in your hands is the premier issue of ***this Constitution***, a chronicle for the Bicentennial of the United States Constitution which will take place on September 17, 1987. The magazine is published by Project '87 as part of its effort to forge a link between scholars of the Constitution and the people who will be planning programs for the public and for the schools in observance of this historical occasion.

this Constitution features three distinct sections that provide ideas, resources and practical information for program planners. The first section contains articles by specialists written in a lively and accessible manner. These essays are designed to suggest themes and topics for Bicentennial programs, and will address a wide range of ideas.

Among these essays, ***this Constitution*** will offer readers a series of articles on "Enduring Constitutional Issues." Last spring, Project '87 asked its considerable network of scholars and public officials to identify crucial constitutional issues of enduring concern; more than one hundred of those surveyed responded. Project '87's governing body, its Joint Committee, reviewed these suggestions and, after some deliberation, chose thirteen issues that can serve to organize examination of the United States Constitution, its evolution and meaning. The issues can be found in the box on page 3.

this Constitution introduces the discussion of the "Enduring Constitutional Issues" with a personal interpretation by James MacGregor Burns and Richard B. Morris, co-chairs of Project '87's Joint Committee. Their essay poses questions about the goals and intent of the United States Constitution.

In each successive issue, ***this Constitution*** will feature an article by a different student of the Constitution exploring one of the "Enduring Constitutional Issues." These essays should provoke inquiry, discussion and alternative interpretations. We welcome such responses from readers to these essays—as well as to the other articles.

The second section of ***this Constitution*** highlights documents relating to the Constitution, accompanied by explanation of their context and analysis of their importance. These documents, too, represent resources for Bicentennial programs and publications.

The third section of ***this Constitution*** contains information we have received from program planners, thus providing a clearinghouse about Bicentennial events. Planners and educators can learn about projects being designed by colleges, museums, libraries, state and national archives and government agencies, private civic and educational organizations throughout the country. Funding sources for Bicentennial programs and activities—humanities councils, foundations—will also be described.

The resource section of the magazine will also identify and publish sample educational materials on the Constitution and constitutional issues; report on the Federal Government's plans for the Bicentennial; and post calendars of events. We will also take a look at some of the programs and publications prepared for the 1976 Bicentennial of American Independence since many are useful as models and materials for the forthcoming commemoration.

U.S. Supreme Court

A Salutation From Chief Justice Warren E. Burger

Honorary Chair of Project '87's Advisory Board

The Bicentennial of the Constitution offers a rare opportunity to reflect upon the founding principles of our government, and their impact upon the development of the nation—and indeed of other nations. It is highly appropriate that commemorative events be used to foster thoughtful discussion and study of the most durable Constitution in the history of nations. Each of us should take the responsibility to inaugurate and participate in Bicentennial activities that will lead to a richer understanding of the Constitution that was meant "for the ages."

In future issues of ***this Constitution***, we will include guides to television programs and films in the planning stage and in production. Another feature will list scholars, by state, who agree to serve as consultants and speakers for Bicentennial programs.

Each issue of ***this Constitution*** will contain material which will continue to be useful throughout the Bicentennial era. Recipients of the magazine who save the issues as they arrive should find the magazine a valuable resource during the next four years.

In order to help us serve the needs and interests of Bicentennial planners and other readers, we are including an evaluation sheet on page 49. Please fill this questionnaire out, and return it to us to share your impressions of ***this Constitution*** and your suggestions on how it may assist planners of public programs to make the Bicentennial of America's Constitution a thoughtful, educational and enduring commemoration.

Thirteen Enduring Constitutional Issues

THE UNION AND THE CONSTITUTION FOREVER.

- National Power—limits and potential
- Federalism—the balance between nation and state
- The Judiciary—interpreter of the Constitution or shaper of public policy
- Civil Liberties—the balance between government and the individual
- Criminal Penalties—rights of the accused and protection of the community
- Equality—its definition as a Constitutional value
- The Rights of Women Under the Constitution
- The Rights of Ethnic and Racial Groups Under the Constitution
- Presidential Power in Wartime and in Foreign Affairs
- The Separation of Powers and the Capacity to Govern
- Avenues of Representation
- Property Rights and Economic Policy
- Constitutional Change and Flexibility

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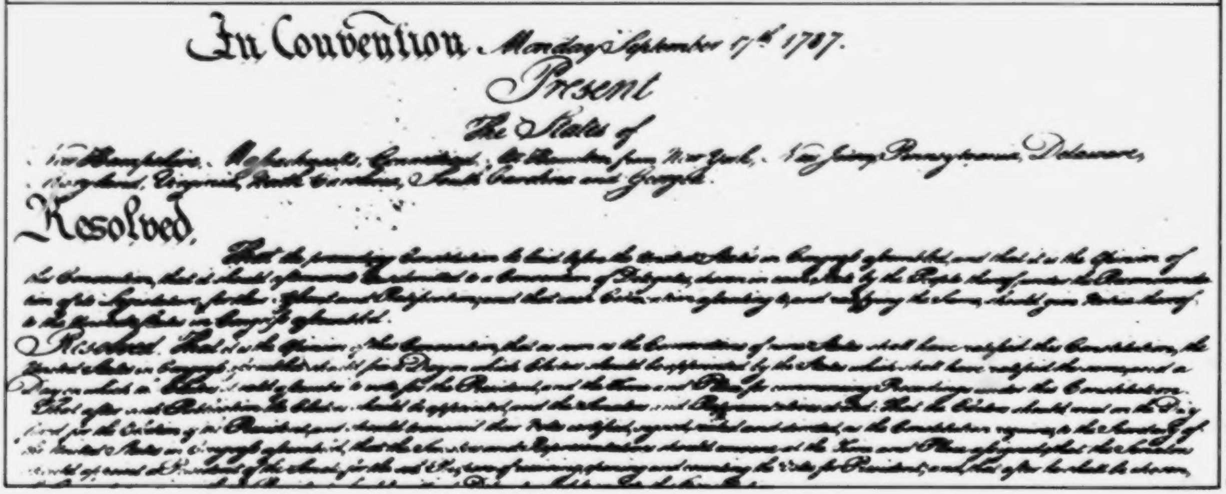
The Constitution: Thirteen Crucial Questions

by JAMES MACGREGOR BURNS AND RICHARD B. MORRIS



In Convention. Monday September 17th 1787.

Present

The States of

New Hampshire, Massachusetts, Connecticut, Mr. Hamilton from New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.

Resolved,

Resolved.

Resolution of the Constitutional Convention to submit the newly adopted Constitution to the Congress of the Confederation. *National Archives*

1. TOO MUCH—OR TOO LITTLE—NATIONAL POWER? Are the limits placed on the federal government's powers by the Constitution realistic and enforceable?

The Framers wanted a national government strong enough to exercise certain general powers but not so powerful as to threaten peoples' liberties. In their reading of history and their own experience they had seen all too many republics turn into despotisms. "In framing a government which is to be administered by men over men," wrote James Madison, "the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." Thus the Framers carefully enumerated the powers delegated to the national government while, in the Bill of Rights, reserving the rest to the states and the people. Congressional legislation, executive acts, and decisions by the federal judiciary have broadened national power enormously in the face of internal and external threats to our national security and economic well-being. Has this trend gone too far? Or is the national power in fact inadequate in the face of social unrest, economic instability and international turbulence? Will it be even less adequate in our Third Century—the age of continuing technological change, nuclear danger, and intense pressure on national and global resources?

2. DOES FEDERALISM WORK? Is the Constitution maintaining an efficient and realistic balance between national and state power?

The United States did not invent federalism, but under our Constitution it has a distinctly indigenous form—equality of the states in the Senate, and a Bill of Rights which, through the Tenth Amendment, reserves to the states or the people powers not delegated to the United States by the Constitution. Nevertheless, the American union exercises its power directly on the individual, and under the Constitution's supremacy clause congressional statutes and treaties constitute the supreme law of the land. Drastic changes in the direction of centralization have taken place since the Civil War, especially during and after the New Deal, including the nationalization of most of the Bill of Rights. The Income Tax Amendment of 1913, which has led to the federal government's collecting an overwhelming portion of the tax revenue, has further weakened state power. To sustain state solvency, Congress promulgated a Revenue Sharing Act in 1972, but it is doubtful whether the ensuing limited fiscal relief to the states has restored the balance of power of the federal structure. Can federalism work without continued federal handouts? Must federal control of revenue mean federal domination of state action?

3. IS THE JUDICIAL BRANCH TOO POWERFUL? Are the courts exercising their powers appropriately as interpreters of the Constitution and shapers of public policy?

A whole cluster of cases—from Dred Scott through the New Deal decisions, the recent civil libertarian cases and culminating in Brown v. Board of Education (1954-desegregation), Baker v. Carr (1962-reapportionment), and Roe v. Wade (1973-abortion)—show that where Congress fails to act, the Supreme Court has ventured into the field of policymaking, in areas ranging from human freedom to definitions of privacy. It has been asserted that "the Constitution is what the judges say it is." Is this role for the courts a proper and necessary one in a democracy? Does it bespeak a vacuum of power in Congress and a tendency of the representative body to evade making decisions in cases where public opinion is sharply divided? Could the current move to limit the jurisdiction of the federal courts endanger the Bill of Rights, among other safeguards to individual freedom? Can a federal union survive without lodging somewhere a power to declare laws unconstitutional, to ensure separation of powers, to apply to laws a strict scrutiny in instances of impaired fundamental rights, and to make explicit the avowed intent of the Preamble, "to establish justice"?

4. BALANCING LIBERTY AND SECURITY: HOW CAN REPUBLICAN GOVERNMENT PROVIDE FOR NATIONAL SECURITY WITHOUT ENDANGERING CIVIL LIBERTIES?

For the Framers, liberty—the protection of individual rights against governmental or religious interference—lay at the heart of a constitutional republic. The Bill of Rights is the enduring and eloquent testament to their commitment to liberty. But Americans have differed over the meaning of liberty—does it mean the right to speak, to assemble, to print, to pray, to bear arms without limit of any kind? Is the essential role of republican government simply to leave people alone in their exercise of these rights, or to take a positive role in expanding these liberties, or even to broaden some rights—such as free speech—and to narrow others—such as the right to bear arms? And are civil and political and religious liberties enough—what about economic and social rights? During World War II Franklin D. Roosevelt promulgated the Four Freedoms—freedom of speech and of worship, but also freedom from want and from fear. Does government have the right and duty under the Constitution to guarantee all these "freedoms" and at the expense of whose liberty? Finally, what is the proper role of government in resolving conflicts between individual rights and national needs—for example, the right of free speech and assembly during war? Can republican government provide for national security without endangering civil liberties?

5. SUSPECTS' RIGHTS: How can republican government protect its citizenry and yet uphold the rights of the criminally accused?

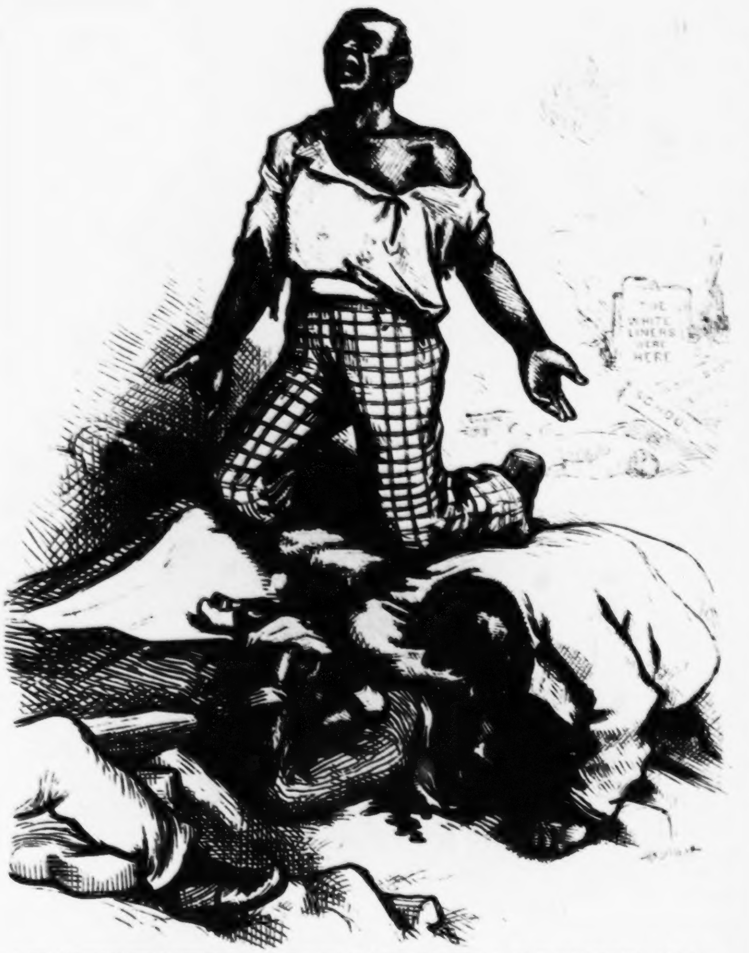
The rise of crime in the United States has raised tensions between certain guarantees in the Bill of Rights, the capacity of the legal system, and measures intended to curb lawlessness. Article II protects the right to bear arms, but gun control measures seek to restrain gun ownership. Article IV protects citizens from governmental searches without warrants, but conflicts arise over collection of evidence in potentially criminal situations. Articles VI, VII and VIII stipulate the rights of the criminally accused to counsel, trial by jury, and protection from excessive bail and cruel punishment, but the complexity of procedures required to administer the criminal justice system, including constitutionally-mandated rights, results in practices like plea-bargaining which are often troublesome to observers. These issues are of immense concern to the public, which demands personal security and at the same time supports the basic principles of criminal justice in a democratic society. Can these conflicting interests be reconciled?

6. "ALL MEN ARE CREATED EQUAL": What kinds of equality are and should be protected by the Constitution and by what means?

A major contemporary issue is the distinction between equality before the law and equality in distribution of resources and benefits. The former deals with a limited set of governmental procedures, like voting. The latter embraces all interests and would require social

WE DEMAND
AN AMENDMENT
TO THE
UNITED STATES
CONSTITUTION
ENFRANCHISING
WOMEN.

Suffrage banner. Division of Political History, Smithsonian Institution, Washington, D.C.


THE WHITE LINERS WERE HERE
SCHOOL

IS *THIS* A REPUBLICAN FORM OF GOVERNMENT? IS *THIS* PROTECTING LIFE, LIBERTY, OR PROPERTY? IS *THIS* THE EQUAL PROTECTION OF THE LAWS?

Mr. Lamar (Democrat, Mississippi). "In the words of the inspired Poet, 'Thy Gentleness has made thee Great.'" [Did Mr. Lamar mean the Colored Race?]

Harper's Weekly, September 2, 1876. *Division of Political History, Smithsonian Institution, Washington, D.C.*

policy to achieve equality. Questions are constantly arising about equality: Can a state deny welfare to a person only briefly resident? Can a state, by using property taxation as a basis for school finance, allocate less money to poor districts? Can universities use quotas to promote affirmative action? Does the Constitution guarantee equality of opportunity or equality of result, and which do we want? Finally, we must address the question of how much the government should intervene in sensitive areas like health, education and housing, in order to equalize economic and even "social" opportunity.

7. WOMEN'S RIGHTS: Does the Constitution adequately protect the rights of women?

Women are not mentioned in the original Constitution. Nonetheless, the description of the qualifications of a Representative as a "person" permitted a woman to be elected to Congress in 1916 even before they were guaranteed the right to vote by a federal Constitutional amendment. The 14th Amendment too speaks of "all persons" being entitled to citizenship, bars any state from enforcing any law which shall "abridge the privileges or immunities of Citizens of the United States," prohibits any state from depriving "any person of life, liberty or property without due process of law" and from denying "to any person within its jurisdiction the equal protection of the laws." While none of these provisions discriminates on the basis of sex, the Supreme Court to date has not interpreted them to bar sex distinctions in law outright. The Constitution, through the 19th Amendment, specifically prohibits only one form of sex-based discrimination; no state may now deny women the franchise. In a variety of other crucial areas, however, the Constitution contains no explicit guarantees of women's rights. The defeat of ERA raises anew the question of whether the present protections of the Constitution can be interpreted as providing affirmative guarantees of sexual equality, and if not, what alternatives should be pursued?

8. SAFEGUARDING MINORITIES: Does the Constitution adequately protect the rights of blacks, native Americans, ethnic groups, and recent immigrants?

The Constitution historically has protected various economic and regional groups against national interference—19th-century industrial capitalists, slave holders, religious minorities, political dissenters. On the other hand, it has failed to protect American blacks, both before and after Emancipation, other racial groups, including native Americans and Japanese-Americans, and leaders and members of alleged "radical" groups suspected of "subversion." The trend in this century, as a result of congressional legislation, presidential action, judicial decisions, the efforts of organized minorities and civil liberties and civil rights groups, has been toward much stronger constitutional guarantees of minority rights. Will this trend continue? Is it imprudent to depend so heavily on federal judicial sensitivity to minority concerns? Can we strengthen majority rule *and* protect minority rights?

9. THE CONSTITUTION FACES OUTWARD: Does the President

The Framers contrived a most ingenious system of pitting the legislative branch against the executive, Senate against the House, and, in effect, the judiciary against either or both the other branches.

possess adequate power—or too much power—over war-making and foreign policy?

Except in his capacity as commander-in-chief, the President receives the bulk of his powers under delegation and authority of Congress. The experience of the Civil War, World War II, and the Vietnam War reveals that the President can exercise extraordinary powers in wartime both to subvert civil liberties and to dispatch troops into war zones without explicit direction of Congress. Are such measures necessary for the national defense? The recent War Powers Act was designed to make the commander-in-chief more responsive to the people's representatives in Congress. Whether it will do so has yet to be tested, especially in view of the recent Supreme Court decision invalidating the legislative veto.

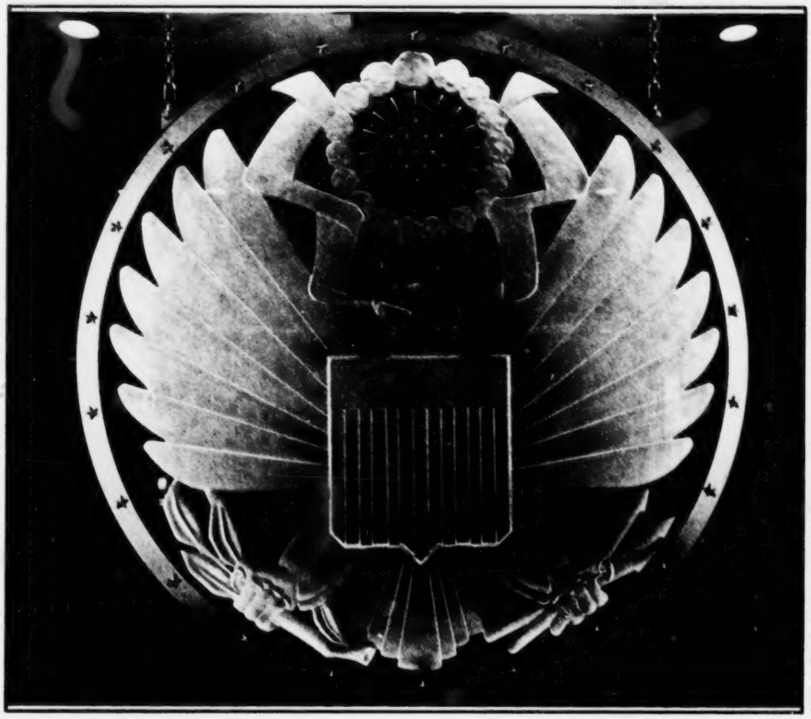
In foreign affairs, the President under the Constitution is the principal actor, although treaties require the assent of the Senate to be valid. While in most instances the consent of the Senate has become a formality, there have been and continue to be occasions when the necessity for Senate ratification does produce a struggle between the President and the Senate. Such contests took place over the adherence to the Covenant of the League of Nations, the Panama Canal Treaty and the Canadian Fisheries compact. Should the two-thirds requirement for a treaty be lowered to a simple majority or a three-fifths majority in order to minimize such conflicts, or should the Senate be a more active partner than it has been?

10. TOO MANY CHECKS AND BALANCES? Does the constitutional separation of powers between the President, the Congress and the Judiciary create a deadlock in governance?

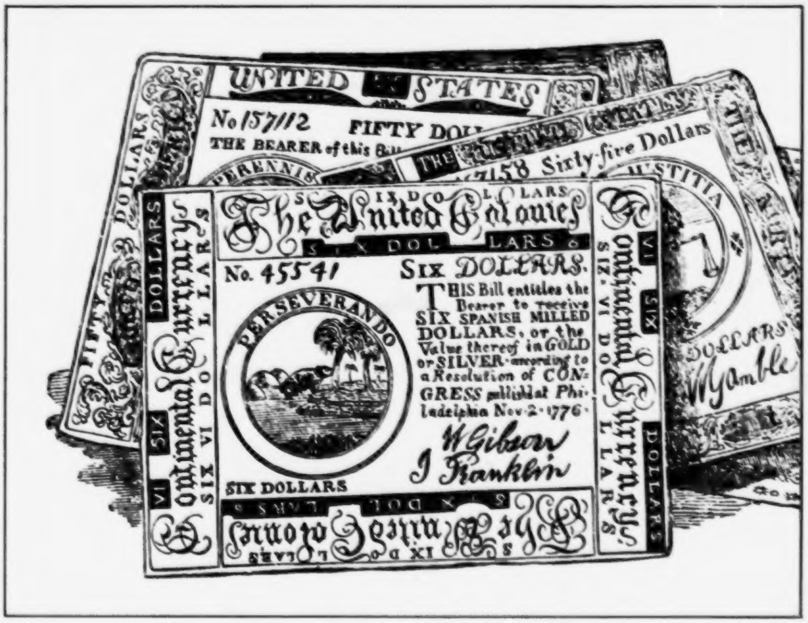
Determined to make government their servant and not their master, the Framers contrived a most ingenious system of pitting the legislative branch against the executive, Senate against the House, and, in effect, the judiciary against either or both the other branches. The "accumulation of all powers, legislative, executive, and judiciary, in the same hands," Madison said, was the "very definition of tyranny." The Framers not only gave different branches different powers but required their members to be chosen by—and hence responsive to—diverse and conflicting "constituencies." "Ambition," Madison summed it up, "must be made to counteract ambition." Their handiwork can still be seen on the front page of virtually any newspaper today. Is the checks-and-balance system out of date, a relic of the "horse-and-buggy" era? Does it unduly hobble the federal government as it seeks to cope with an overwhelming tide of problems? Or is governmental quarreling, inefficiency, delay and even impotence a price we must pay—are willing to pay—to keep "government off our backs?"

11. "GOVERNMENT BY THE PEOPLE": Does the evolving constitutional system, including political parties and interest groups, strengthen fair and effective representation of the people or undermine it?

We are used to majority rule in House and Senate, town meetings, city councils, student governments. Counting heads, and deciding in favor of the side having the votes of a majority seems an easy, practical, and fair way to settle differences.



Great Seal of the United States. Etched in glass by Sidney Waugh. Division of Political History, Smithsonian Institution, Washington, D.C.


UNITED STATES
No 157112 FIFTY DOL
THE BEARER of this Bi
Sixty-five Dollars
The United Colonies
SIX DOLLARS
No. 45541
SIX DOLLARS.
THIS Bill entitles the Bearer to receive SIX SPANISH MILLED DOLLARS, or the Value thereof in GOLD or SILVER according to a Resolution of CONGRESS published at Philadelphia Nov. 2. 1776.
PERSEVERANDO
Continental Currency
W Gibson
J Franklin
SIX DOLLARS

The Constitution, however, was not established solely on the basis of majority rule, but on the protection of regional and local minorities as well. By controlling one body, such as the Senate, a regional, economic or political minority could veto actions by the majority. This arrangement differs sharply from the parliamentary system, where simple majorities can and do make crucial decisions. Over the years the extension of the right to vote, the rise of a national party system that united like-minded presidents, senators and congressmen, and such changes as the direct election of United States senators, tended to make national government somewhat more majoritarian. Recent decades, however, have often seen the executive and legislative branches politically divided, inhibiting simple majoritarian decisions. Moreover, even leaders and parties winning nationwide majorities have trouble putting through their programs in the face of the strength of economic and social interest groups. Do these groups advance or threaten the goal of "government by the people?" Have we ever in our history attained this goal?

12. THE CONSTITUTION AND THE ECONOMY: Can the Constitution be utilized more effectively to provide economic security and promote the well-being of all Americans?

The Constitution was created not in a vacuum, but largely in response to the severe depression which the Articles of Confederation were powerless to arrest. Hence, the charter granted to Congress powers over commerce and taxation and included various fiscal prohibitions on the states in the full-faith-and-credit clause, the export-import clause, and the clause against impairing the obligation of contracts. Hamilton's enunciation of implied powers, his interpretation of the taxing power, and his insistence on honoring the public credit contributed to the upward economic thrust in the first decade of our history. Thus, from the start the government was a friend of private enterprise. The degree to which the Constitution has been employed to promote business enterprise and yet discipline its abuses has varied with national administrations and the personnel of the federal courts. But the power to promote the public welfare resides in the Constitution, and its use depends finally upon the public conception of its necessary and proper function, especially in the times of economic crisis. Are we satisfied with its performance today?

13. CONSTITUTIONAL FLEXIBILITY: Should we make changing our fundamental charter of government simpler and more democratic?

The Constitution provides two formal ways for amending it: 1) by a two-thirds vote of Congress and a three-quarters vote of the state legislatures or state conventions; 2) by a convention to be called by the legislatures of two-thirds of the states, whose amendments shall be ratified by the legislatures of three-quarters of the states. This procedure was a modification of the Articles of Confederation, which required a unanimous vote of *every* state to amend the Articles. The states have made no use of their power to initiate amendments. From the start all amendments to the Constitution have been proposed by Congress and not by the state legislatures, and only one of them, the 21st Amendment repealing prohibition, was effected through ratification by convention rather than state legislatures. The defeat of recent amendments and the prospect of a cluster of other proposals have given rise to serious questions: Do we need further amendments to the Constitution? Is the present amendment procedure too restrictive or have judicial interpretation, legislative and executive actions proven adequate to meet most needs for Constitutional flexibility? If a constitutional convention is called by the states, can its proposals be restricted to the terms of its summons? Does the convening of a new constitutional convention threaten the very foundation of the original document?

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James MacGregor Burns is Woodrow Wilson professor of government at Williams College. He is now writing a three-volume political and intellectual history of the United States since the founding period; it is being published by Alfred A. Knopf, Inc.

Eighteenth-Century American Constitutionalism

by GORDON S. WOOD

The era of the American Revolution was the greatest and most creative age of constitutionalism in American history. During the last part of the eighteenth century Americans established the modern idea of a written constitution. There had been written constitutions before in Western history, but Americans did something new and different. They made written constitutions a practical and everyday part of governmental life. They showed the world not only how written constitutions could be made truly fundamental, distinguishable from ordinary legislation, but also how such constitutions could be interpreted on a regular basis and altered when necessary. Further, they offered the world concrete and usable governmental institutions for the carrying out of these constitutional tasks. All in all it was an extraordinary achievement, scarcely duplicated by any modern country in such a brief period of time.

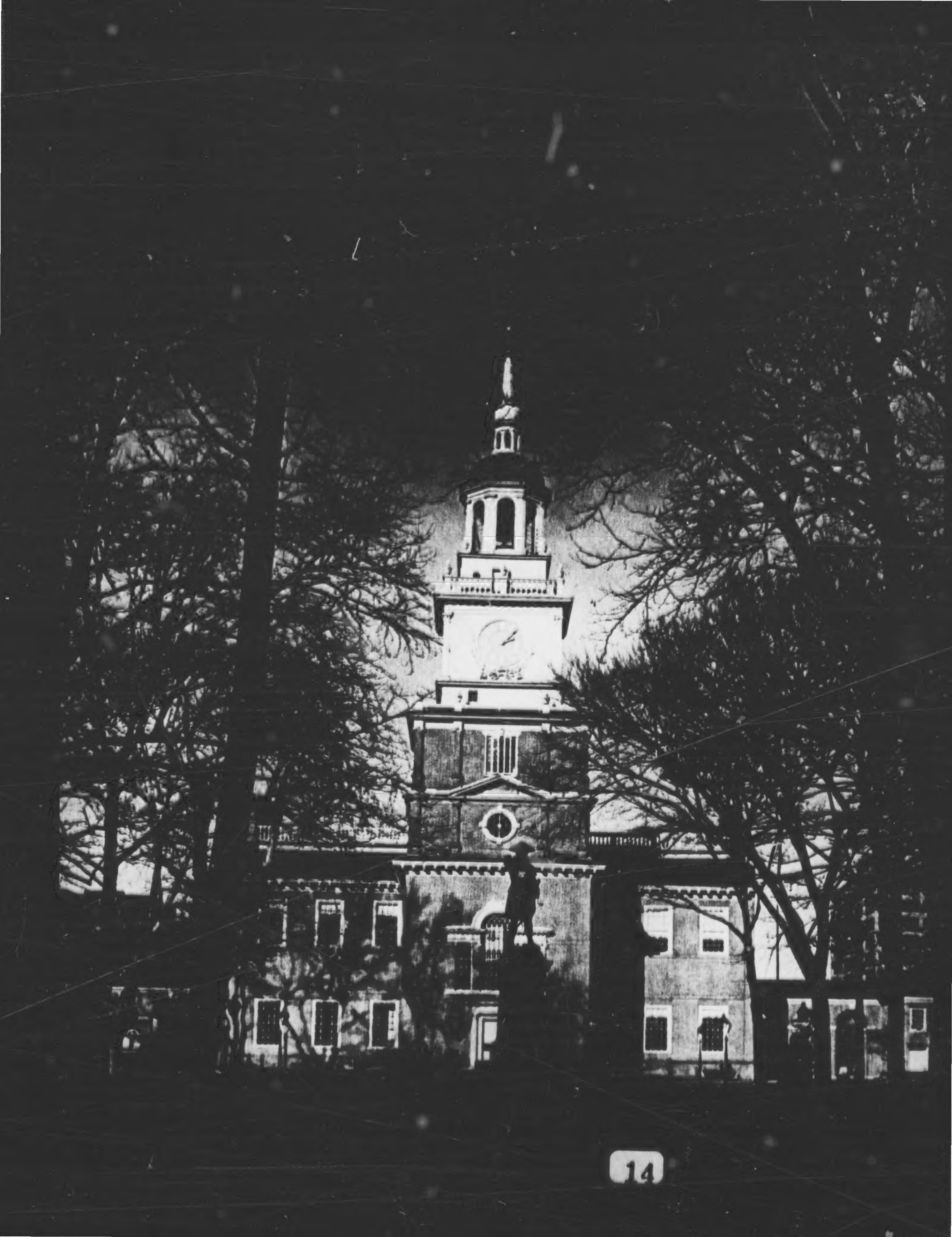
Before the era of the American Revolution a constitution was rarely ever distinguished from the government and its operations. Traditionally in English culture a constitution referred not only to fundamental rights but also to the way the government was put together or constituted. A constitution was the disposition of the government; it even had medical or physiological connotations, like the constitution of the human body. "By constitution," wrote Lord Bolingbroke in 1733, "we mean, whenever we speak with propriety and exactness, that assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system, according to which the community hath agreed to be governed." The English constitution, in other words, included both fundamental principles and rights and the existing arrangement of governmental laws, customs, and institutions.

By the end of the Revolutionary era, however, the Americans' idea of a constitution had become very different from that of the English. A constitution was now seen to be no part of the government at all. A constitution was a written document distinct from and superior to all the operations of government. It was, as Thomas Paine said in 1791, "a thing *antecedent* to a government; and a government is only the creature of a constitution." And, said Paine, it was "not a thing in name only; but in fact." For Americans a constitution was like a bible, possessed by every family and every member of government. "It is the body of elements, to which you can refer, and quote article by article; and which contains ... everything that relates to the complete organization of a civil government, and the principles on which it shall act, and by which it shall be bound." A constitution thus could never be an act of a legislature or of a government; it had to be the act of the people themselves, declared James Wilson in 1790, one of the principal framers of the federal Constitution of 1787; and "in their hands it is clay in the hands of a potter; they have the right to mould, to preserve, to improve, to refine, and to furnish it as they please." If the English thought this American idea of a constitution was, as Arthur Young caustically suggested in 1792, like "a pudding made by a recipe", the Americans had become convinced the English no longer had a constitution at all.

Lord Bolingbroke

It was a momentous transformation of meaning. It involved not just a change in the Americans' political vocabulary but an upheaval in their whole political culture. In the short span of less than three decades Americans created a whole new way of looking at government.

The colonists began the imperial crisis in the early 1760s thinking about constitutional issues in much the same way as their fellow Britons. Like the English at home they believed that the principal threat to the people's ancient rights and liberties had always been the prerogative powers of the king, those vague and discretionary but equally ancient rights of authority that the king possessed in order to carry out his responsibility for governing the realm. Indeed, eighteenth-century English citizens saw their history as essentially a struggle between these conflicting rights, between a centralizing monarchy on one hand and localist-minded nobles and people on the other. Eighteenth-century colonists had no reason to think about government much differently. Time and again in the colonial period the colonists had been forced to defend themselves against the intrusions of royal prerogative power. They relied for defense on their

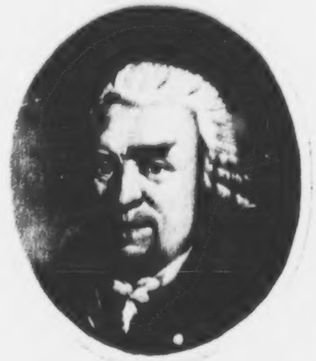


Indeed, it was precisely on this distinction between "legal" and "constitutional" that the American and the British constitutional traditions diverged at the Revolution.

colonial assemblies, their rights as Englishmen, and what they called their ancient charters. In the seventeenth century many of the colonies had been established by crown charters, corporate or proprietary grants made by the king to groups like the Massachusetts Puritans or to individuals like William Penn and Lord Baltimore to found colonies in the New World. In subsequent years these written charters gradually lost their original purpose in the eyes of the colonists and took on a new importance, both as prescriptions for government and as devices guaranteeing the rights of the people against their royal governors. In fact, the whole of the colonists' past was littered with such charters and other written documents of various sorts to which the colonial assemblies had repeatedly appealed in their squabbles with royal power.

In appealing to written documents as confirmations of their liberties the colonists acted no differently from other Englishmen. From almost the beginning of their history, Britons had continually invoked written documents and charters in defense of their rights against the crown's power. "Anxious to preserve and transmit" their liberties "unimpaired to posterity", the English people, observed one colonist on the eve of the Revolution, had repeatedly "caused them to be reduced to writing, and in the most solemn manner to be recognized, ratified and confirmed," first by King John with Magna Carta, then by Henry III and Edward I, and "afterwards by a multitude of corroborating acts, reckoned in all, by Lord Cook, to be thirty-two from Edw. 1st to Hen. 4th. and since, in a great variety of instances, by the bills of rights and acts of settlement." All of these documents, from Magna Carta to the Bill of Rights of the Glorious Revolution of 1689, were merely written evidence of those "fixed principles of reason" from which Bolingbroke had said the English constitution was derived.

Although eighteenth-century Englishmen talked about the fixed principles and the fundamental law of the English constitution, few of them doubted that Parliament, as the representative of the nobles and people and as the sovereign law-making body of the nation, was the supreme guarantor and interpreter of these fixed principles and fundamental law. Parliament was in fact the bulwark of the people's liberties against the crown's encroachments; it alone defended and confirmed the people's rights. The Petition of Right, the act of Habeus Corpus, the Bill of Rights were all acts of Parliament, statutes not different in form from other laws passed by Parliament.



S. ADAMS, ESQ.

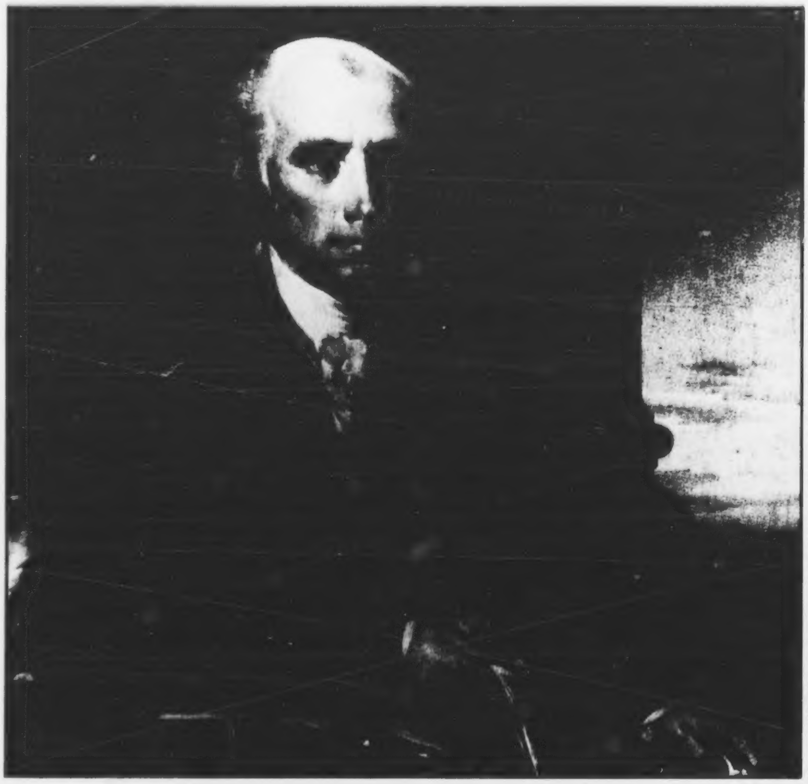
Governor of Massachusetts

For Englishmen therefore, as William Blackstone, the great eighteenth-century jurist pointed out, there could be no distinction between the "constitution or frame of government" and "the system of laws". All were of a piece: every act of Parliament was part of the English constitution and all law, customary and statute, was thus constitutional. "Therefore," concluded the English theorist William Paley, "the terms *constitutional* and *unconstitutional*, mean *legal* and *illegal*."

Nothing could be more strikingly different from what Americans came to believe. Indeed, it was precisely on this distinction between "legal" and "constitutional" that the American and the British constitutional traditions diverged at the Revolution. During the 1760s and seventies the colonists came to realize that although acts of Parliament, like the Stamp Act of 1765, might be legal, that is, in accord with the acceptable way of making law, such acts could not thereby be automatically considered constitutional, that is, in accord with the basic principles of rights and justice that made the English constitution what it was. It was true that the English Bill of Rights and the act of settlement in 1689 were only statutes of Parliament, but surely, the colonists insisted, they were of "a nature more sacred than those which established a turnpike road." Under this pressure of events the Americans came to believe that the fundamental principles of the English constitution had to be lifted out of the law-making and other institutions of government and set above them. "In all free States," said Samuel Adams in 1768, "the Constitution is fixed; and as the supreme Legislature derives its Powers and Authority from the Constitution, it cannot overleap the Bounds of it without destroying its own foundation." Thus in 1776, when Americans came to make their own constitutions for their newly independent states, it was

Independence Hall. National Park Service, U.S. Department of the Interior

Samuel Adams, mezzotint attributed to George Graham. National Portrait Gallery, Smithsonian Institution, Washington, D.C.



James Madison, engraving attributed to N.E. Maurin. National Portrait Gallery, Smithsonian Institution, Washington, D.C.

inevitable that they would seek to make them fundamental and explicitly write them out in documents.

It was one thing, however, to define the constitution as fundamental law, different from ordinary legislation and circumscribing the institutions of government; it was quite another to make such a distinction effective. In the years following the Declaration of Independence, many Americans paid lip service to the fundamental character of their state constitutions, but like eighteenth-century Britons they continued to believe that their legislatures were the best instruments for interpreting and changing these constitutions. The state legislatures were the representatives of the people, and the people, it seemed, could scarcely tyrannize themselves. Thus in the late 1770s and early eighties, several state legislatures, acting on behalf of the people, set aside parts of their constitutions by statute and interpreted and altered them, as one American observed, "upon any occasion to serve a purpose." Time and again the legislatures interfered with the governors' legitimate powers, rejected judicial decisions, disregarded individual liberties and property rights, and in general, as one victim complained, violated "those fundamental principles which first induced men to come into civil compact."

By the mid-1780s many American leaders had come to believe that the state legislatures, not the governors as they had thought in 1776, were the political authority to be most feared. Legislators were supposedly the representatives of the people who annually elected them; but "173 despots would surely be as oppressive as one," wrote Thomas Jefferson. "An *elective despotism* was not the government we fought for." It increasingly seemed to many that the idea of a constitution as fundamental law had no real meaning after all. "If it were possible it would be well to define the extent of the Legislative power, but," concluded a discouraged James Madison in 1785, "the nature of it seems in many respects to be indefinite."

No one wrestled more persistently with this problem of distinguishing between statutory and fundamental law than did Jefferson. In 1779 Jefferson knew from experience that no legislature "elected by the people for the ordinary purposes of legislation only" could restrain the acts of succeeding legislatures. Thus he realized that to declare his great act for Establishing Religious Freedom in Virginia to be "irrevocable would be of no effect in law; yet we are free," he wrote into the bill in frustration, "to declare, and do declare, that ... if any act shall be hereafter passed to repeal the present or to narrow its operation, such act will be an infringement of natural right." But such a paper declaration was obviously not enough; he realized that something more was needed. By the 1780s both he and Madison were eager "to form a real constitution" for Virginia; the existing one was merely an "ordinance" with "no higher authority than the other ordinances of the same session." They wanted a constitution that would be "perpetual" and "unalterable by other legislatures." But how? That was the rub. Somehow or other, if the constitution were to be truly fundamental and immune from legislative tampering, it would have to be created, as Jefferson put it, "by a power superior to that of the legislature."

By the time Jefferson came to write his *Notes on the State of Virginia* in the early 1780s the answer had become clear. "To render a form of government unalterable by ordinary acts of assembly," said Jefferson, "the people must delegate persons with special powers. They have accordingly chosen special conventions to form and fix their governments." In 1775–76 conventions or congresses had been legally deficient legislatures made necessary by the refusal of the royal governors to call together the regular and legal representatives of the people. Now, however, these conventions were seen to be special alternative representations of the people with the exclusive authority to frame or amend constitutions. When Massachusetts and New

> *These then were the great contributions to constitutionalism that Americans in the Revolutionary era made to the world—the modern idea of a constitution as a written document, the device of a convention for creating and amending constitutions, the process of popular ratification, and the practice of judicial review.*

Hampshire wrote new constitutions in the early 1780s, the proper pattern of constitution-making and constitution-altering was set: constitutions were formed by specially elected conventions and then placed before the people for ratification. Thus in 1787 those who wished to change the federal government knew precisely what to do: they called a convention in Philadelphia and sent the resultant document to the states for approval. Even the French in their own revolution several years later followed the American pattern. Conventions and the process of ratification made the people the actual constituent power. Such institutions, historian R. R. Palmer has said, were the most distinctive contributions the American Revolution made to Western politics.

But these were not the only contributions. With the idea of a constitution as fundamental law immune from legislative encroachment more firmly in hand, some state judges during the 1780s began cautiously moving in isolated cases to impose restraints on what the assemblies were enacting as law. In effect they said to the legislatures, as George Wythe, judge of the Virginia supreme court did in 1782, "Here is the limit of your authority; and hither shall you go, but no further." These were the hesitant beginnings of what would come to be called judicial review—that remarkable American practice by which judges in the ordinary courts of law have the authority to determine the constitutionality of acts of the state and federal legislatures. There is nothing quite like it anywhere else in the world.

The development of judicial review came slowly. It was not easy for people in the eighteenth century, even those who were convinced that many of the acts of the state legislatures in the 1780s were unjust and unconstitutional, to believe that unelected judges could set aside acts of the popularly-elected legislatures; this prerogative seemed to be an undemocratic judicial usurpation of power. But as early as 1787 James Iredell of North Carolina, soon to be appointed a justice of the newly-created Supreme Court of the United States, saw that the new meaning Americans had given to a constitution had clarified the responsibility of judges to determine the law. A constitution in America, said Iredell, was not only "a fundamental law" but also a special popularly-created "law in writing ... limiting the powers of the Legislature, and with which every exercise of those powers must necessarily be compared." Judges were not arbiters of the constitution or usurpers of legislative power. They were, said Iredell, merely judicial officials fulfilling their duty of applying the proper law. When faced with a decision between "the *fundamental unrepealable* law" made specially by the people and an ordinary statute enacted by a legislature contrary to the constitution, they must simply determine which law was superior. Judges could not avoid exercising this authority, concluded Iredell, for in America a constitution was not "a mere imaginary thing, about which ten thousand different opinions may be formed, but a written document to which all may have recourse, and to which, therefore, the judges cannot witfully blind themselves." Although Iredell may have been wrong about the number of different opinions that could be formed over a constitution, he was certainly right about the direction judicial authority in America would take. Through the subsequent development of the doctrine of judicial review judges in America came to exercise a power over governmental life unparalleled by any other judiciary in the world.

These then were the great contributions to constitutionalism that Americans in the Revolutionary era made to the world—the modern idea of a constitution as a written document, the device of a convention for creating and amending constitutions, the process of popular ratification, and the practice of judicial review. The sources of these constitutional contributions went back deep in Western history. For centuries people had talked about fundamental law and the placing of limits on the operations of government. But not until the American Revolution had anyone ever developed such regular and everyday institutions not only for controlling government and protecting the rights of individuals but also for changing the very framework by which the government operated. Americans in 1787 and in numerous state constitutional conventions thereafter demonstrated to the world how a people could fundamentally and yet peaceably alter their forms of government. In effect they had institutionalized and legitimized revolution. After these American achievements, discussions of constitutionalism could never again be quite the same.

Suggested additional reading:

Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* (1959).

J. W. Gough, *Fundamental Law in English Constitutional History* (1961).

Andrew C. McLaughlin, *The Foundations of American Constitutionalism* (1932)

Gordon S. Wood, *The Creation of the American Republic*, 1776–1787 (1969).

Gordon S. Wood is professor of history at Brown University, and the author of *The Creation of the American Republic, 1776–1787* (University of North Carolina Press, 1969).

The Centennial of the United States Constitution: A Case of Memory and Amnesia

by MICHAEL KAMMEN

On November, 1911, Senator Henry Cabot Lodge of Massachusetts presented an address, entitled "The Constitution and Its Makers," before the Literary and Historical Assocation of North Carolina, meeting in Raleigh.* He began by recalling the Centennial celebrations that had taken place at Philadelphia in 1887, and then in New York City two years later to honor the inauguration of George Washington and the genesis of a new national government for the United States. Following three long paragraphs filled with fond reminiscence, Lodge's tone turned sour:

> Those celebrations of the framing of the Constitution and of the inauguration of the government have been almost forgotten. More than twenty years have come and gone since the cheers of the crowds which then filled the streets of New York and Philadelphia—since the reverberations of the cannon and the eloquent voices of the orators died away into silence. And with those years, not very many after all, a change seems to have come in the spirit which at that time pervaded the American people from the President down to the humblest citizen in the land. Instead of the universal chorus of praise and gratitude to the framers of the Constitution the air is now rent with harsh voices of criticism and attack; while the vast mass of the American people, still believing in their Constitution and their government, look on and listen, bewildered and confused, dumb thus far from mere surprise, and deafened by the discordant outcry so suddenly raised against that which they have always reverenced and held in honor.

What had gone wrong? What had changed? The Centennial festivities—sometimes solemn but mostly exuberant—had indeed been rooted in a national consecration of the Consitution for which Lodge now longed. He correctly assumed that most Americans, most of the time, had respected the Constitution—"reverenced" is not an excessive word. In nineteenth-century schoolbooks, references to the Constitution were customarily, almost ritually, preceded by the words "glorious" or "sacred." Lodge had not reckoned, however, with the American propensity to celebrate national anniversaries and then just as promptly neglect their occasions. Historical amnesia has not been a uniquely American quality; but we have been exemplary, perhaps, in our capacity to forget what we have recently remembered—sometimes at considerable cost.

A curious circumstance also played an important part in the lapse of memory lamented by Lodge in 1911: namely, a multiplicity of historical occasions that might properly be ballyhooed as *the* most important Constitutional anniversary, inevitably causing public uncertainty and, eventually, indifference for many. On the eve of the Centennial in 1887, and once again with greater intensity during 1888, uncertainty had been expressed by public figures and ordinary citizens about the most suitable occasion for celebration of the Centennial. Early in January, 1887, for example, the Executive Committee of the Sub-Constitutional Centennial Commission proposed to President Grover Cleveland that a grand celebration be held in Philadelphia on September 17, 1887, with abundant speeches, parades, pageantry, and all appropriate pomp. On January 18 the President sent a message to Congress in which he acknowledged the importance of the event, but pointed out that different states had ratified the Constitution at different times. Consequently, Cleveland did not want "to select one day or place in preference to all others." He appealed for "patriotic co-operation" rather than "local competition" in congressional planning.

The governors of the thirteen original states had met in September 1886 to discuss plans for the Centennial; and three months later, delegates met once again to firm up their agenda for diverse celebrations. Eventually they acknowledged that September 17, 1787, stood as the single most important date because it had marked the moment of completion and adoption at the Convention. Hence the delegates commended the festivities planned for Philadelphia on September 17, 1887. They also asserted, however, the importance of each state's individual ratification, and particularly that of New Hampshire on June 21, 1788, because New Hampshire's assent provided the two-thirds approval required to put the new Constitution into effect. An editorial in *The New York Times*, which reviewed these deliberations, lauded the celebration in Philadelphia, but concluded that the most important *national* com-

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*The 1911 speech by Henry Cabot Lodge will be found in a collection of his addresses entitled *The Democracy of the Constitution* (New York, 1915). Public planning, controversies, and activities pertaining to the celebration of the Centennial may be traced in *The New York Times* between January 19, 1887, and early May, 1889. Hampton L. Carson, Secretary of the Constitutional Centennial Commission, edited a *History of the One Hundredth Anniversary of the Promulgation of the Constitution of the United States* (Philadelphia, 1889), 2 volumes. For the social aspects, see *Banquet Given by the Learned Societies of Philadelphia at the American Academy of Music, September 17, 1887, Closing the Ceremonies in Commemoration of the Framing and Signing of the Constitution of the United States* (Philadelphia, 1888).

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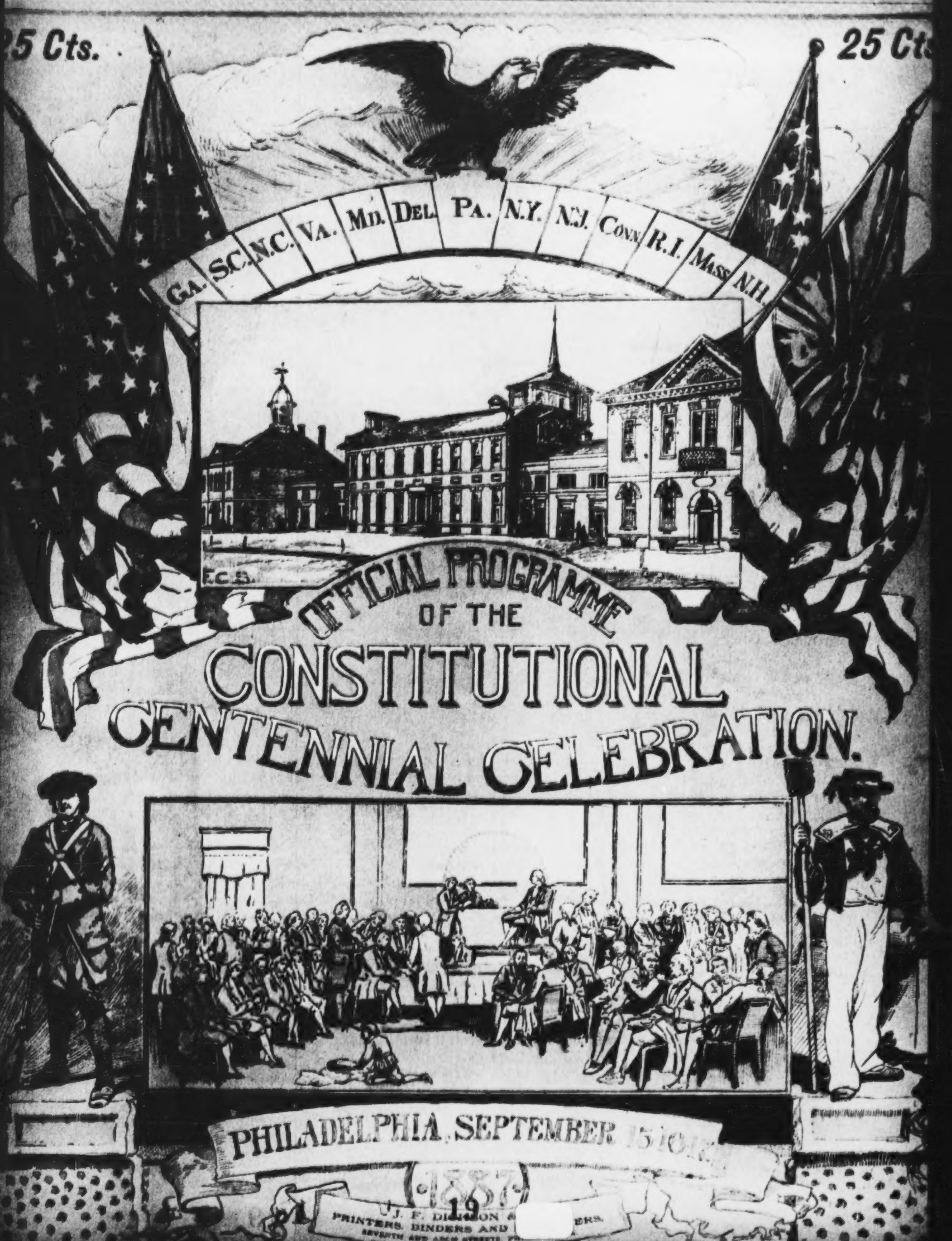
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OFFICIAL PROGRAMME
OF THE
CONSTITUTIONAL
CENTENNIAL CELEBRATION.
PHILADELPHIA, SEPTEMBER 15.16.17.
1887
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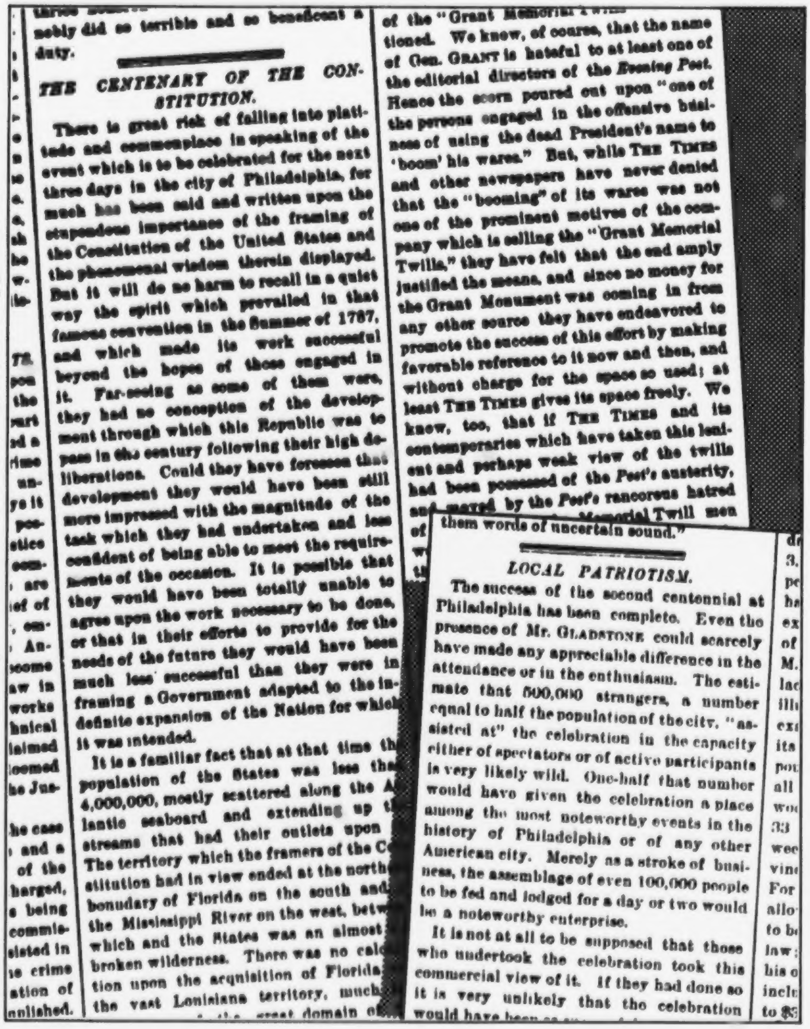


nobly did so terrible and so beneficent a duty.

THE CENTENARY OF THE CONSTITUTION.

There is great risk of falling into platitude and commonplace in speaking of the event which is to be celebrated for the next three days in the city of Philadelphia, for much has been said and written upon the stupendous importance of the framing of the Constitution of the United States and the phenomenal wisdom therein displayed. But it will do no harm to recall in a quiet way the spirit which prevailed in that famous convention in the Summer of 1787, and which made its work successful beyond the hopes of those engaged in it. Far-seeing as some of them were, they had no conception of the development through which this Republic was to pass in the century following their high deliberations. Could they have foreseen that development they would have been still more impressed with the magnitude of the task which they had undertaken and less confident of being able to meet the requirements of the occasion. It is possible that they would have been totally unable to agree upon the work necessary to be done, or that in their efforts to provide for the needs of the future they would have been much less successful than they were in framing a Government adapted to the indefinite expansion of the Nation for which it was intended.

It is a familiar fact that at that time th population of the States was less tha 4,000,000, mostly scattered along the A lantic seaboard and extending up t streams that had their outlets upon The territory which the framers of the C stitution had in view ended at the north boundary of Florida on the south and the Mississippi River on the west, betw which and the States was an almost broken wilderness. There was no calc tion upon the acquisition of Florida the vast Louisiana territory, much

of the "Grant Memorial tioned. We know, of course, that the name of Gen. GRANT is hateful to at least one of the editorial directors of the *Evening Post*. Hence the scorn poured out upon "one of the persons engaged in the offensive business of using the dead President's name to 'boom' his wares." But, while THE TIMES and other newspapers have never denied that the "booming" of its wares was not one of the prominent motives of the company which is selling the "Grant Memorial Twills," they have felt that the end amply justified the means, and since no money for the Grant Monument was coming in from any other source they have endeavored to promote the success of this effort by making favorable reference to it now and then, and without charge for the space so used; at least THE TIMES gives its space freely. We know, too, that if THE TIMES and its contemporaries which have taken this lenient and perhaps weak view of the twills had been possessed of the *Post's* austerity, and moved by the *Post's* rancorous hatred Memorial Twill men them words of uncertain sound."

LOCAL PATRIOTISM.

The success of the second centennial at Philadelphia has been complete. Even the presence of Mr. GLADSTONE could scarcely have made any appreciable difference in the attendance or in the enthusiasm. The estimate that 500,000 strangers, a number equal to half the population of the city, "assisted at" the celebration in the capacity either of spectators or of active participants is very likely wild. One-half that number would have given the celebration a place among the most noteworthy events in the history of Philadelphia or of any other American city. Merely as a stroke of business, the assemblage of even 100,000 people to be fed and lodged for a day or two would be a noteworthy enterprise.

It is not at all to be supposed that those who undertook the celebration took this commercial view of it. If they had done so it is very unlikely that the celebration

Editorials, September 15, 18, 1887. © 1887 by the New York Times Company. Reprinted by permission.

memoration would surely come in the spring of 1889 when New York City would be the focal point for rejoicing over George Washington's inauguration and the convening of the first Congress.

As one might expect in a business-oriented society, centennials were lucrative affairs; and no community with a legitimate claim wanted to miss its golden opportunity. In July, 1887, Colonel A. London Snowden, who was in charge of civic and industrial programs for the Philadelphia Centennial, wrote to all the state governors asking them to form committees that would solicit various businesses to participate and interest the general public in the festivities to be held "September next." On July 29 President Cleveland agreed that on September 15th there should be a "processional industrial display" in Philadelphia that would exemplify the nation's progress during the preceding century. That emphasis would come first. A military parade would follow on the 16th, and then on the 17th special ceremonies would take place at which the President would speak and Supreme Court Justice Samuel F. Miller would deliver an oration.

The centrality of entrepreneurial growth for this Centennial of the Constitution was underscored by the announcement that on the morning of September 16th President Cleveland would attend a reception at the Commercial Club, then review troops on parade that afternoon, and conclude his long day by dancing at a ball, attended by 1,500 dignitaries, and held at the Philadelphia Academy of Music. On September 15 a *New York Times* editorial lavished praise upon the Founding Fathers but conceded, nevertheless, that even such visionaries could not have anticipated how large and prosperous the United States would become by 1887.

On the morning of the 16th Cleveland visited the Commercial Club as scheduled, and praised the city's business community there. Amidst all the historical excitement, he observed, no one should forget "that the aim and purpose of good government tend after all to the advancement of the material interests of the people and the increase of their trade and commerce." He then expressed the hope that a widely shared patriotism would prevail in which businessmen would think beyond their margins of profit. "Must we always look for the political opinions of our business men precisely where they suppose their immediate pecuniary advantage is found?" he asked.

In most other respects the Centennial's tone and texture were just about what one might imagine. Philadelphia was adorned with red, white, and blue bunting; and American flags flew ubiquitously. Three triumphal arches had been erected—the one on Broad Street at Chestnut being particularly impressive. The 300 parade floats included such diverse themes as education, agricultural technology, and the history of native Americans.** One million spectators from Philadelphia were joined by half a million visitors from out of town.

September 17th itself was designated "Memorial Day". During the morning Cleveland met with thousands of people in a reception held at City Hall. Ceremonies then continued at Independence Square. A

**On September 21, 1887, *The New York Times* declared that one of the most successful aspects of the celebration involved the participation of Indian pupils from the school in Carlisle, Pennsylvania. Their "fine appearance" seemed a promising omen of change, because educating young Indians who did not share their parents' hatred of whites was deemed the "main hope of effective civilization."

Stephen Grover Cleveland, painting by A. Zorn
National Portrait Gallery, Smithsonian Institution, Washington, D.C.

photograph of the Constitution was displayed in front of the President's reviewing stand, and the high-backed chair on which George Washington had sat in 1787 was featured inside. More than 100 bands played, and patriotic songs were sung. Cleveland delivered an orotund oration on the greatness of the Constitution and the Republic. Justice Miller then declaimed about the remarkable men who had framed the Constitution.

After that Grover Cleveland attended a banquet given by the Hibernian Society in St. George's Hall. Cleveland praised the Society's patriotism, and quoted remarks that Washington had made in 1782 to the Friendly Sons of St. Patrick, the Hibernian Society's predecessor. Meanwhile Mrs. Cleveland attended an exclusive reception at Wooton, an estate in Bryn Mawr, in the company of Philadelphia's elite.

New York City's response to the Centennial also revealed the nexus between patriotism and entrepreneurship. On September 18, 1887, *The New York Times* editorialized that Philadelphians must have found the affair very profitable—all those people needing food, lodging, souvenirs, etc. Nevertheless, *The Times* conceded, economic self-interest alone could not account for the Centennial's success. Equal doses of careful planning and hard work, inspired by patriotism, had been critical ingredients too. *The Times* then proceeded to lambaste the lack of pride and organizational *esprit* in New York. "The spirit of local patriotism is very rife in Philadelphia, but here it can scarcely be said to exist at all," the column remarked. "It is rumored that there is a historical society in this city, but this rumor is not founded upon anything that has been done by that body to keep up the traditions of New York. A Philadelphia schoolboy knows all the monuments of his city and what they commemorate, whereas a New York schoolboy is in dense ignorance of the history of the city".

Within a month, however, New York's Chamber of Commerce, along with representatives of the Historical Society, had launched serious plans for a vast celebration, on April 30 and May 1, 1889, of George Washington's inaugural on Wall Street. On November 10, 1887, fifty citizens, including Mayor Hewitt, met at the Fifth Avenue Hotel to discuss and coordinate plans for their own extravaganza. The event would, in fact, dwarf the Philadephia Centennial in terms of scale, logistical problems, commercial profits, and social conflict. But that's yet another, more complicated saga.

During the spring of 1888, however, a charming contretemps occured—exacerbating public confusion provoked by the multiplicity of centennials that inevitably followed from the adoption of the Constitution on September 17, 1787. The controversy began late in May, 1888, when the New York *Evening Post* ran a long essay entitled "Celebrating The Wrong Centennial." The author, "Historicus," insisted that New York's ratification of the Constitution on July 26, 1788, was really a far more momentous occasion than George Washington's inauguration on April 30, 1789. Angry rebuttals came from various correspondents, including partisans of yet a third position, namely, that New Hampshire's ratification on June 21, 1788, was more consequential than anything that had happened in New York because New Hampshire, as the ninth state to ratify, made the Union a *fait accompli*.

The controversy then spilled over into a discussion of what did, and what did not, happen in Poughkeepsie at New York's ratifying convention: e.g., whether the Poughkeepsie convention had endorsed the Constitution on the condition that a Bill of Rights be added. By June 8, 1888, readers were writing to complain that all the contradictory claims—involving matters as factual as dates and as interpretive as priority (the significance of who did what, and when)—were becoming *very* confusing.

In July three authors calling themselves "Verax," "Historicus," and "G.H.M.", went at it tooth and nail over the significance of *The Federalist Papers*. The anti-Hamiltonian "Verax" declared that *The Federalist* had been a failure. "Historicus" glorified Hamilton, vilified Governor Clinton, and minimized the role of John Jay, first Chief Justice of the Supreme Court. "G.H.M." insisted that *The Federalist* had been immensely influential in the ratification process and had, since then, become "the political Bible of America."

The New York Times tried to remain above the fray in 1888 and appear judicious. Its culminating editorial acknowledged the difficulty of determining just how significant New York's ratification actually may have been. Delaware deserved primacy as the *first* state bold enough to ratify. New Hampshire had been essential because it supplied the necessary two-thirds. The very close but affirmative votes in such large states as Massachu-

"Although the Court's composition may change, the Constitution—despite some accretions and interpretive adjustments—remains fundamentally the same, a flexible framework that has served extraordinarily well for almost two centuries."

setts and Virginia were also vital for the Constitution's successful promulgation. It had been fitting and proper to commemorate the signing of the Constitution on September 17, 1787; but it would be equally important to observe the inauguration of the new government in New York City on April 30, 1889. Ultimately, all the significant historical dates were observed by suitable, and profitable, festivities.

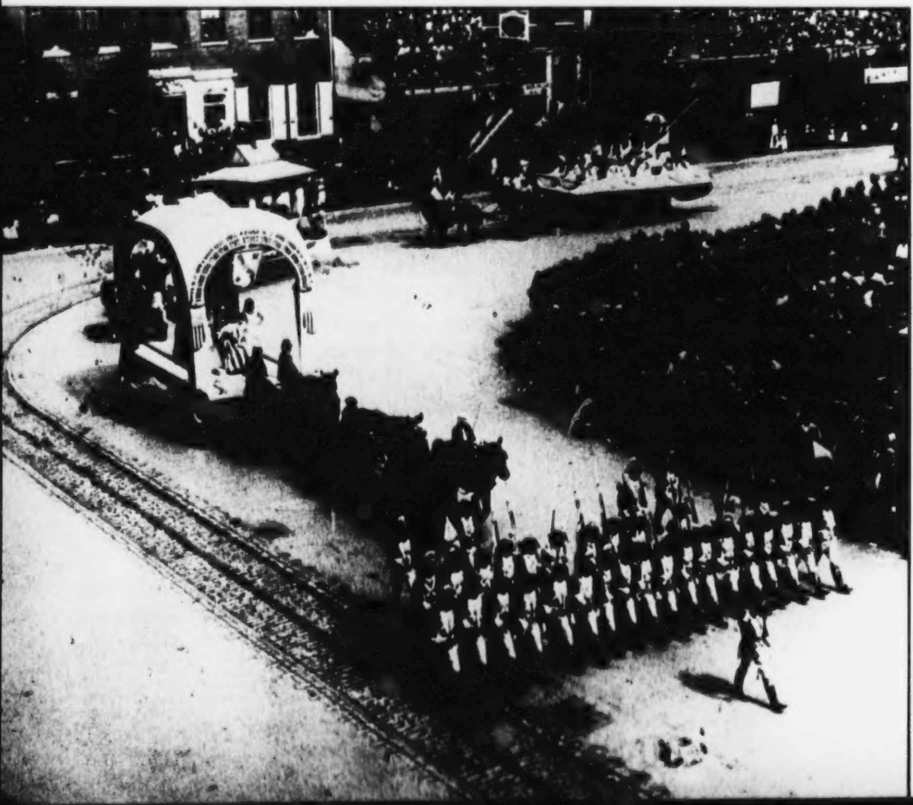
Let us return, in closing, to the distress expressed by Senator Lodge in 1911. Can we now complete our response to the question: What had changed since 1887? In the decades after that year a conservative Supreme Court made various decisions that were offensive to liberal Americans. Consequently, voices of criticism had been raised: in utopian novels hostile to the Court; in constitutional histories of the United States written from a socialist perspective; in proposals to make the process of amending the Constitution easier; and in controversial suggestions for facilitating the recall of unpopular judges.

So there were, indeed, substantive reasons for Lodge's anxiety, and for his wistful declaration that "All this is quite new in our history. We have as a people deeply reverenced our Constitution." Lodge's nostalgic mood may have caused his memory to function in a highly selective manner, however. It had been Noah Webster, after all, a Massachusetts Federalist and arch-nationalist, who in 1814 expressed distrust of the Constitution as a naively democratic document. And yet another famous son of the Bay State, the fiery abolitionist William Lloyd Garrison, had burned the Constitution on July 4, 1854, at Framingham, Massachusetts, proclaiming: "So perish all compromises with tyranny."

If there is a lesson in all of this, and I believe that there is, it involves two related sorts of vacillation that have occurred in Americans' responses to their fundamental charter. First, long periods of comparative ignorance or indifference have given way to briefer bursts of intense interest. And second, ideological partisanship has caused criticism of the Constitution to flourish spasmodically, almost rhythmically, depending to a considerable degree upon the political predilections of the Supreme Court during a given generation. Liberals reviled the Constitution during the 1840s and 1890s, just as conservatives did during Reconstruction and the Earl Warren era.

Although the Court's composition may change, the Constitution—despite some accretions and interpretive adjustments—remains fundamentally the same, a flexible framework that has served extraordinarily well for almost two centuries. For that very reason, perhaps, most Americans, most of the time, have affirmed their basic governmental blueprint. It is incumbent upon us to remember that wise but fallible men wrote it. Our responsibility, therefore, is to recognize that judicious (albeit fallible) men and women must continue to interpret and apply it as best they can.

Michael Kammen is professor of history at Cornell University. He is now preparing a book about the cultural impact of the United States Constitution, 1789 to the present, which will be published by Alfred A. Knopf, Inc.



Float in the 1887 centennial parade,
Free Library of Philadelphia

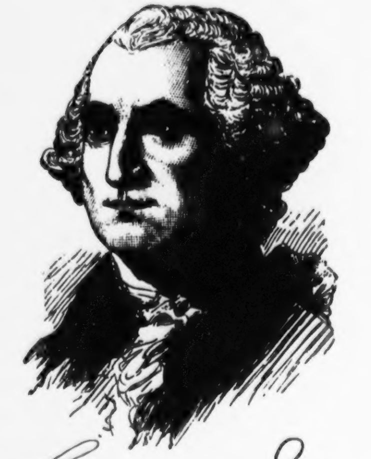
For the Classroom

WASHINGTON'S *DECISION TO* ATTEND THE CONSTITUTIONAL CONVENTION

The lesson which follows has been designed for use in the high school classroom, in courses which teach American history and government. It is one of more than sixty lessons developed by Project '87 with a grant from the National Endowment for the Humanities. The lesson on Washington's decision to attend the Constitutional Convention contains three parts: material for students, a lesson plan and notes for teachers, and a list of suggested readings. This lesson may be photocopied for classroom application with the attribution noted on page 1.

The complete book of ***Lessons on the United States Constitution*** will be published and distributed to high schools throughout the nation for use in conjunction with standard high school textbooks. The lessons were designed and developed by John J. Patrick of the Social Studies Development Center, Indiana University, and Richard Remy of the Citizenship Development Program, Ohio State University. Paul Finkelman of the University of Texas served as consulting historical editor.

Project '87 would like to hear of other curriculum materials on the Constitution developed for all grade levels, but especially pre-collegiate. We will consider publishing samples in this section of the magazine. Please contact ***this Constitution,*** 1527 New Hampshire Avenue, N.W., Washington, D.C. 20036. Attention: Educational materials.



G Washington

Background to a Difficult Decision

When the Revolution ended, General George Washington went home. After eight years of continuous service to his country, the man who had become the greatest hero of his age—both in America and abroad—retired from public office. Washington wanted to enjoy the last years of his life as a gentleman farmer on his Virginia plantation. Although Washington had spent almost his entire life in public service—as a surveyor of western lands, a politician, and a soldier in two wars—he had always claimed to prefer the life of a planter.

At fifty-one Washington was relieved that he no longer had to bear the great responsibilities of leading an army and helping to create a nation. He wrote his friend and former comrade-in-arms, the Marquis de Lafayette:

> "I am become a private citizen on the banks of the Potomac, and under the shadow of my own vine and my own fig tree. Free from the bustle of a camp and the busy scenes of public life, I am . . . not only retired from all public employment, but I am retiring within myself, and shall be able to wend the solitary walk and tread the paths of private life with heartfelt satisfaction. Envious of none, I am determined to be pleased with all, and this, my dear friend, being the order of my march, I will move gently down the stream of life until I sleep with my fathers."

In a letter which was circulated throughout the country, Washington declared he would never again "take any share in public business." He also issued a warning about the need for a stronger national government. During the war Washington's troops often went without adequate food or clothing, and many were never paid the wages owed them because the government under the Articles of Confederation had been unable to raise money through taxation. It was thus with no exaggeration that the retiring leader of the revolutionary armies wrote: "No man in the United States is, or can be, more deeply impressed with the necessity of reform in our present Confederation than myself."

Washington's advice was not followed. The Articles of Confederation were not amended. Consequently, from 1783 to 1786, the new American nation suffered from an ineffective national government. Many citizens doubted that the weak United States could survive. It seemed likely that the fragile national union would be fractured into several competing republics.

As the nation's troubles worsened, many citizens, and some state governments, saw that the Articles of Confederation needed to be changed. In 1786 representatives from five states met at Annapolis, Maryland to discuss ways to reform the national government. While the Annapolis Convention, as this meeting was known, accomplished nothing, it set the stage for the Constitutional Convention a year later. The men who met at Annapolis called for such a Convention to be held in Philadelphia in May, 1787. A number of states quickly endorsed the idea and eventually, a reluctant Congress agreed to the proposal. Each state government was officially invited to select delegates who would participate in the meeting to amend the Articles of Confederation.

The Occasion for a Decision

The Virginia government chose Washington to head the state delegation. Washington, however, had mixed feelings about going to Philadelphia.

George Washington faced a difficult decision. Should he attend the convention in Philadelphia?

Reasons for Not Going to the Convention

Washington certainly did not feel up to a long, hard trip. He was 55 years old, and he often felt older. His body usually ached from rheumatism; sometimes he could not lift his arm as high as his head.

Family problems were pressing Washington. His 79-year-old mother was very ill, as was his sister. They lived nearby and often asked for help. His brother had died in January, 1787, which depressed Washington very much. He also wanted to help his dead brother's children.

The general's wife, Martha, did not want her husband to leave home again. She had hardly seen him during the eight years of the War for Independence. After the war, in 1783, she said: "I had anticipated that from this moment we should have been left to grow old in solitude and tranquility together." Likewise, Washington was reluctant to once again forsake the comforts of his home for public service.

Business problems were a constant worry. Washington hesitated to leave his plantation because the place needed his attention. There were repairs to be made and debts to be paid. He believed he owed it to himself and his family to attend to these matters.

The political reasons for staying home loomed larger than the personal reasons. First, what if the convention failed? What if most states didn't bother to send delegates? Washington would be embarrassed. His great reputation might be harmed. His old friend, Henry Knox, advised him to stay home to protect his good name. Even James Madison, the Convention's strongest supporter, wrote: "It ought not to be wished by any of his friends that he should participate in any abortive undertakings."

John Jay, another strong supporter of the convention, reminded Washington that the convention wasn't quite legal. The legal procedures for amending the Articles of Confederation were being ignored by the organizers of the Philadelphia convention. The Congress had not yet approved of the convention. Should Washington go to a meeting that citizens might view as illegal?

Washington also remembered his promise to stay out of "public business." If he accepted election as a delegate to the convention, people might say that he had broken his word. They might also think he wanted to use the convention to gain power in the government. Did he want to risk being called a hypocrite? Did he want to seem to be a schemer in pursuit of personal power and glory?

Reasons for Going to the Convention

On February 21, Congress recognized the convention. This gave the meeting an appearance of legality.

By the end of March, it appeared that most states would send delegates to Philadelphia. Only Rhode Island seemed likely to boycott the meeting. There was no doubt that there would be a convention, which might be successful. How would Washington feel if the convention made great achievements without his participation? Would his reputation suffer if great decisions were made in his absence?

Washington found out that most of the delegates already selected were men with great reputations. If he went to the convention, he would be in good company.

During March, 1787, Washington received many letters urging him to attend the convention. They came from his wartime comrades, who asked their General to preserve the fruits of this victory by helping to create an effective national government. Henry Knox changed his advice. He wrote: "It is the general wish that you should attend."

Some leaders believed that Washington's participation might make the difference between success or failure at the convention. His reputation among citizens was so great that his attendance would make the convention seem legitimate.

Why Washington Decided to Go

On March 28, George Washington wrote Governor Randolph that he would lead the Virginia delegation in Philadelphia. Washington feared that Americans would consider him a bad citizen if he did not participate in an event of such great significance. He decided it was his duty to attend the Convention.

Washington wanted very much for his new nation to succeed. "To see this country happy ... is so much the wish of my soul," he wrote. He had to help, no matter what the personal or political risks.

His fellow citizens needed him, so Washington once again rose to the challenge of public responsibility. He mustered his strength and went to Philadelphia in May, 1787.

Henry Knox observed: "Secure as he was in his fame, he has again committed it to the mercy of events. Nothing but the critical situation of his country would have induced him to so hazardous a conduct."

Reviewing Facts and Main Ideas About Washington's Decision

1. What was the difficult decision facing George Washington in 1787?
2. What political events brought about Washington's decision.
3. What were main reasons for *not* attending the Constitutional Convention in Philadelphia?
4. What were main reasons for attending the Constitutional Convention?

Analysis of Washington's Decision

George Washington's decision to attend the Constitutional Convention involved *alternatives, consequences* and *goals.* Anyone faced with a difficult decision should think carefully about these questions:

1. What are my alternatives or choices?
2. What are the possible and probable consequences, or outcomes, of each choice?
3. What are my goals? (What do I want or value in this situation?)
4. In view of my goals, which consequences are best in this situation?
5. What choice or decision should I make? (What choice is most likely to lead toward my goals?)

What were Washington's alternatives in this case?

Washington's main goals in this case reveal his values—his beliefs about what is good or bad, right or wrong. The goals are guides to Washington's choice to attend the Constitutional Convention. They help us to understand why he thought one alternative was better than the other.

1. What were Washington's goals in this case?
2. What do Washington's goals tell us about his values?
3. How do Washington's goals and values explain his decision to attend the convention?
4. What were positive and negative consequences associated with a decision to go to the convention?
5. What were positive and negative consequences of a decision *not* to go to the convention?

Washington's decision had some positive and negative effects on him and others. Make two lists. *First, review the case study and identify how Washington's decision was likely to affect him.*

Next, review the case study and identify how the decision was likely to affect others.

One important way to evaluate a decision is to consider if it balances the needs and wants of individuals with the needs and wants of the community to which they belong. *On balance, did Washington's decision seem fair to himself and others?*

LESSON PLAN AND NOTES FOR TEACHERS

Preview of Main Points

This lesson tells about the decision of George Washington to attend the meeting in Philadelphia, which became the Constitutional Convention, in 1787. The conflicting pressures, which made Washington's decision difficult, are discussed. A main purpose of this lesson is to introduce decision making as it confronts citizens in a free society. Students are introduced to procedures that help them clarify, analyze and make decisions.

Connection to Textbooks

This lesson can be used with standard textbook discussions of the events that led to the Constitutional Convention at Philadelphia in 1787. None of the standard textbooks includes a detailed discussion of Washington's difficult decision to attend the Convention. Most of the textbooks do not even mention this interesting and revealing choice. This case study can be used as an introductory lesson to precede textbook treatments of the Constitutional Convention.

Connections to Other Lessons in this Sourcebook

The lesson provides a simple introduction and guide to the basic steps of rational decision making.

Objectives

Students are expected to:

1. explain the situation that brought about Washington's need to make a decision in this case;
2. identify Washington's alternatives in this case;
3. identify reasons for and against a decision by Washington to attend the convention in Philadelphia;
4. explain why Washington decided to attend the convention;
5. appraise Washington's decision in terms of the decision's (a) effect on Washington, (b) effect on various others, (c) practicality, (d) fairness.

Suggestions for Teaching the Lesson

This lesson can be used as a "springboard" into textbook discussions of the organization of the convention in Philadelphia. The lesson also may be used as a simple introduction to decision making by citizens, which may be necessary for students who have not encountered this type of lesson before.

Opening the Lesson

- Begin by previewing the main points and purposes of the lesson. This provides students with a sense of direction.

Developing the Lesson

- Have the students read the description of Washington's decision. Then conduct a discussion of the questions that follow the case to make certain that students know the main facts and ideas.
- Move to the part of the lesson about the analysis of Washington's decision. Consider Washington's (1) alternatives, (2) consequences, and (3) goals.
- Ask students to give examples of alternatives, consequences and goals to demonstrate that they understand these ideas.
- Emphasize the meaning of the decision-making routine, so that students will be able to analyze and make decisions systematically in subsequent lessons.

Concluding the Lesson

- Conclude the lesson by conducting a discussion of the questions at the end of the lesson.
- The final question involves an overall judgment about the worth of Washington's decision. Ask students to support their judgment with evidence and examples drawn from the case study of Washington's decision.

Note on Uses of Evidence

This lesson introduces students to the use of quotations from letters as an historical source. Two aspects of this might be worth pointing out to the students. First, the students will quickly see that language in the 18th century was different from the language of today. Students should be urged to keep this fact in mind when they read historical sources, including the Constitution itself. Second, the students may wonder about the dots in the middle of the first quotation from a Washington letter. This of course is an ellipsis, which indicates that some words have been left out of a quotation. This mark is used in many forms of writing. Students should be aware of this usage. The ellipsis is designed to allow a writer to quote from the most relevant parts of a letter, speech, or article (or any other source) without quoting the entire source. Sometimes an ellipsis may be used to emphasize a point, while cutting out unnecessary material in the middle of a passage. Students should also be aware that it is possible to change the meaning of a sentence through an ellipsis. Such a use—or misuse—of an ellipsis is something like lying, because an author that misuses an ellipsis in that way is attributing a statement to a source when in fact the source did not make such a statement.

Suggested Reading

The following book is part of a set of four volumes on the life of Washington. It is considered the best biography of Washington. Pages 30-111 tell about the events of Washington's life from 1783-1787, prior to his participation in the Constitutional Convention.

Flexner, James Thomas. *George Washington and the New Nation: 1783-1793* (Boston: Little, Brown and Company, 1970), pp. 30-111.

The best single-volume biography of Washington, which also covers this period of his life, is:

Flexner, James Thomas, *Washington: The Indispensible Man* (Boston: Little, Brown and Company, 1969). This book is available in paperback and highly readable. Many high school juniors and seniors will find it an enjoyable and worthwhile biography.

The Preamble to the Constitution of the United States

DOCUMENTS

by DONALD S. LUTZ

The Preamble to the United States Constitution not only introduces the document; it encapsulates and reflects the various sources of, and influences upon, our constitutional tradition. The covenants and compacts written by colonists during the early seventeenth century first established the form and general elements of American constitutions. Early in the eighteenth century the ideas and values of Harrington and the Commonwealth thinkers, Florentine republicanism as exemplified by Machiavelli, and the contract theorists, especially Hobbes and Locke, provided additional philosophical underpinnings. These three strands of thought were woven into the fabric of the covenant/compact tradition, and the synthesis achieved fullest expression in the state constitutions written between 1776 and 1787. Beginning in the 1770's, the ideas of the Scottish Enlightenment writers, particularly Hume, and of the European Enlightenment more generally, especially Montesquieu, were injected into American political thought. The Federalists who assembled in Philadelphia in the summer of 1787 brought Enlightenment ideas into American constitutionalism, but the founders had additional models for government in the early state constitutions. Our constitutional tradition also responded to critical political situations. Constitutions are never written in a political vacuum, but tend to present a "snapshot" of the balance of political forces at the time of their writing. Our analysis of the Preamble's form and content, then, must necessarily focus upon the early colonial foundation documents, the early state constitutions, the proceedings of the Constitutional Covention, and the historical events surrounding the writing of the Constitution, including the matter of the Articles of Confederation.

Form of The Documents

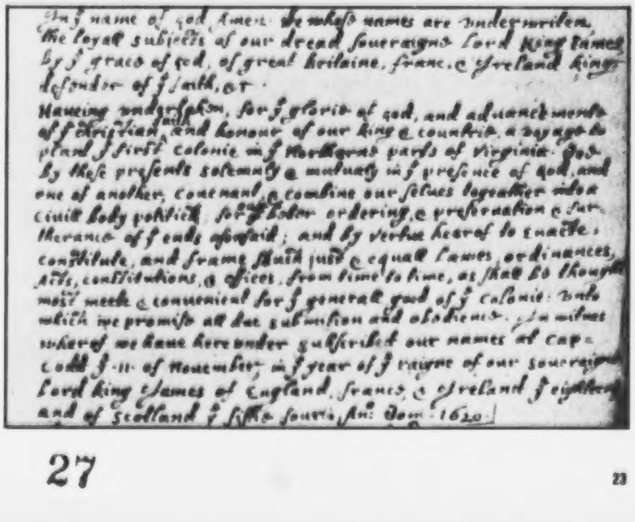
By 1787 Americans had been writing documents of political foundation for over a century and a half. Although technically governed by a charter from the English Crown, colonists to America were invariably granted the right by these charters to erect and conduct local government as long as the laws passed were not in contradiction with English law. Thus, from the very beginning Americans had considerable control over their local political affairs; the Mayflower Compact is a good example of the foundation documents they wrote for themselves to formalize local government. These brief documents were direct descendants of religious covenants developed by Calvinist-oriented Protestants and influenced by the Old Testament, especially the book of Deuteronomy.

> *In the name of God, amen. We whose names are underwritten . . . do, by these presents, covenant and combine ourselves together into a civil body politic for our better ordering and preservation and furtherance of the ends aforesaid; and by virtue hereof do enact, constitute, and frame such just and equal laws, ordinances, acts, constitutions, and officers, from time to time, as shall be thought most meet and convenient for the general good of the colony, to which we promise all due submission and obedience. . . .*

Mayflower Compact, in part, adopted November 11, 1620. Text taken from F. N. Thorpe, ed., *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States*, Vol. III, p. 1841.

Dozens of similar local documents of foundation would be written in the next twenty years throughout the colonies. Typically these documents would embody the principles of popular sovereignty, majority rule, and political equality among citizens, through there was some qualification of these principles in practice. Ideally, government was to be based upon the consent of the people, either directly or indirectly through representatives elected for that purpose, and decisions were to be derived from an open and deliberate discussion of what best served the common good.

The colonists drew up longer and longer codes of law, altered and expanded their political systems, and brought the basics of their government into single documents which laid out fundamental principles and institutions. At this point, the earlier documents of foundation tended to become introductory statements of the grounds and intention of



In ye name of God Amen. We whose names are underwriten,
the loyall subjects of our dread soveraigne Lord King James
by ye grace of God, of great Britaine, Franc, & Ireland king
defender of ye faith, &c.
Haveing undertaken, for ye glorie of God, and advancemente
of ye Christian faith, and honour of our king & countrie, a voyage to
plant ye first colonie in ye Northerne parts of Virginia. Doe
by these presents solemnly & mutualy in ye presence of God, and
one of another, covenant, & combine our selves togeather into a
civill body politick; for our better ordering, & preservation & fur-
therance of ye ends aforesaid; and by vertue hearof to enacte,
constitute, and frame shuch just & equall lawes, ordinances,
Acts, constitutions, & offices, from time to time, as shall be thoug
most meete & convenient for ye generall good of ye Colonie: unto
which we promise all due submission and obedience. In witnes
wherof we have hereunder subscribed our names at Cap-
Codd ye ·11· of November, in ye year of ye raigne of our soveraig
Lord king James of England, France, & Ireland ye eight
and of Scotland ye fiftie fourth. Ano: Dom. 1620.

Excerpt from the Mayflower Compact, 1620. Archives Division, Commonwealth of Massachusetts

these longer proto-constitutions. In 1636 the citizens of Plymouth, Massachusetts wrote the first true constitution in American history, and used as a preface the Plymouth agreement which they had adopted the same day.

> *We, the associates of New-Plymouth coming hither as freeborn subjects of the State of England endowed with all and singular the privileges belonging to such being assembled; doe ordain Constitute and enact that noe act imposition law or ordinance be made or imposed upon us at present, or to come but such as shall be imposed by Consent of the body of associates or their representatives legally assembled; which is according to the free liberties of the State of England.*

Plymouth Agreement, from the preface to the Pilgrim Code of Law, adopted November 15, 1636. Text is taken from Harry M. Ward, *Statism in Plymouth Colony*, p. 17.

Between 1620 and 1776, simple foundation documents written by the colonists, and derived from religious covenants both in form and content, became secularized preambles to modern constitutions. During this evolution of a constitutional tradition, Americans usually included five foundation elements in their documents of political foundation. First, there was an explanation of why the document was necessary. Second, the document created, defined or redefined a people, a community of individuals. Third, it laid out the fundamental values or goals which described the kind of people this community was or hoped to become. Fourth, the document formally established a civil society by creating a government. Fifth and finally, the document laid out the specific design for the governmental institutions through which the community would make collective decisions.

It became standard practice to combine the first four foundation elements with a bill of rights as a long introduction to the body of the document. In the early state constitutions, the section after the preamble would often begin with, "Part II: The Constitution or Form of Government," and only then launch into an institutional description of the sort we usually associate with constitutions. This structure made the bills of rights part of the preamble, by implication prior to, and thus not part of, the constitution proper. The Preamble to the United States Constitution did not have a bill of rights to help it carry the load of the four foundation elements, but it is easy to see the long documentary tradition of which it is a part.

The Preamble to the federal Constitution begins "We the people," another structural device taken from early state constitutions. Most of the colonial documents written between 1620 and 1650 began with the phrase "We the undersigned," and the signatures invariably represented all the free, property-owning adult males in the community. Using only fifty-two words, the Preamble to the Constitution efficiently contains the requisite foundation elements. It creates a people, the citizens of the United States, where the Articles of Confederation had recognized only a league of states, (each of which was constituted a people by their respective constitutions). We are given the reasons the document is needed at the same time that we have a list of fundamental values or goals—union, justice, domestic tranquility, the common defense, the general welfare, and liberty. The words "do ordain and establish this Constitution" create a government. Thus, we have the first four foundation elements at hand, ready to be joined by the fifth, the institutional description, in the body of the document.

Content

We have been implying a direct connection in form between the preambles of the early state constitutions and our national Preamble, but it must be remembered that the framers of our national Constitution met in Philadelphia in the summer of 1787 in order to overcome the weaknesses in the Articles of Confederation which failed to create an adequate national government. State constitutions did not have as their purpose the design of a national government. Thus, the founders could not extract such ideas from them. In fact, the framers in many instances were reacting against what they found in the more parochial state constitutions, including their preambles. Nevertheless, just as bicameralism, representation, and a host of other ideas flowed into the national document from the state constitutions as a result of the familiar and persistent patterns carried in the heads of the framers from living under the state constitutions, so too did the Preamble. The national Preamble derived partly through the apposition of the state preambles, and partly in opposition to them.

Furthermore, the state constitutions had an impact on the national Constitution by the simple fact of the existence of the states prior to the birth of the nation. The proposed national Constitution had to incorporate a federal system to acknowledge the autonomous purview of the states. Thus, the states are mentioned in the national document, either directly or by clear implication, over fifty times in forty-two separate sections. Our political system is defined by an interlocking system of constitutions, and the state documents are an essential part of a proper, complete United States Constitution. The preambles to the state constitutions set the pattern for preambles to constitutions, introduced other portions of the interlocking system, and served as positive and negative examples of content for the framers.

Since the preambles and bills of rights of the early state constitutions reflected the colonial tradition, they contained many English Whig, republican, and contractarian elements. But they also contained elements derived from the more recent Enlightenment tradition, elements which first showed up in force in the Declaration of Independence. To the earlier values were added life, liberty, and happiness.

> *We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed; That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. . . .*

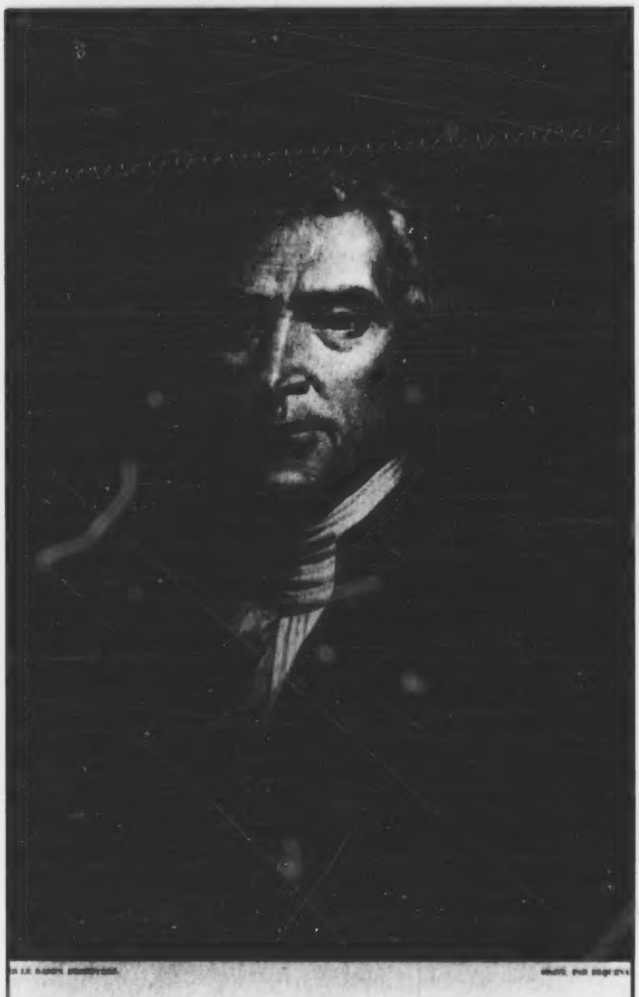
Beginning of the second paragraph of the Declaration of Independence, adopted July 4, 1776.

The Declaration had a tremendous impact upon the early state constitutions. Eight of them borrowed language directly from the Declaration, and the 1777 New York Constitution reprinted the entire Declaration of Independence as part of its preamble.

In 1776 the state of Virginia adopted a constitution, and its preamble and the Virginia Bill of Rights resemble the Declaration at least in part because Thomas Jefferson was centrally involved with both.

> *We therefore, the delegates and representatives of the good people of Virginia, having maturely considered the premises, and viewing with great concern the deplorable conditions to which this once happy country must be reduced, unless some regular adequate mode of civil polity is speedily adopted . . . do ordain and declare the future form of government of Virginia to be as followeth . . . .*

The last paragraph of a 1,500 word introductory statement to the 1776 Virginia Constitution. Text taken from F.N. Thorpe, ed., *The Federal and State Constitutions*, Vol. VII, p. 3815.



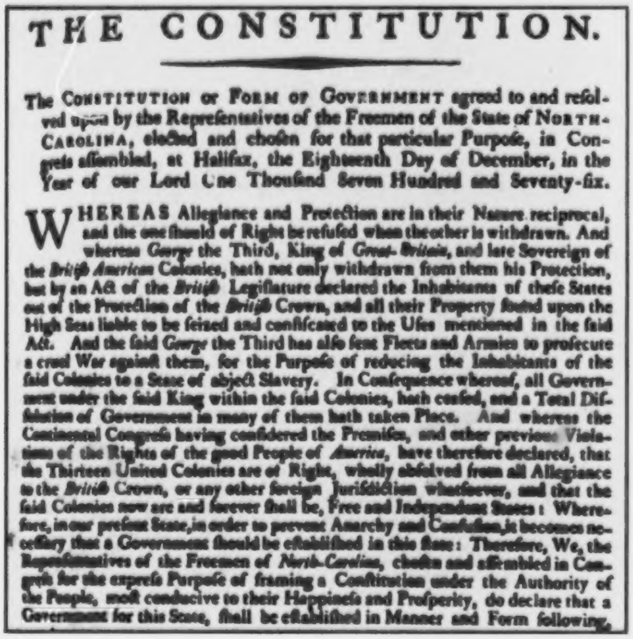
JEFFERSON.

Thomas Jefferson, *engraving by F.J. Dequevauviller*

National Portrait Gallery, Smithsonian Institution, Washington, D.C.

> *That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.*

Section 1 of the Bill of Rights of the 1776 Virginia Constitution. Text from Thorpe, p. 3813.



THE CONSTITUTION.

The CONSTITUTION or FORM of GOVERNMENT agreed to and reſolved upon by the Repreſentatives of the Freemen of the State of NORTH-CAROLINA, elected and choſen for that particular Purpoſe, in Congreſs aſſembled, at Halifax, the Eighteenth Day of December, in the Year of our Lord One Thouſand Seven Hundred and Seventy-ſix.

WHEREAS Allegiance and Protection are in their Nature reciprocal, and the one ſhould of Right be refuſed when the other is withdrawn. And whereas *George* the Third, King of *Great-Britain*, and late Sovereign of the *Britiſh American* Colonies, hath not only withdrawn from them his Protection, but by an Act of the *Britiſh* Legiſlature declared the Inhabitants of theſe States out of the Protection of the *Britiſh* Crown, and all their Property found upon the High Seas liable to be ſeized and confiſcated to the Uſes mentioned in the ſaid Act. And the ſaid *George* the Third has alſo ſent Fleets and Armies to proſecute a cruel War againſt them, for the Purpoſe of reducing the Inhabitants of the ſaid Colonies to a State of abject Slavery. In Conſequence whereof, all Government under the ſaid King within the ſaid Colonies, hath ceaſed, and a Total Diſſolution of Government in many of them hath taken Place. And whereas the Continental Congreſs having conſidered the Premiſes, and other previous Violations of the Rights of the good People of *America*, have therefore declared, that the Thirteen United Colonies are of Right, wholly abſolved from all Allegiance to the *Britiſh* Crown, or any other foreign Juriſdiction whatſoever, and that the ſaid Colonies now are and forever ſhall be, Free and Independent States: Wherefore, in our preſent State, in order to prevent Anarchy and Confuſion, it becomes neceſſary that a Government ſhould be eſtabliſhed in this ſtate: Therefore, We, the Repreſentatives of the Freemen of *North-Carolina*, choſen and aſſembled in Congreſs for the expreſs Purpoſe of framing a Conſtitution under the Authority of the People, moſt conducive to their Happineſs and Proſperity, do declare that a Government for this State, ſhall be eſtabliſhed in Manner and Form following,

Preamble to 1776 North Carolina state constitution.
Archives and Records Section, North Carolina Department of Cultural Resources

It thereafter became typical to use the first article or two of the respective state constitution's bill of rights to complete the laying out of fundamental values begun in the state preamble proper. These long introductions to state constitutions, combining a preamble with a bill of rights to lay out the first four foundation elements, were usually several thousand words long. The preambles themselves averaged about 425 words, ranging in length from the 42 words in the 1784 New Hampshire document to over 1,300 words in the 1776 South Carolina and 1777 Vermont documents. The New Hampshire Constitution is instructive for comparing a short, northern document with the long Virginia document written eight years earlier.

> *The people inhabiting the territory formerly called the Province of New Hampshire, do hereby solemnly and mutually agree with each other, to form themselves into a free, sovereign, and independent Body-politic, or State, by the name of the State of New Hampshire.*

Entire preamble to Part II—The Form of Government, of the 1784 New Hampshire Constitution. Text taken from Thorpe, p. 2458.

> *All men are born equally free and independent; therefore, all government of right originates from the people, is founded in consent, and instituted for the general good.*
> *All men have certain natural, essential, and inherent rights; among which are—the enjoying and defending life and liberty—acquiring, possessing and protecting property—and in a word, of seeking and obtaining happiness.*

Articles I and II of the Bill of Rights to the 1784 New Hampshire Constitution. Text from Thorpe, p. 2453.

The essential contents are the same as found in the 1776 Virginia document, but the format differs a bit. Here we have the first two articles of the bill of rights containing more explicitly what has been, and in most instances still will be, contained in the preamble. The preamble has been moved to Part II, the beginning of the Constitution proper. Together, the preamble and first two articles of the bill of rights contain the values first enunciated during the colonial era—popular consent, the general good, etc.—as well as the more recently appropriated Enlightenment values of life, liberty, and happiness. Two more brief extracts from state preambles will show how the formulas can vary.

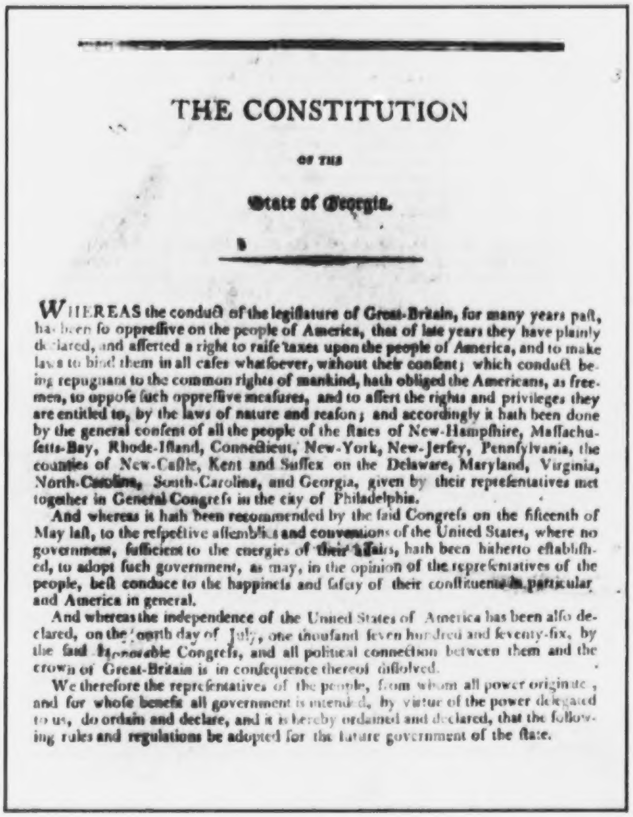
> *Wherefore, in our present state, in order to prevent anarchy and confusion, it becomes necessary, that government should be established in this State; therefore we, the Representatives of the freemen of North Carolina, chosen and assembled in Congress, for the express purpose of framing a Constitution under the authority of the people, most conducive to their happiness and prosperity, do declare, that a government for this State shall be established, in manner and form following. . . .*

Last paragraph of the preamble to the 1776 North Carolina Constitution. Text from Thorpe, pp. 2789-90.

> *We, therefore, the representatives of the people, from whom all power originates, and for whose benefit all government is intended, by virtue of the power delegated to us, do ordain and declare, and it is hereby ordained and declared, that the following rules and regulations be adopted for the future government of this state. . . .*

Last paragraph of the preamble to the 1777 Georgia Constitution. Text taken from Thorpe, 778.

It is too easy to view the national Preamble as simply a more efficient, more abstract rendering of the equivalent in the state constitutions. The state preambles and associated portions of their respective bills of rights lay out not only a richer set of goals than does the national Preamble, but also a somewhat different set of values and goals that reflect radical Whig and Biblical sources. The state documents speak of the consent of the people, the common good, deliberative processes, God's dis-



THE CONSTITUTION

OF THE

State of Georgia.

WHEREAS the conduct of the legiſlature of Great-Britain, for many years paſt, has been ſo oppreſſive on the people of America, that of late years they have plainly declared, and aſſerted a right to raiſe taxes upon the people of America, and to make laws to bind them in all caſes whatſoever, without their conſent; which conduct being repugnant to the common rights of mankind, hath obliged the Americans, as freemen, to oppoſe ſuch oppreſſive meaſures, and to aſſert the rights and privileges they are entitled to, by the laws of nature and reaſon; and accordingly it hath been done by the general conſent of all the people of the ſtates of New-Hampſhire, Maſſachuſetts-Bay, Rhode-Iſland, Connecticut, New-York, New-Jerſey, Pennſylvania, the counties of New-Caſtle, Kent and Suſſex on the Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, given by their repreſentatives met together in General Congreſs in the city of Philadelphia.

And whereas it hath been recommended by the ſaid Congreſs on the fifteenth of May laſt, to the reſpective aſſemblies and conventions of the United States, where no government, ſufficient to the exigencies of their affairs, hath been hitherto eſtabliſhed, to adopt ſuch government, as may, in the opinion of the repreſentatives of the people, beſt conduce to the happineſs and ſafety of their conſtituents in particular and America in general.

And whereas the independence of the United States of America has been alſo declared, on the fourth day of July, one thouſand ſeven hundred and ſeventy-ſix, by the ſaid Honorable Congreſs, and all political connection between them and the crown of Great-Britain is in conſequence thereof diſſolved.

We therefore the repreſentatives of the people, from whom all power originates, and for whoſe benefit all government is intended, by virtue of the power delegated to us, do ordain and declare, and it is hereby ordained and declared, that the following rules and regulations be adopted for the future government of the ſtate.

Preamble to the 1777 Georgia state constitution.
Georgia Department of Archives and History.

pensation, equality, the ability of people to form and change government, as well as the common defense, liberty, domestic tranquility, and the passage of these things to posterity. Whereas the national Preamble speaks of justice, the state preambles describe in some detail the nature of fair and equal treatment of all citizens. The national Preamble speaks of the general welfare, but the state preambles use the alternative language of "happiness and prosperity" in the 1776 North Carolina Constitution, and the "common good" of the 1780 Massachusetts Constitution. The state formulations tend to be richer in that they imply a community of interests rather than simply material sufficiency.

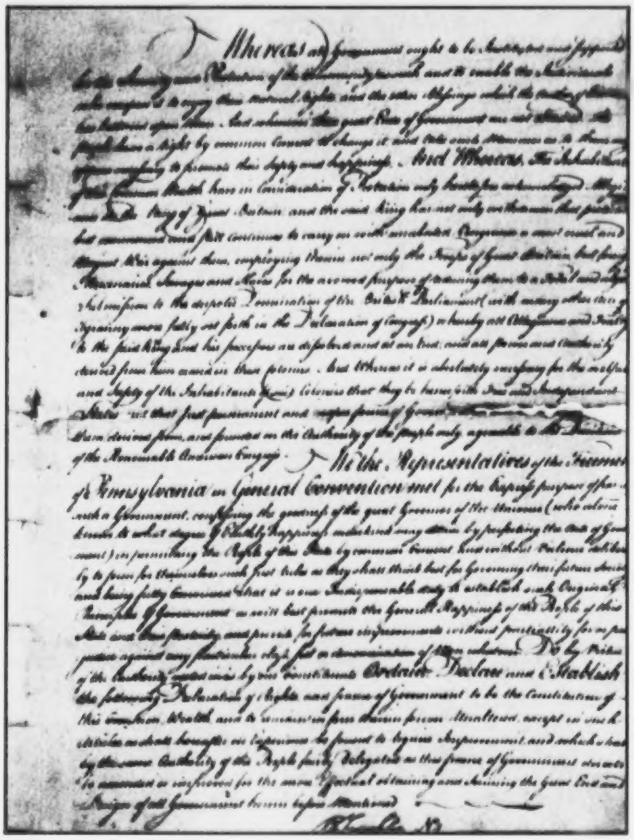
The Federalists who wrote the Constitution hoped to create an effective national government with an emphasis upon effectiveness. Not wishing to impinge on American freedoms, they nonetheless saw a serious need to overcome the instability at the state level that appeared to arise from excessive state autonomy. They had no need to emphasize liberty, consent, majority rule and legislative supremacy because these values were protected by state constitutions, and the federal government had a different role to play. To dramatize the point, we reproduce here two state preambles which best summarize the political theory operative at the state level, with its ringing language derived from contractarian, radical Whig and covenantal sources. They are full and explicit. The first, the 1776 Pennsylvania Preamble, introduced the most radically egalitarian constitution of the era. The second, the Preamble to the 1780 Massachusetts Constitution, introduced a traditional, mainstream document that was to become the model for later state constitutions. As we will see, the Federalists were having neither.

> *Whereas all government ought to be instituted and supported for the security and protection of the community as such, and to enable the individuals who compose it to enjoy their natural rights, and the other blessings which the Author of existence has bestowed upon man; and whenever these great ends of government are not obtained, the people have a right, by common consent to change it, and take such measures as to them may appear necessary to promote their safety and happiness . . . . We the representatives of the freemen of Pennsylvania, in general convention met, for the express purpose of framing such a government, confessing the goodness of the great Governor of the universe . . . in permitting the people of this State, by common consent, and without violence, deliberately to form for themselves such just rules as they shall think best, for governing their future society . . . as will best promote the general happiness of the people of this State, and their posterity, and provide for future improvements, without partiality for, or prejudice against any particular class, sect, or denomination of men whatever, do by virtue of the authority vested in us by our constituents, ordain, declare, and establish, the following* Declaration of Rights *and* Frame of Government, *to be the CONSTITUTION of the commonwealth . . . .*

About 40% of the preamble to the 1776 Pennsylvania Constitution. Text taken from Thorpe, pp. 3081-82.

> *That all men are born equally free and independent, and have certain natural, inherent and unalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.*

Article I of the Declaration of Rights of the 1776 Pennsylvania Constitution. Taken from Thorpe, p. 3082.



Portion of preamble to Pennsylvania Declaration of Rights 1776. *RG 26, Division of Archives and Manuscripts, Pennsylvania Historical and Museum Commission.*

The end of the institution, maintenance, and administration of government, is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquility their natural rights, and the blessings of life: and whenever these great objects are not obtained, the people have a right to alter the government, and to take measures necessary for their safety, prosperity and happiness.

The body politic is formed by a voluntary association of individuals: it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in framing a constitution of government, to provide for an equitable mode of making laws, as well as for an impartial interpretation and a faithful execution of them; that every man may, at all times, find his security in them.

We, therefore, the people of Massachusetts, acknowledging with grateful hearts, the goodness of the great Legislator of the universe, in affording us, in the course of His providence, an opportunity, deliberately and peaceably, without fraud, violence, or surprise, of entering into an original, explicit, and solemn compact with each other; and of forming a new constitution of civil government, for ourselves and posterity; and devoutly imploring His direction in so interesting a design, do agree upon, ordain, and establish, the following Declaration of Rights, *and* Frame of Government, *as the CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS.*

Entire Preamble to the 1780 Massachusetts Constitution. Text taken from Thorpe, pp. 1888-89.

Neither of these preambles could have introduced the United States Constitution. Whether mainstream or radical, large state or small state, northern or southern, the consistent pattern and content of American foundation documents from 1620 to 1784 is clear. The Federalists framing the national Preamble found themselves needing a preamble, unable to use much of what was to be had at the state level, yet seeking some basis for continuity that would echo the basic symbols of the American political tradition.

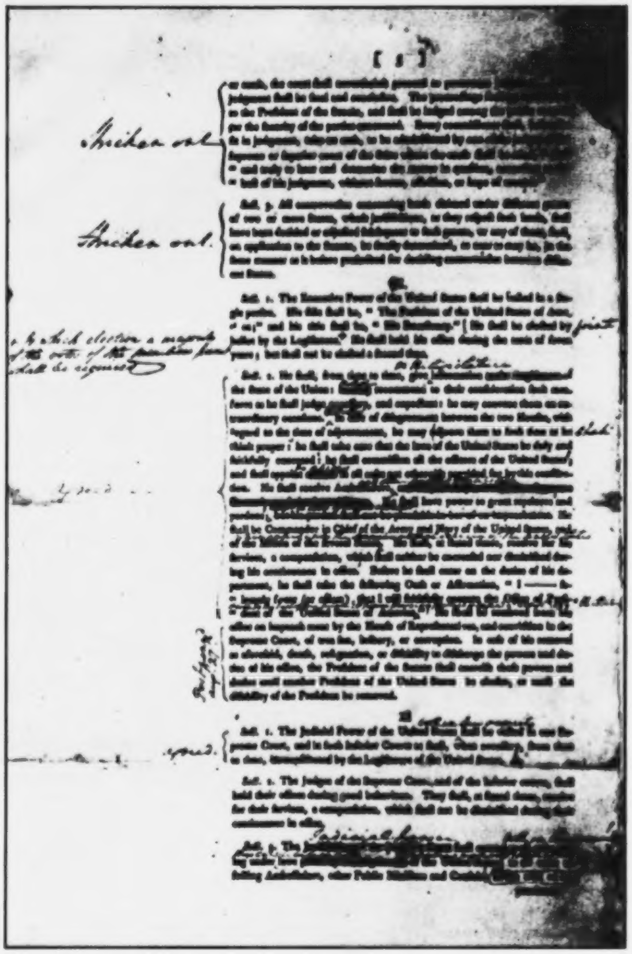
Edmund Randolph introduced a statement, apparently edited in part by John Rutledge, which urged the Convention in Philadelphia to stick to "simple and precise language, and general propositions." He also argued that a preamble should not designate the ends of government, nor contain the language of covenants or compacts; they were, he believed, working with a people and government already in being, not creating a new people or polity. Leaving aside the question of how language can be precise and general at the same time, or what they thought they were doing in Philadelphia if not creating a new people or polity, it is clear that Randolph was among those not wishing to repeat the form or content of state preambles in the national preamble. At several points in the discussion it was suggested that any preamble should indicate only that the Articles of Confederation were inadequate for achieving the general happiness, and thus a new constitution was being written. The framers, and especially those on the Committee of Style and Arrangement, chose instead to write a Preamble that looked superficially similar to those in the state documents. The result was briefer and contained language that was less precise and more general. It thereby appeared to include many traditional values and goals, yet it removed references to those things which the Federalists found most objectionable for a national government—the emphasis upon relatively direct popular consent and equality, the dominance of the legislative branch, a moralistic stance with respect to politics, and the tendency for the states to act as if each were an independent nation. The national Preamble also reflects the greatest concerns of the nationalists—union, as opposed to a league of squabbling states; justice, as opposed to legislatures responding to rapidly shifting majorities; domestic tranquility, as opposed to the kind of insurrections that had already occurred in Massachusetts, Pennsylvania, and North Carolina, insurrections that the Federalists felt stemmed from too much popular consent, too much legislative supremacy, and too much equality in state governments. As for the common defense, the general welfare, and liberty, the framers were drawing here upon the first American national constitution, the Articles of Confederation.

Early in the Convention proceedings, Edmund Randolph of Virginia introduced the most nationalistic of all the proposed constitutions—the Virginia Plan. His very first resolution used the tactic of taking the language found in the Articles as the measure of what was to be done—to achieve a common defense, enhance security of liberty, and promote the general welfare. These goals implied the contents for a preamble to any new constitution the Convention might produce.

> *The said states hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare. . . .*
>
> **First sentence of Article III, the Articles of Confederation, adopted November 15, 1777.**

> *Resolved, that the articles of confederation ought to be so corrected and enlarged, as to accomplish the objects proposed by their institution, namely, common defence, security of liberty and general welfare.*
>
> **The first motion by Edmund Randolph introducing the Virginia Plan at the Constitutional Convention, May 29, 1787.**

Randolph's approach had the virtue of making the proposed Constitution appear to be a fulfillment of the Articles, and thus almost a natural development. However, mid-way through the Convention, a tentative preamble was adopted that began, "We the people of the States of New-Hampshire, Massachusetts," etc. It too had the virtue of implying a connection with the Articles, perhaps too much of one, since it still connoted a loose league of sovereign states.



Preliminary draft of federal preamble. *National Archives.*

> *We the People of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, do ordain, declare and establish the following Constitution for the Government of Ourselves and our Posterity.*
>
> **The Preamble to the proposed United States Constitution as it went to the Committee of Style and Arrangement from the full convention at the end of August, 1787.**

The amendment of this proposed Preamble by the Committee of Style and Arrangement demonstrated an understanding of both politics and the importance of rhetoric. The Committee kept "We the people" which resonated so strongly with American foundation documents since 1620, and replaced the list of states with "of the United States of America," thus rendering the Preamble in accord with the Federalist nationalist perspective. "Common defence, security of liberty, and the general welfare" were resurrected from the early Randolph resolution, and thus from the Articles of Confederation. This addition not only lent a touch of continuity and a dollop of legitimacy, it also resonated with some of the language found in the state preambles, such as "happiness and prosperity," "the common good," "the security and protection of the community," "safety and happiness," and "safety and tranquility." A rereading of the passages from the state constitutions here provided will show the connections. "Union," "justice," and "domestic tranquility," Federalist preoccupations, were inserted before "common defense," "security of liberty," and "general welfare." For the last sentence, the Committee on Style and Arrangement revised slightly the final clause from the original Preamble that the Convention had devised.

The result looked, on a quick reading, to be similar to the preambles found in the state constitutions, but it actually differed from the state formulations in being more general, and in omitting the conventional language of earlier preambles. The Preamble did borrow directly from the long-standing American tradition of foundation documents by beginning with "We the people," and by including the traditional four foundation elements. The version that had been given to the Committee on Style and Arrangement by the Convention for polishing had contained only three elements—it did not list any goals or provide any hint of why a new Constitution was needed. The Preamble to the United States Constitution thus is linked with a long line of American documents, beginning with the Mayflower Compact, and running up through the Declaration of Independence, the Articles of Confederation, and many of the early state constitutions. Properly understood, the Preamble is not only an introduction to our national Constitution but is also emblematic of our constitutional history.

> *WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.*
>
> **The Preamble to the Constitution of the United States, adopted September 17, 1787.**

Select Bibliography

The early convenants and compacts can be found reproduced in Donald S. Lutz, *Documents of Political Foundation Written by Colonial Americans* (Philadelphia: Institute for the Study of Human Issues, 1984). The early state constitutions and other colonial documents are reproduced in Francis N. Thorpe, ed., *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* (Washington, D.C.: Government Printing Office, 1907), 7 vols. The best book on the contents and derivation of early American political thinking is Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (Chapel Hill: University of North Carolina Press, 1969). For works on the early state constitutions, see Donald S. Lutz, *Popular Consent and Popular Control: Whig Political Theory in the Early State Constitutions* (Baton Rouge: Louisiana State University Press, 1980) and Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* (Chapel Hill: University of North Carolina Press, 1980). Other useful introductions to various aspects of American political theory outlined here are: J. G. A. Pocock, *The Machiavellian Moment* (Princeton: Princeton University Press, 1975); Caroline Robbins, *The Eighteenth Century Commonwealthman* (Cambridge, Mass: Harvard University Press, 1959); Gary Wills, *Explaining America: The Federalist* (New York: Penguin Books, 1981); and David Lundberg and Henry F. May, "The Enlightened Reader in America," *American Quarterly*, XXVIII, No. 2 (special issue), 262–293. For the actual writing of the Preamble the reader will want to consult Max Farrand, ed, *The Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1937), 4 vols.

E PLURIBUS
UNUM.
LIBERTY
CONSTITUTION & LAWS.

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Bicentennial Gazette

The Bicentennial of American Independence: a look back

American Revolution Bicentennial Administration

To coordinate the commemoration of the bicentennial of the Declaration of Independence, Congress established the American Revolution Bicentennial Commission (ARBC) in 1966 and its successor, the American Revolution Bicentennial Administration (ARBA), in 1973. These two entities were charged with the coordination, promotion, funding, and limited direct sponsorship of the nation's 1976 bicentennial activities. While congressional appropriations for such activities went to a number of federal agencies and departments, the great bulk of funds went to these two bodies.

Early in the planning phase of the 1976 Bicentennial, ARBC/ARBA decided against the option of sponsoring a single, major commemorative project. Instead, federal efforts focused on the promotion and funding of "grassroots projects" through state and territorial commissions, along with support for various regional and national programs of particular merit.

At the grassroots level, locally sponsored projects most frequently involved restorations, re-creations of historical events, or celebrations of the cultural diversity of an area. Major projects of national or regional significance took a variety of forms and were sponsored by ARBA itself, other federal agencies, various private nonprofit and for-profit organizations and foreign governments. A brief description of some of the most successful major activities follows.

The World of Franklin and Jefferson. This touring exhibition was designed by the offices of the late Charles Eames and his wife Ray, with the cooperation of the Metropolitan Museum of Art in New York and with an initial grant of $500,000 from the IBM Corporation. ARBA contributed an additional $500,000.

Spanning the 120 years from 1706-1826, the exhibit traced the American colonial experience and its European heritage up to the time of America's westward migration. The show was organized into four sections: "Friends and Acquaintances" which included portraits of distinguished Americans as well as a grouping of ordinary citizens by anonymous artists of the Revolutionary period; "The Two Men," which focused on the careers of Franklin and Jefferson; "Three Documents" which dealt with the Declaration of Independence, the Constitution and the Bill of Rights; and "Jefferson and the West" which depicted the emerging nation through a representative sample of wilderness paintings, and a collection of American Indian artifacts.

The exhibit measured eighteen feet in height and occupied over five thousand square feet of floor space. This massive size served to limit significantly the number of museums able to house the show. The exhibit premiered January 10, 1975 at the Grand Palais in Paris, the city in which both Franklin and Jefferson served as diplomats. During its two-month stay in Paris it was viewed by 250,000 visitors—a record attendance for an exhibit of its magnitude. It drew equally impressive crowds at the National Museum in Warsaw and the British Museum in London, after which it traveled to the United States, opening its American tour at the Metropolitan Museum of Art in New York. From there it went to Chicago, Los Angeles, and Mexico City, drawing record crowds in each location.

The Eye of Thomas Jefferson. This National Gallery of Art exhibit revolved around the central figure of Thomas Jefferson. Over 600 items—paintings, drawings, models, pieces of furniture—evoked Jefferson's aesthetic and intellectual environment. The exhibition also included: a 30-minute documentary film; a book of twelve essays, issued as separate tracts in eighteenth-century style; and an exhibit catalogue written in consultation with some twenty scholars.

In the Minds and Hearts of the People: Prologue to the American Revolution, 1760-1774. This exhibit at the National Portrait Gallery opened in June 1974 and set the stage for the Revolutionary period by identifying the persons involved and the events that occurred. A complementary exhibit, **The Dye Is Now Cast,** which opened the following April, detailed chronologically the two crucial years which began with the confrontation at Lexington and Concord and ended with the Declaration of Independence. Each exhibit contained about 250 items—portraits, artifacts and documents. Both were converted to panel shows for touring.

The American Issues Forum, developed under the auspices of the National Endowment for the Humanities, received $1.5 million from the Exxon Corporation and a $200,000 grant from ARBA. The Forum was designed to be a nationwide dialogue to explore the significance of the American Revolution through a series of monthly programs. A national calendar of nine topics provided a framework for the project, and an agenda based upon these themes was distributed in newspapers, newsletters, and various mailings. A number of organizations offered forum-related materials from their own perspective and urged constituents to take part in this dialogue. Additionally, a range of national media programs related to the American Issues Forum. These efforts included: the **Course-by-Newspaper,** a series of newspaper articles; WNET/Thirteen's **Ourstory,** and National Public Radio's **Radio Forum.**

The 1976 Revolutionary Bicentennial celebration was also marked by international activities. ARBA, the State Department, the U.S. Information Agency, and the Smithsonian Institution collaborated in coordinating these international events in which over 100 countries participated. In addition to sending gifts, many foreign nations contributed to the Smithsonian Festival of American Folklife and the July 4 Operation Sail. There were also numerous performing arts tours and traveling exhibits depicting America's ethnic heritage.

In a scholarly vein, several countries established chairs in American universities. There were also international conferences held including the International World Congress on Philosophy of Law and Social Philosophy in St. Louis, Missouri in August 1975, and a series of international symposia entitled **Knowledge 2000.**

A number of activities took place abroad as well. The State Department, in conjunction with the U.S. Information Agency, encouraged the initiation of new and expanded American Studies Programs in foreign universities and other institutions. The State Department also organized a series of five regional conferences on American Studies during 1975-76, each held on a different continent.

Projects under the State Department's Mutual Education and Cultural Exchange Program were also used to enhance the Bicentennial commemoration in this country and abroad. Among these were travel grants for American lecturers to participate in Bicentennial events overseas; and an international congress on "Education: The Link for Human Understanding" that was held in Washington, D.C. and sponsored by the Board of Foreign Scholarships for former Fulbright Scholars from the U.S. and other countries.

A more complete description of 1976 Bicentennial events can be found in the final report of the American Revolution Bicentennial Administration available in most libraries.

The Library of Congress

The Library of Congress organized an ambitious program for the 1976 Revolutionary Bicentennial. Materials produced at that time remain available for scholarly use.

Original Research Resources:

Letters of Delegates to Congress, 1774–1789: In honor of the 1976 bicentennial, the Library of Congress located and accessioned copies of more than 20,500 letters, documents, and diary entries written by delegates to the Continental Congress and the Congress of the Confederation. Ten volumes of a projected 25-volume series have been published.

"A Decent Respect to the Opinions of Mankind": Congressional Justifications of American Policy Before Independence: this volume contains memorials to the peoples of Quebec, Great Britain, Ireland, and North America, petitions to the King, and the memoire of John Paul Jones to Louis XVI, among other items.

English Defenders of American Freedoms, 1774–1789 & Letters from a Distinguished American; Twelve Essays by John Adams: these two volumes comprise reprints of scarce Revolutionary pamphlets.

The Library has also published facsimiles of Paul Revere engravings and the journal of Gideon Olmsted.

Bibliographies:

Four bibilographies compiled under the bicentennial project are available:

The American Revolution: A Selected Reading List
Periodical Literature on the American Revolution
Creating Independence, 1763–1789 (for young readers)
Revolutionary American, 1763–1789.

In addition, the Library compiled two guides to its own resources:

Manuscript Sources for Research on the American Revolution
The American Revolution in Drawings and Prints

A guide to the maps at the Library is also available.

Symposia:

From May 1972 through May 1976, the Library of Congress hosted five scholarly symposia devoted to fostering a deeper understanding of the Revolution, and published collections of the papers delivered:

The Development of a Revolutionary Mentality
The Fundamental Testaments of the American Revolution
Leadership in the American Revolution
The Impact of the American Revolution Abroad
The American Revolution: A Continuing Commitment

Exhibits:

A major exhibit on the American Revolution in the Library's Great Hall opened on April 24, 1975, the 175th anniversary of the Library of Congress. The Library issued brochures based on this exhibit, *To Set A Country Free*, as well as *Twelve Flags of the American Revolution*, which pictured and described twelve banners that were replicated for use in that exhibit.

The 1976 bicentennial provided the opportunity for the Library to assemble 17 of the 21 extant copies of the first printing of the Declaration of Independence. The Library also found support to enlarge its collection of records of Revolutionary music.

Materials printed in book form may be obtained from The Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

Materials on microfilm or microfiche can be obtained from the Photoduplication Service of the Library of Congress, Washington, D.C.

Copies of the Bicentennial Symposia are available from the Office of Information, Library of Congress, Washington, D.C. 20540. (The cost prepaid is $1.50 per volume and $2.00 handling charge per order.)

A Contemporary Look At *The Federalist Papers*

In the mid-1970's, reflecting on a contemporary period of political and even constitutional turmoil in our history (the Vietnam-Watergate era), the League of Women Voters Education Fund (LWVEF) initiated a re-examination of the U.S. governmental structure and process through a project called *The Federalist Papers, Re-Examined.* The challenge for the project was posed to the 1974 League of Women Voters Convention by Henry Steele Commager, who stated:

> The great question that confronts us so implacably is whether the American political principles, which have served us so well and have weathered so many crises, can continue to function in the modern world. Is a constitutional mechanism rooted in the 17th century ideas of the relations of men to government and admirably adapted to the simple needs

of the 18th and early 19th centuries adequate to the importunate exigencies of 20th—and of the 21st?

With funding through a grant from the National Endowment for the Humanities, the LWVEF set out to explore Professor Commager's question and launched its project, *The Federalist Papers, Re-Examined*, in 1976, in conjunction with the Bicentennial of American independence.

The project was designed as a citizen education effort, using *The Federalist Papers* as the resource to link current problems with the past. The project rested on the premise that much of the public negativism and confusion caused by recent political events came from preoccupation with immediate concerns, with too little attention being given to underlying historical principles and precedents. *The Federalist Papers* seemed capable of serving as a bridge between the 18th and 20th centuries and, as such, provided the foundation upon which the project objective could rest: to promote a broad public dialogue on the fundamental decisions of our past as a basis for analyzing current constitutional and governmental questions. The LWVEF designed the project to include, first, a series of seminars with scholars and other experts discussing key questions, and, second, a series of pamphlets based on the seminar discussions for wide public use.

During the course of just over a year, the LWVEF organized six small, one-day seminars, held around the nation. Each seminar's panelists included not only scholars (outstanding political scientists, historians, constitutional lawyers and philosophers), but also "practitioners" of government—members of Congress, and representatives of the communications media. All were expected to engage in a lively and far-reaching discussion of public policy issues. Each seminar focused on a different aspect of constitutional structure—the executive branch, for example, or the Bill of Rights—and panelists as well as the audience were sent briefing papers ahead of time, with questions for further discussion.

The LWVEF's seminar on the executive branch provides a typical example of a session notable for its intellectual interplay and the nature of the concepts discussed. Held shortly after the Watergate experience, this seminar focused on the question of presidential accountability. Participants included Morton Borden and Merrill Peterson, professors of history; Charles Hardin, Nelson Polsby, and Frederick Mosher, political scientists; Neal Peirce and Robert Pierpoint, representing the media; Congressman Timothy Wirth; and David Lissy from the Ford Administration White House Domestic Council. This distinguished and diversified panel dissected and examined presidential powers, relations with Congress, and presidential accountability, moving back and forth between historical examples and current policy debate. In the process, the panelists also looked at the subjects of impeachment and presidential succession. A full day of stimulating discussion was reluctantly brought to a close.

Following the seminars, LWVEF staff used the transcripts to distill and adapt the discussions for a pamphlet on each seminar. The result is a series of pamphlets suitable for general citizen use. Each pamphlet, of between 30 and 40 pages, consists of edited seminar dialogue, interspersed with a minimum of narrative text; selected passages from *The Federalist Papers*; questions for further discussion; and a list of annotated readings. Each pamphlet thus preserves the flavor of the spontaneous give-and-take discussion that distinguished the seminars.

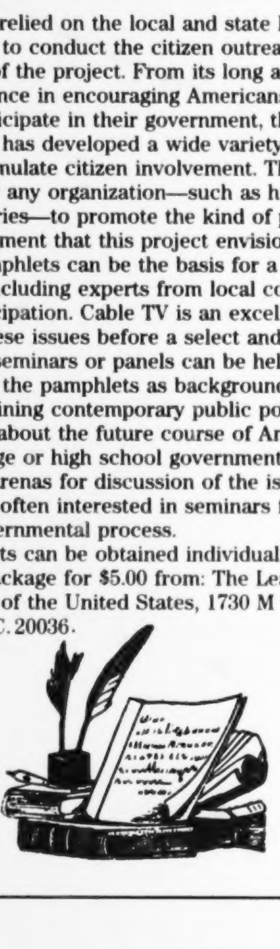
The list of pamphlets follows, corresponding to the respective seminar:

The Federalist Papers Re-Examined
Number 1, *Past as Prologue: Present Perspectives*
Number 2, *The Bill of Rights Then and Now: Perspectives on Individual Liberty*
Number 3, *Perspectives on Congress: Performance and Prospects*
Number 4, *Achieving "Due Responsibility": Perspectives on the American Presidency*
Number 5, *The Growth of Judicial Power: Perspectives on "The Least Dangerous Branch"*
Number 6, *Our "Compound Republic": Perspectives on American Federalism*

The LWVEF also published a community guide, *Back to First Principles*, to assist interested citizens and organizations in using the pamphlets in community education efforts.

The LWVEF relied on the local and state Leagues of Women Voters to conduct the citizen outreach and education aspect of the project. From its long and widespread experience in encouraging Americans to learn about and participate in their government, the League of Women Voters has developed a wide variety of creative methods to stimulate citizen involvement. These ideas can be used by any organization—such as historical societies or libraries—to promote the kind of public debate on government that this project envisioned. For example, the pamphlets can be the basis for a local radio or TV series, including experts from local colleges and audience participation. Cable TV is an excellent medium for bringing these issues before a select and interested public. Public seminars or panels can be held at the local level, using the pamphlets as background, with speakers explaining contemporary public policy debates or speculating about the future course of American government. College or high school government classrooms are also ideal arenas for discussion of the issues. Local businesses are often interested in seminars for employees on the governmental process.

The pamphlets can be obtained individually for $1.00 each or as a package for $5.00 from: The League of Women Voters of the United States, 1730 M St. NW, Washington, D.C. 20036.



Members of the First Virginia Regiment Yorktown Bicentennial Brigade, Claude Moore Colonial Farm, Turkey Run, Virginia. Michael R. Brouphy.

The Yorktown Bicentennial Brigade

For the bicentennial of the Siege at Yorktown in 1981, 150 different recreated regiments formed a brigade representing the original units that fought in the American Revolution. A New England Battalion of units came from Massachusetts, Connecticut, Rhode Island, Vermont and New Hampshire, a Northern Battalion from New York and New Jersey, plus Ohio, Wisconsin and Michigan. The Mid-Atlantic Battalion comprised units from Maryland, Pennsylvania, and Virginia and the Southern Battalion from North and South Carolina, plus Illinois. A Militia Battalion came from units in all these states, plus Florida, Georgia, Indiana, Iowa, Maine, and West Virginia. Each battalion was commanded by an officer experienced in Bicentennial events and from the area where the battalion was based.

Most of these units continue to be active and many of them are involved in living history programs demonstrating camp and military life of the late 18th-century. Female "camp followers" cook 18th-century recipes outdoors and demonstrate a variety of 18th-century crafts. Participants wear 18th-century clothing.

If you would like to locate or organize such a group in your area, write to Thomas Deakin, Encampment Commander, 11166 Forest Edge Drive, Reston, VA 22090 (please enclose a stamped, self-addressed envelope).

NATIONAL URBAN LEAGUE, INC.

For the bicentennial of the American Revolution, the National Urban League developed pamphlets under the overall title, "Black Perspectives on the Bicentennial."

The series included:

The Land of Plenty: The Economic Progress of Blacks After 200 Years by Dr. Herrington J. Bryce.

Certain Unalienable Rights: The Struggle of Political Equality by Dr. Charles V. Hamilton.

America in the World: Blacks in the U.S. Wars by Dr. Lawrence D. Reddick.

Growing up in America: The Struggle for Educational Equality by Dr. Nancy L. Arnez.

Growing up in America: The Struggle of the Black Family by Dr. Andrew Billingsley.

Certain Unalienable Rights: The Black Press and the First Amendment by James D. Williams.

In addition, at the League's annual conference in 1976 a special program highlighted the poetry and prose of outstanding black citizens on the meaning of being black in America.

A third Bicentennial project involved the distribution of 4,000 copies of the 1100-page volume entitled *A Special Bicentennial Edition of the Negro Almanac*. This reference book was prepared by private sources and contained 33 sections dealing with various aspects of the black experience in America. It was distributed in high schools, predominately black colleges and universities, bi-racial private high schools, national private organizations and state and local human rights commissions. For information about these efforts, contact the National Urban League, Inc., 500 East 62nd St., New York, New York 10021.

JOINT CENTER FOR POLITICAL STUDIES, INC.

In 1976, the Joint Center published a special edition of its annual *National Roster of Black Elected Officials*. The edition contained, in addition to the usual statistical data on black elected officials, a detailed analysis of black participation in electoral politics from Reconstruction to 1976. Copies of this volume are available from the Joint Center, Suite 400, 1301 Pennsylvania Ave., N.W., Washington, D.C. 20004.

Among the events mounted in 1976 to commemorate the bicentennial of American Independence were the following:

The International Brick and Rolling Pin Throwing Contest at Stroud, Oklahoma,
Spirit of '76 caskets, in red, white and blue,
A 907-foot banana split in Anchorage, Alaska, and
A 69,000-pound birthday cake in Baltimore.

Milton M. Klein, "Commemorating the American Revolution: The Bicentennial and its Predecessors," *New York History*, July, 1977, pp. 259-60.

RETAINING THE BEST OF THE CULTURE: SHAKESPEARE AND THE BICENTENNIAL

On September 15, 1752, *The Merchant of Venice* was performed in Williamsburg, Virginia, thus becoming the first Shakespeare play to be seen in America. A quarter of a century later, America declared itself independent from the country which gave the world its greatest poet. However, the new nation had a dilemma: how much of the English culture could it retain while establishing its own identity? And what would it mean to "Americanize" those parts of the culture which it did want to retain? No one in the new frontier wanted to reject Shakespeare.

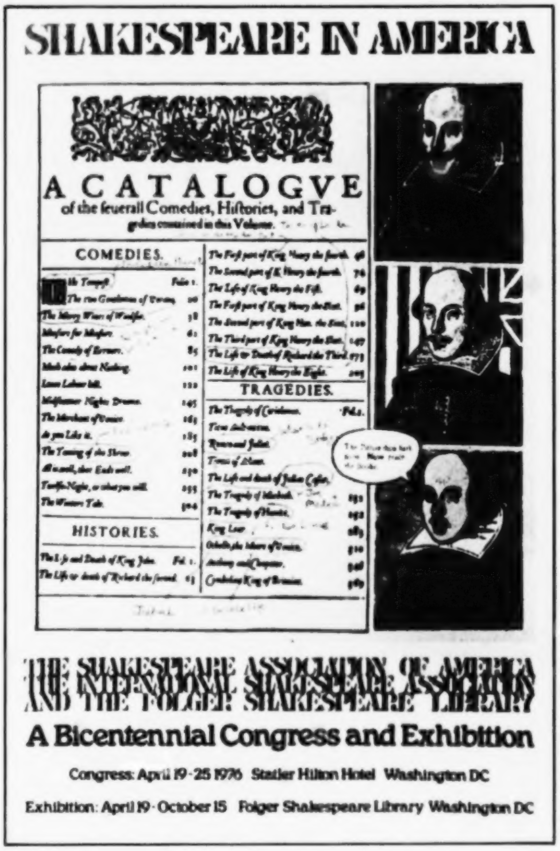
For a week in April 1976, the Folger Library in conjunction with the Shakespeare Association of America and the International Shakespeare Association celebrated America's commitment to Shakespeare scholarship and performance with a bicentennial exhibition and congress comprised of lectures, presentations, and workshops. Scholars and commentators from all over the world attended and participated in the proceedings which underscored the American effort to retain the best of its English heritage. Moreover, they illustrated the long-standing inclination of the American public to transform Shakespeare from a foreign export into an expressive force which could be particularly American.

The Bicentennial festivities at the Folger focused on the nineteenth-century for this era engendered the first flowering of an original, American approach to Shakespeare. During that period, English actors such as Edmund Kean, Thomas Cooper, and Junius Booth passed the mantle of their craft onto native-born actors John Howard Payne, James Henry Hackett, Charlotte Cushman, and Charles Macready. As a special feature of the festivities, distinguished actress Eugenia Rawls presented a special performance entitled "Affectionately yours, Fanny Kemble," based on the career and life of English actresss Fanny Kemble who toured the United States triumphantly from 1832-1834. The production incorporated years of Ms. Rawls' research both in the United States and England.

Honoring English and American actors alike, an exhibition entitled "Shakespeare in America, 1776-1976" was created to highlight Shakespeare on stage in America, particularly in the nineteenth century. Portraits of actors from both sides of the Atlantic comprised a major portion of the exhibition. Books, manuscripts, promptbooks, playbills, photographs, prints, engravings, and costumes spanning two hundred years of American interest in Shakespeare were also included.

In 1884, Walt Whitman wrote an essay entitled "What lurks behind Shakespeare's historical plays?" According to his analysis, the sources of democratic ideals were contained within these plays. Written evidence exists to prove that prominent Americans from John Quincy Adams to Abraham Lincoln read and were moved by Shakespeare's writings. Scholars and poets before Whitman and since have pondered to what extent he may have inspired passion or policy in learned leaders.

In the spirit of inquiry, then, a bicentennial series of lectures, symposia, and seminars brought together a stellar group of scholars and theater professionals to discuss Shakespeare in a way that would be pertinent to contemporary society. Jorges Luis Borges, Alistair Cooke, Anthony Burgess, Joseph Papp, Kenneth Muir, Anthony Quayle, and a host of others gathered to find out what makes Shakespeare still interesting and important. The bicentennial celebration of Shakespeare marked the two-hundredth anniversary of Shakespeare in the United States, and the four-hundredth anniversary of the beginning of formal theatrics in the English-speaking world—the first London playhouse having been built in 1576. The exhibit and the array of lectures and activities yielded both entertainment and enlightenment.


SHAKESPEARE IN AMERICA

A CATALOGVE
of the feuerall Comedies, Hiſtories, and Tragedies contained in this Volume.

COMEDIES.

HISTORIES.

TRAGEDIES.

THE SHAKESPEARE ASSOCIATION OF AMERICA
THE INTERNATIONAL SHAKESPEARE ASSOCIATION
AND THE FOLGER SHAKESPEARE LIBRARY

A Bicentennial Congress and Exhibition

Congress: April 19-25 1976 Statler Hilton Hotel Washington DC

Exhibition: April 19 · October 15 Folger Shakespeare Library Washington DC

Folger Shakespeare Library

The Bicentennial of the Constitution: a look ahead

THE CONSTITUTION

THE NATIONAL ENDOWMENT FOR THE HUMANITIES SPECIAL INITIATIVE FOR THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION

In 1982, at the specific directive of Chairman William Bennett, the National Endowment for the Humanities inaugurated a "special initiative" for the Bicentennial of the United States Constitution within the Division of General Programs. This special initiative is meant to encourage scholarly interest in the public reflection on the principles and foundations of constitutional government. The Endowment awarded twenty-one planning grants under this new rubric.

Earlier this year, the special initiative became formalized through the creation of an Office of the Bicentennial of the United States Constitution, headed by Jeffrey D. Wallin who reports directly to the chairman. The role of the Office is to coordinate the special initiative throughout all NEH divisions, and to make the scope of the initiative clear to the public. The Office will assist applicants in developing proposals, but all proposals are to be submitted and reviewed through the Endowment's current program divisions.

Many of the Endowment's regular grant-making divisions and programs have formulated plans to promote projects which focus on the study of the Constitution. The Division of Fellowships and Seminars has instituted a special competition for Constitutional Fellowships, which provide stipends for six to twelve months for college faculty and independent scholars; the Division of Research Programs is seeking proposals to reissue out-of-print seminal works on the founding period; and the Division of Education Programs is inviting proposals from scholars to conduct institutes for secondary-school teachers.

During an informal interview with Project '87 staff in May of 1983, Jeffrey Wallin explained in more detail the impetus behind the creation of a special initiative for the 200th anniversary of the Constitution. Observed Dr. Wallin: "It behooves us as a nation to come to some understanding of who and what we are, of our national character, and to ask whether that character is the result of a particular intention or whether it just happened. Remember what Alexander Hamilton said in Federalist No. 1, 'It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.' We were the first nation that was founded by reflection and choice (though there was some accident and force also). This was the first time that a people talked and argued about what kind of government they wanted to have—decided the issue without bloodshed—and then left a written record of the debate. The Bicentennial of the Constitution is the appropriate occasion to reopen and reconsider this record, the debate as well as the conduct and example. We can look back and raise questions which are central to the humanities—who we are, what we are, whether there was some purpose behind our constitutional structure, whether we have adhered to it, or veered from it, either consciously or otherwise. It seems to me that in asking questions like these, we're going to have to be concerned about history and philosophy. And so it's just a natural thing for us to do at the Endowment. In fact, if the National Endowment for the Humanities did not pay a high priority to this sort of thing, one would wonder what it is that we exist to do."

The Endowment recommends that applicants submitting proposals under the Bicentennial special initiative, as with other programs, contact the Endowment several months in advance of the deadline for submission. Program officers will work with applicants to determine the appropriate area for submission, and will review preliminary proposals in order to assist the applicant in providing needed information. The initial contact may be made to the Bicentennial Office or a specific division by telephone.

The National Endowment encourages planners of Bicentennial events to seek advice from state humanities councils, which are also very eager to engage in Bicentennial programs, and which are knowledgeable about local resources. In addition to being appropriate sources of assistance for local projects, state councils usually offer faster decisions on small grants than the National Endowment is able to give. State council staff can also provide assistance to applicants who plan to submit proposals to the National Endowment, and should be considered an important resource for those with little experience in writing grant applications.

Proposals for local media programming usually should be submitted to the appropriate state humanities council, but the National Endowment is eager for national and regional television efforts on the Constitution which are designed for broadcast over the Public Broadcasting System. NEH will also consider radio program proposals for national, regional and local broadcast.

Planners of Bicentennial events who are contemplating seeking support from the National Endowment should contact the Office of the Bicentennial of the United States Constitution, National Endowment for the Humanities, Washington, D.C., or telephone (202) 786-0267.

NEH Planning Grants Awarded in 1982

American Political Science Association
1527 New Hampshire Ave., N.W.
Washington, D.C. 20036
✓ Sheilah Mann

To support planning for a magazine to serve as an educational resource for organizations and institutions in developing Bicentennial programs.

Arizona State University
Arizona Center for Medieval and Renaissance Studies
Social Science Bldg. 244 C
Tempe, Arizona 85287
Jeanie R. Brink

To support planning for projects that explore the ways in which the sources of the U.S. Constitution derive from intellectual traditions of the medieval and renaissance periods.

Association for Higher Education of North Texas
P.O. Box 688
Richardson, Texas 75080
John Kincaid

To support planning for educational programs focusing on two themes: 1) We the People: The Constitution as Covenant-Compact; and 2) The American Federal Republic: The Constitution as Agreement and Model.

Columbia University, Teachers College
525 West 120th Street
Box 75
New York, New York 10027
Dr. Marguerite Ross Barnett

To support planning for public programs and educational materials that explore the concepts embodied in the U.S. Constitution and the impact of the Constitution in shaping American society.

Columbia University
Box 20 Low Memorial Library
New York, New York 10027
Louis Henkin

To support planning for a series of public programs that involve U.S. and foreign scholars in the analysis of the U.S. Constitution's impact on other legal and political systems.

American Association for State and Local History
708 Berry Road
Nashville, Tennessee 37204
George R. Adams

To support planning for a guide to assist state historical societies, archives and museums in developing exhibits, and interpretive programs about the history of states' relations with the federal government.

Community Renewal Society
111 No. Wabash Avenue
Chicago, Illinois 60602
Richard H. Luecke

To support planning for a series of programs to involve citizen groups in the study of Constitutional issues and their relationship to the history of urban development in the U.S.

George Mason University
Project for the Study of Human Rights
4400 University Drive
Fairfax, Virginia 22030
Josephine F. Pacheco

To support planning for a program that focuses on the relationships between the U.S. Bill of Rights, the Virginia Declaration of Rights, and the French Declaration of the Rights of Man and the Citizen.

State Historical Society of Wisconsin
816 State Street
Madison, Wisconsin 53706
Gerald F. Ham

To support planning for a series of public programs with the Center for the Study of the American Constitution, University of Wisconsin-Madison. Programs will focus on the writing and ratification of the U.S. Constitution, as well as Wisconsin's role in its evolution.

Loyola University
Department of Political Science
820 N. Michigan
Chicago, Illinois 60611
Jean Yarbrough

To support planning for a major conference to examine the effect of the U.S. Constitution upon the formation of the American moral and civic character.

North Carolina State University
School of Humanities and Social Sciences
Raleigh, North Carolina 27650 ✓
Abraham Holtzman

To support the development of study units focusing on theoretical, historical, and contemporary constitutional issues for distribution through the University's Humanities Extension Program.

University of Pennsylvania
Office of Research Admin.
409 Franklin Building/16
3451 Walnut Street
Philadelphia, Pennsylvania 19104
Elizabeth F. Flower

To support a major conference to plan a series of public programs on the background and drafting of the U.S. Constitution, the tasks to which it was addressed, its impact on the 19th and 20th centuries, and its role with respect to contemporary problems.

Phi Alpha Delta Law Fraternity
Office of Attorney General
Justice Building
Little Rock, Arkansas 72201
David M. Schimmel

To support planning for a program designed to increase citizen understanding of the historic issues, philosophical principles, and jurisprudential foundations of the U.S. Constitution.

Russell Sage College
Troy, New York 12180
Stephen L. Schechter

To support planning for a series of educational programs on the ratification of the U.S Constitution in the original thirteen states.

Public Research Syndicated
201 W 4th Street, Suite 200
Claremont, California 91711
Larry P. Arnn

To support planning for a series of newspaper articles for national syndication on the U.S. Constitution, its origin and its place in our national life today.

Deadlines

FELLOWSHIPS

Constitutional Fellows: June 1, annually, for projects starting after the following January 1

RESEARCH

Projects in the Special Initiative described above: May 1, annually, for projects beginning after the following October 1; and November 1, annually, for projects beginning after the following April 1 (for other projects, see regular Research guidelines)

EDUCATION

Bicentennial Institutes for Teachers: June 15, annually, for institutes to be held the following year (for other projects, see regular Education guidelines)

GENERAL PROGRAMS

For Major Public Projects on the Bicentennial other than radio or television programming, interpretive exhibitions at museums and historical organizations and youth programs: August 1, 1983, for projects starting after April 1, 1984; February 6, 1984, for projects starting after October 1, 1984; and August 1, 1984, for projects starting after April 1, 1985 (for other projects, see regular guidelines)

CHALLENGE GRANTS

June 1, 1983, with notification of awards in December 1983 (for subsequent deadlines, see note below)

STATE PROGRAMS

Applicant should contact his/her state humanities program for requirements and deadline information (addresses are listed on pp. 16-20)

PLANNING AND POLICY ASSESSMENT

August 1, 1983, for projects starting April 1, 1984; February 1, 1984, for projects starting after October 1, 1984; and August 1, 1984, for projects starting after April 1, 1985

NOTE: *Deadlines are subject to change. Please confirm exact deadlines with the appropriate Endowment division.*

National Council on the Aging
600 Maryland Avenue, S.W.
Washington, D.C. 20024
Edmund H. Worthy

To support planning with National History Day, Inc. for a project which involves older Americans and young people in study and discussion of the U.S. Constitution.

National Federation of State
Humanities Councils
12 S. 6th Street, Suite 527
Minneapolis, Minnesota 55402
Steven Weiland

To support the development of a resource and program guide to assist state humanities councils and their grantees in planning public humanities programs on the history and meaning of the U.S. Constitution.

New York City Public Schools
110 Livingston Street, Room 651
Brooklyn, New York 11201
Nancy Scott

To support planning for a major project to involve adults and young people in the study of the U.S. Constitution through discussion programs and the use of print and media materials.

University of New Mexico
Department of History
Albuquerque, New Mexico 07151
Gerald D. Nash

To support planning for a series of programs designed to explore the history of the U.S. Constitution and its role in a tri-cultural society combining Indian, Hispanic-American and Anglo-American traditions.

University of North Carolina
209 Abernethy Hall 002A
Chapel Hill, North Carolina 27514
Warren A. Nord

To support planning for a project that will explore the religion clauses of the first amendment and their influence on contemporary issues relating to the relationship of religion and the State.

University of Oklahoma
College of Liberal Studies
1700 Asp Avenue
Norman, Oklahoma 73037
Dan A. Davis

To support planning for a Constitutional Bicentennial Resource Center for the purpose of organizing public programs and study materials.

THE NATIONAL FEDERATION OF STATE HUMANITIES COUNCILS

The National Federation of State Humanities Councils has received a planning grant from the National Endowment for the Humanities for the Bicentennial of the U.S. Constitution. The Federation has fifty of the fifty-two state humanities councils as its members and it functions to assist the SHCs in attaining their objective of increased public understanding, appreciation, and use of the humanities.

The planning project has five parts. The first is the preparation of an inventory of resources related to the Constitution. Information will be collected on film, video, radio, exhibit, and print resources concerning the writing of the Constitution, the founding period in American history, important political figures, and the major political, philosophical, and social issues surrounding the Constitution throughout its history.

Second, the Federation will review the resources and select those that are likely to be most useful in public humanities projects in the states and regions. The selections will be made in consultation with an advisory group of state council members.

Third, the Federation proposes to investigate the opportunities to organize resources into packaged public humanities programs for use by grantees of state humanities councils. In this part of the planning project, the Federation will study the utility of various combinations of materials and propose to the councils a variety of packaged programs from which they can choose those appropriate to their own interests and circumstances.

Fourth is a study of the feasibility of producing new resources for use in state council-funded projects. Three possibilities are: (1) a brief slide/tape program on the making of the Constitution; (2) a tabloid newspaper supplement devoted to the Constitution; and (3) a specially-edited reader on the Constitution that could be used as the basis for discussion programs.

Finally, the Federation will provide to the state humanities councils a *Resources and Program Guide* on the Constitution to assist them in planning their own efforts in connection with the 1987 anniversary. The *Guide* will include: (1) detailed information on project resources; (2) possible project formats including suggestions for stimulating the participation of humanists whose disciplines are not, at first glance, directly related to the anniversary, (3) several model requests for proposals (RFPs) that could be used in the announcements and newsletters of individual states; and (4) information on planning activities already underway in the states.

All of the state humanities councils listed below have indicated an interest in supporting Bicentennial programs.

THE COMMITTEE FOR THE HUMANITIES IN ALABAMA

Post Office Box A-40
Birmingham-Southern College
Birmingham, Alabama 35254
(205) 324-1314

ARIZONA HUMANITIES COUNCIL

First Interstate Bank Plaza
100 West Washington,
Suite 1290
Phoenix, Arizona 85003
(602) 257-0335

ARKANSAS ENDOWMENT FOR THE HUMANITIES

1010 West Third St., Suite 102
Little Rock, Arkansas 72201
(501) 372-2672

D.C. COMMUNITY HUMANITIES COUNCIL

1341 G Street, N.W., Suite 306
Washington, D.C. 20005
(202) 347-1732

FLORIDA ENDOWMENT FOR THE HUMANITIES, INC.

University of South Florida
LET, Room 468
Tampa, Florida 33620
(813) 974-4094

GEORGIA ENDOWMENT FOR THE HUMANITIES

1589 Clifton Road, N.E.
Emory University
Atlanta, Georgia 30322
(404) 329-7500

HAWAII COMMITTEE FOR THE HUMANITIES

2615 South King Street,
Suite 211
Honolulu, Hawaii 96826-3292
(808) 947-5891

IOWA HUMANITIES BOARD

Oakdale Campus
Iowa City, Iowa 52242
(319) 353-6754

KANSAS COMMITTEE FOR THE HUMANITIES

112 West 6th Street, Suite 509
Topeka, Kansas 66603
(913) 357-1359

KENTUCKY HUMANITIES COUNCIL, INC.

Ligon House
University of Kentucky
Lexington, Kentucky 40506
(606) 258-5932

MARYLAND COMMITTEE FOR THE HUMANITIES

516 N. Charles Street, Room 305
Baltimore, Maryland 21201
(301) 837-1938

MASSACHUSETTS FOUNDATION FOR HUMANITIES AND PUBLIC POLICY

237 Whitmore Administration Building
University of Massachusetts
Amherst, Massachusetts 01003
(413) 545-1936

The Massachusetts Foundation for Humanities and Public Policy will consider proposals commemorating the Bicentennial of the U.S. Constitution from individuals or organizations through the normal application process. A variety of formats are acceptable: lectures and discussions, conferences, films, videotapes, radio series and publications for a general audience. The Foundation is unlikely to fund scholarship projects.

At the present time the MFH&PP has put out a call for proposals for a film on Shays' Rebellion. This film should be of interest to others who are planning activities in connection with the '87 bicentennial.

Guidelines and applications are available at the address listed above.

MONTANA COMMITTEE FOR THE HUMANITIES

Hellgate Station
P.O. Box 8036
Missoula, Montana 59807
(406) 243-6022

MISSOURI COMMITTEE FOR THE HUMANITIES, INC.

Suite 204, Lobery Building
11425 Dorsett Rd.
Maryland Heights, Missouri 63043
(314) 739-7368

NEW MEXICO HUMANITIES COUNCIL

1712 Las Lomas, NE
Albuquerque, New Mexico 87131
(505) 277-3705

NEW HAMPSHIRE COUNCIL FOR THE HUMANITIES

112 S. State St.
Concord, New Hampshire 03301
(603) 244-4071

NEVADA HUMANITIES, INC.

Post Office Box 8065
Reno, Nevada 89507
(702) 784-6587

NEW YORK COUNCIL FOR THE HUMANITIES

33 West 42 Street
New York, New York 10036
(212) 354-3040

NORTH DAKOTA HUMANITIES COUNCIL

P.O. Box 2191
Bismark, North Dakota 58502
(800) 932-8778

OHIO HUMANITIES COUNCIL

760 Pleasant Ridge Ave.
Columbus, Ohio 43209
(614) 236-6879

The Ohio Humanities Council will support public humanities programs designed to commemorate the Bicentennial of the U.S. Constitution. Such proposals will be considered through the Council's usual procedures and may be either regular proposals or

MAINE HUMANITIES COUNCIL

Post Office Box 7202
Portland, Maine 04112
(207) 773-5051

The Maine Humanities Council is laying a groundwork for the celebration of the Bicentennial of the U.S. Constitution by sponsoring a project "Maine at Statehood: The Forgotten Years, 1783-1820." The project will involve a research phase and coordinated public activities which include a traveling exhibit, a series of presentations by scholars for schools and communities, and a reading program. It is designed to reach a broad audience at the same time that it provides opportunity for scholarly study. In addition to familiarizing the public with an important era in Maine history, it is hoped that through discussion of work in progress the project will also foster understanding of historical procedures and interpretation.

The period 1783-1820 witnessed significant political and economic developments in Maine. In 1783 Maine was a frontier territory of Massachusetts; in 1820 it stood as an independent state on the verge of industrialization. In the intervening years the population increased 450%, the number of incorporated towns more than doubled, agriculture and commerce expanded, and political organization and awareness expanded also, spurred by the struggles over the federal constitution and over the question of statehood. Though the primary task of "Maine at Statehood" will be to develop an understanding of the diversity and texture of Maine life in the years between 1783 and 1820, the project will involve examination of the economic and political trends which emerged during the period and which continue to be evident in Maine life: stratification of class, conflict between the coast and the interior, outside economic control.

The MHC has structured "Maine at Statehood" in four phases. The first phase from August, 1982 to January, 1983 involved: the preparation of an inventory of the fine and decorative arts of the period; the development of a traveling exhibition; the development of a slide collection to serve as a permanent resource for scholars, public school teachers, and others; the encouragement of scholarship through the development of panels in several research areas charged with surveying the work extant and in progress and determining ways in which this work could be presented to the public; a symposium bringing together those working in the several aspects of this project; and the development of materials to explain and promote the activities which will occur in phase two.

Public presentations, the second phase, are scheduled from February, 1983 through December, 1983. Using formats that have been successful in other MHC activities, these public presentations will include programs in the public schools, training programs for teachers, travelling exhibits, and reading programs. The reading programs will be tailored for the local level; they will draw, however, on the successful reading program that the Council has held monthly in Augusta for legislators, judges, and administrators. In fact, this year's seminar, "Can Eighteenth-Century Men Speak to Twentieth Century Americans: A Study of the Founding Fathers," generated much of the interest in the present project.

The third phase of "Maine at Statehood," the follow-up phase, anticipates calling a summary conference, publishing a summary of the work of the project, working on curriculum development for teachers who are interested in integrating the work of the project into their classrooms, adapting the exhibit for an outreach program, developing a Speakers' Bureau, and, if the results of its inventory warrant it, producing a catalogue of the inventory. The final evaluation phase will be completed in December, 1983.

The organization and planning pattern developed by the Maine Humanities Council for "Maine at Statehood" may be of great interest to those planning similar projects in connection with the Bicentennial. Further information may be obtained from the Council's office at the address listed above.

mini-grants for proposals up to $1000. Proposals may be submitted by any non-profit organization in Ohio. They should be for projects which are primarily for the general public. However, programs may also be designed for children and students as long as they do not carry academic credit. Projects may take any format.

The Ohio Humanities Council has already begun to award grants relating to the '87 Bicentennial. This year the University of Dayton received a grant for a series of four panel discussions to be held in different locations in Dayton which will be on the topic "From Revolution to Republic: Post-Revolutionary America and Early Ohio." The project director is Professor Alfred J. Bannan.

Applications, information, and guidelines are available at the address shown above.

OREGON COMMITTEE FOR THE HUMANITIES

Room 410
418 S.W. Washington
Portland, Oregon 97204
(502) 241-0543

PENNSYLVANIA HUMANITIES COUNCIL

401 N. Broad Street, Suite 818
Philadelphia, Pa. 19108
(215) 925-1005

PUERTO RICAN ENDOWMENT FOR THE HUMANITIES (FUNDACION PUERTORIQUENA DE LAS HUMANIDADES)

Post Office Box S 4307
San Juan, Puerto Rico 00904
(809) 723-2087

RHODE ISLAND COMMITTEE FOR THE HUMANITIES

463 Broadway
Providence, Rhode Island 02909
(401) 273-2250

SOUTH DAKOTA COMMITTEE ON THE HUMANITIES

Post Office Box 35
University Station
Brookings, South Dakota 57007
(605) 688-6113

TENNESSEE COMMITTEE FOR THE HUMANITIES, INC.

1001 Eighteenth Avenue South
Post Office Box 24767
Nashville, Tennessee 37202
(615) 320-7001

TEXAS COMMITTEE FOR THE HUMANITIES

1604 Nueces
Austin, Texas 78701
(512) 473-8585

The Texas Committee for the Humanities will entertain proposals for projects designed to concentrate attention upon the Bicentennial of the U.S. Constitution. Such projects could include conferences, symposia, lectures, exhibitions, public radio and television programs and publications stemming from public programs. The audience should be adults and/or young people outside the regular school or college curriculum.

The Texas Committee for the Humanities has just completed the awarding of grants for projects on "Federalism: Assessing an American Political Tradition." The goal of this special call for grant applications was to allow humanities scholars to examine and discuss the original contributions of American federalism to the problems of democratic governance and rights' protections, and to encourage examination of the difficulties, conflicts, and successes encountered by the American people in implementing their unique system of federal democracy since 1789.

Those considering projects in connection with the 1987 bicentennial may obtain information, guidelines, and applications directly from the Committee's offices in Austin.

UTAH ENDOWMENT FOR THE HUMANITIES

Ten West Broadway, Suite 900
Salt Lake City, Utah 84101-2068
(801) 531-7868

VERMONT COUNCIL ON THE HUMANITIES AND PUBLIC ISSUES

Post Office Box 58
Hyde Park, Vermont 05655-0058
(802) 888-3183

VIRGINIA FOUNDATION FOR THE HUMANITIES AND PUBLIC POLICY

1B West Range
University of Virginia
Charlottesville, Virginia 22903
(804) 924-3296

The Virginia Foundation for the Humanities will consider projects related to the Bicentennial of the Constitution of the United States. Guidelines and applications can be obtained from the Foundation at the address provided above.

The Foundation has already funded a number of projects which are of interest to those planning Bicentennial activities. In the spring of 1982 a lecture series entitled "The Legacy of George Mason" was presented at George Mason University (Josephine Pacheco, Project Director). These papers will be published. A sequel to the first program "The Legacy of George Mason, II," will take place at George Mason University in the spring of 1983.

Also in the spring of 1982, "The Miracle of Virginia: The Role of American Leadership" was presented by the Madison Memorial Foundation, Orange, Virginia (George Barton, Project Director). The program included papers on Washington, Madison, Monroe and others, which will also be published.

Finally a planning grant has been awarded to the Institute of Government at the University of Virginia (Dolph Norton, Director) to aid in the establishment of a clearing-house for planning on the 1987 Bicentennial.

WASHINGTON COMMISSION FOR THE HUMANITIES

Olympia
Washington 98505
(206) 866-6510

The Washington Commission for the Humanities is planning to encourage a number of Bicentennial programs, and has already made two grants for projects relating to the Constitutions of the United States and of Washington State. One of these projects, sponsored by the Metrocenter Y.M.C.A. in Seattle, will feature ten young-adult seminars and three conventions under the general title of "Constitution and You."

Groups in Washington State wishing to apply for funding for bicentennial projects may obtain information and applications at the address given above. All applications will be considered through regular grant channels.

THE HUMANITIES FOUNDATION OF WEST VIRGINIA

Post Office Box 204
Institute, West Virginia 25112
(304) 768-8869

WYOMING COUNCIL FOR THE HUMANITIES

Box 3274, University Station
Laramie, Wyoming 82071-3274
(307) 766-6496

THE NATIONAL ARCHIVES

National Archives and Records Service
General Services Administration
Washington, D.C.

In January, 1983 the National Archives mounted an exhibition in the Rotunda of the Archives building entitled "The Formation of the Union." Included in this show are samples of the Records of the Continental and Confederation Congresses and the Constitutional Convention; a deposition describing the Battle of Lexington; George Washington's account book as Commander of the Continental Army, 1775-83; The Lee Resolution for Independence, June 7, 1776; and the printed and corrected draft of the Articles of Confederation, 1777. Among the many letters displayed are: correspondence between Washington and Benedict Arnold; a letter from Benjamin Franklin, Silas Deane and Arthur Lee about their first meeting with the French Minister of Foreign Affairs; and a letter from Franklin, Adams and Jay announcing the signing of the Treaty of Paris with Great Britain, September 10, 1783. Portions of the Report of the Annapolis Convention, the Virginia Plan as amended in the Philadelphia Convention, and the Record of votes taken during the Federal Convention are exhibited as well. George Washington's copy of the printed draft of the Constitution is featured with several other documents illustrating aspects of the ratification struggle and the passage of the Bill of Rights.

Several pamphlets are available from the National Archives that describe materials available on microfilm. *Papers of the Continental Congress, 1774-89* are detailed in "Pamphlet Accompanying Microcopy No. 247." Part of the Papers are in manuscript volumes (blank books in which records were copied). These volumes consist of the Journals ("rough," "corrected," and "secret") of the Congress, and other record books maintained by Charles Thomson, Secretary of the Continental Congress; the letterbooks (containing copies of letters sent) of the Presidents of the Congress and of a few committees, such as the Committee to Headquarters and the Committee for Foreign Affairs; and transcripts of original diplomatic dispatches received from political agents and ministers of the United States residing abroad, of letters received from French envoys in this country and from Generals Washington, Gates, Greene, and Schuyler; and a few supplementary record books containing copies of passports and copies of commissions of foreign ministers and consuls, kept by the Department of Foreign Affairs.

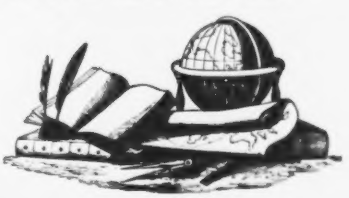
The other numbered Items of the Papers of the Continental Congress consist of individual documents that have been arranged by groups. These include the reports of committees of Congress; official communications from the several States; a large number of miscellaneous letters addressed chiefly to the President of Congress; original letters (dispatches) received from political agents and diplomatic and consular representatives of the United States abroad; letters (notes) from the Dutch, French, and Spanish envoys in this country; papers relating to claims for captured vessels, including some decisions by admiralty courts of the various States; papers relating to the New Hampshire Grants controversy; original letters from George Washington and other generals; oaths of allegiance; ships' bonds required for Letters of Marque issued to American privateers; and letters and reports from the Department of Foreign Affairs, the Board of Treasury, the Office of the Superintendent of Finance, the Board of War, the Secretary of War, and the Office of the Postmaster General.

Although most of the Continental Congress Papers are dated within the period 1774-89, a few volumes contain earlier and several contain later documents. Record books maintained by the Department of Foreign Affairs were continued in use by Thomas Jefferson when he became Secretary of State. A volume of copies of commissions and letters of credence of foreign ministers and consuls contains copies of documents dated as late as 1821.

Miscellaneous Papers of the Continental Congress, 1772-89 are described in "Pamphlet Accompanying Microcopy No. 332." Some of these miscellaneous papers duplicate documents in the numbered Item series described above, but others do not. They consist chiefly of loose papers and a few volumes relating to such subjects as foreign, naval, and fiscal affairs, papers relating to specific States, and papers kept by the Office of the Secretary of Congress. Among them are originals and copies of dispatches and letters (including some letters from Louis XVI), reports of the Marine Committee, the Marine Committee Letter Book, bonds, receipts, deeds of cession of Western Lands, credentials of Delegates to the Continental Congress, and broadsides issued by the Congress.

The *Records of the Constitutional Convention of 1787* are described in a pamphlet by that title available from the National Archives and describing microfilm M866. On the single roll of this microfilm publication are reproduced the official records of the Constitutional Convention, May 14-September 17, 1787; the papers of David Brearley, September 27, 1785-September 12, 1787; the credentials of delegates, 1786-87, from "Ratifications of the Constitution," also known as "Bankson's Journal"; and a single motion in the hand of Elbridge Gerry (July 24, 1787). The official records consist of four volumes of journals; drafts of the Virginia Plan of the Constitution, and of a letter from the Convention to Congress; and four letters and one enclosed resolution received. They are organized in the order indicated, with the incoming correspondence in chronological order. The credentials of delegates are arranged in geographic order from New Hampshire to Georgia.

All of these pamphlets and additional information can be obtained from the National Archives.



THE CLAREMONT INSTITUTE FOR THE STUDY OF STATESMANSHIP AND POLITICAL PHILOSOPHY

480 North Indian Hill Boulevard
Claremont, California 91711
Contact: Ken Masugi

On Constitution Day, September 17, 1983, The Claremont Institute for the Study of Statesmanship and Political Philosophy will inaugurate its celebration of the Bicentennial of the American Constitution. Entitled "A New Order of the Ages" (*Novus Ordo Seclorum*), this commemoration will continue through 1989, and will include conferences, lectures, a variety of publications, media programs, and exhibits, all devoted to examining and elucidating the fundamental principles of American Constitutionalism. The Institute wants to encourage reflection on the profound and revolutionary claim that a particular people established for the first time a form of government founded on principles applicable to all people at all times, and thus inaugurated a new epoch in political thought, "a new order of the ages." The Institute aims to combine seminal scholarly thought on the principles and practices by which Americans have constituted themselves a people, with a broad public education program centered in Claremont and the greater Los Angeles metropolitan area and reaching nationwide audiences through National Public Radio.

Beginning in February of 1984 and continuing through the spring of 1989, The Claremont Institute will sponsor one or two major conferences each year, which will be the central events in year-long public education projects concerning the American constitutional heritage, together with a Constitutional Statesmanship lecture on a major figure in the development of American constitutional government. The following conferences have been scheduled:

1. A New Order of the Ages? The Declaration of Independence and the Constitution (February 23-25, 1984).
2. Democracy in America: Alexis de Tocqueville Observes the New Order (January 26-28, 1985—the sesquicentennial of the first publication of *Democracy in America.*)

A call for papers for the Tocqueville conference has been issued. Merrill Peterson will inaugurate the Constitutional Statesmanship Lecture Series with "Jefferson on the Consent of the Governed."

Among other conferences planned are "The Old Order Ends: The Founding Generation Reflects on Two Hundred Years of America, from the 1580s to the 1780s," "What Constitution Have I? Freedom, Native Americans, and Immigrants in the New Order," "*The Federalist*—How Would the New Order Educate the Public to Pursue the Common Good?" and "Thomas Hobbes and America—Modern Political Philosophy's Influence on the New Order" (which coincides with the 400th anniversary of Hobbes' birth).

Throughout each year of its Bicentennial project the Institute will conduct a local speakers program, which emphasizes the annual conference theme or themes, for civic, professional, and educational organizations, schools, and colleges. Local scholars will give talks, engage in debates, and hold seminars before these audiences.

Books, monographs, and various pamphlets, including one containing annotated bibliographies of primary and secondary sources on the Institute's annual themes, will accompany these activities.

AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH

1150 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 862-5800

"A Decade of Study of the Constitution" was launched in 1978 by the American Enterprise Institute for Public Policy Research to help prepare the nation for a thoughtful observance of the Bicentennial of the Constitution in 1987. The project aims in all of its activities to examine the Constitution as the ultimate source of our national political life, as well as of our constitutional law.

The Project's activities include:

Annual Conferences of opinion leaders from the fields of education, journalism, government, and the professions, to discuss essays addressing standing constitutional issues.

Volumes of Essays of constitutional controversy, stemming from the Annual Conferences, that are used as texts in undergraduate and graduate courses in American history, politics, and constitutional law, and by the general public.

Audio and videotaped Public Policy Forums, featuring prominent speakers with differing points of view on constitutional issues currently before the public. These Forums are broadcast over an extensive network of television and radio stations across the country, and are available in audio and video cassette as well as in printed transcript form.

Research on constitutional issues by scholars writing from a broad, humanistic perspective, that are intended to be permanent contributions to the study of the Constitution.

International conferences bringing together foreign and American scholars and public figures to examine constitutionalism and the influence of the U.S. Constitution abroad.

Since 1978 the Constitution Project has held four Annual Conferences, each leading to a Volume of Essays. The topics of the conferences were: "How Democratic is the Constitution?," "How Capitalistic is the Constitution?," "How Does the Constitution Secure Rights?," and "How Federal is the Constitution?" For the years 1983, 1984 and 1985 the proposed Annual Conference topics are: "Does the Constitution's Separation of Powers Still Work?," "How Does the Constitution Secure Religion and Religious Freedom?," and "The Terrible Flaw: The Constitution, Slavery, and its Aftermath."

Two Public Policy Forums are produced each year by the AEI Constitution Project. These Forums present to a general audience a panel discussion on a constitutional subject of topical concern. The discussants in the Forums are selected because they are acknowledged authorities on the subject to be discussed and because they represent different points of view. Individual programs are made available without charge to commercial and public television stations and cable systems that schedule the program as public affairs broadcasting. In the average year, PPFs have been shown on 221 commercial and educational television, and on 202 cable systems. Audio tapes of the PPF shows are produced for use by commercial and public radio networks, affiliates, and non-network stations. Among the topics considered in the Public Policy Forums are: the possibility and desirability of a second constitutional convention, the new method of selecting presidential candidates, constitutional proposals for limiting presidential and congressional terms, the present state of the separation of powers, and recent presidential attempts to secure a "representative judiciary."

In addition to AEI activities directed toward teaching the Constitution—in the media through the Public Policy Forums, and in the classroom through the Volumes of Essays—the Constitution Project also hopes to make significant contributions to serious research on the Constitution. A two-part collection of essays by 15 scholars from universities in the United States and Canada has been commissioned under the general editorship of Professor Allan Bloom of the Committee on Social Thought at the University of Chicago. The first part will discuss the political and philosophical underpinnings of the Constitution at the time of its writing, and the second the waves of philosophical teachings that have tended to erode those underpinnings by changing ideas about human nature and the nature of political society.

Work is also continuing on "The Mind of the Founders," a collection of the writings and speeches of the Founding Fathers. These affordable, one-volume editions will illuminate the Founders' reflections on the fundamental political principles of the Constitution. The first volume, *Alexander Hamilton: Selected Writings and Speeches,* is being edited by Morton J. Frisch. *James Madison: Selected Writings and Speeches* is being edited by Ann Diamond. The third projected volume, *The Annotated Federalist*, will be edited by Richard and Sandra Levy. The editors of this volume will explain the examples and illustrations used in *The Federalist*, discuss eighteenth century word usage, and supply other explanatory material to aid students of this seminal work in American political thought.

CONSTITUTION-MAKING CONFERENCE

September 12-16, 1983
Sponsored by American Enterprise Institute for Public Policy Research

The American Enterprise Institute for Public Policy Research is sponsoring an international conference on Constitution-Making in Washington, D.C. September 12-16, 1983. The conference is part of AEI's "A Decade of Study of the Constitution," a project begun in 1978 to help prepare the nation for the observance of the Bicentennial of the U.S. Constitution in 1987.

More than half of the effective constitutions in the world have been written since 1970, and therefore many of these constitution-writers are alive today. To discover how specific national circumstances affect the universal tasks of constitution-making, these constitution-writers of countries from around the world will participate in the conference on constitution-making.

Essays of prominent participants in the making of the constitutions of Egypt, France, Nigeria, Spain, and Venezuela will be presented at the conference. Other participants will be invited from Germany, Austria, Canada, Liberia, India, Israel, Malaysia, Turkey, Japan, Portugal and the United Kingdom.

The 1983 conference will be the first in a series culminating in a symposium on "The Influence of the Constitution on Other Nations" at the time of the Bicentennial of the U.S. Constitution in 1987.

AMERICAN HISTORICAL ASSOCIATION

400 A Street, S.E.
Washington, D.C. 20003
(202) 544-2422
Contact: Jamil Zainaldin, John W. Larner

Working under contract from the National Endowment for the Humanities, the AHA will organize and host three regional conferences to improve the teaching of U.S. constitutional history in secondary schools. Bringing together noted constitutional scholars and talented teachers recognized for their instructional leadership on the state and local level, the conferences are aimed at enriching social studies programs by acquainting teachers with recent historical scholarship and introducing them to innovative instructional resources.

Conferences will be held across the country in fall 1983: Philadelphia (September 25-28); St. Paul (October 16-19); and Austin (November 13-16).

The participating secondary school teachers, approximately sixty at each conference, have been chosen on the basis of formal history preparation, enthusiasm and demonstrated teaching quality, ability to include constitutional history in their classes, and willingness to share conference experiences with colleagues. Participants have been selected from a range of teaching situations; principals, supervisors, superintendents and state education officials have been invited to participate in the conference as observers.

The creation of a network of informed and talented teacher-leaders is an important goal of these conferences, and it is hoped that they will enhance the position of constitutional history in secondary schools.

BARD COLLEGE

Annandale-on-Hudson, New York 12504

In the summer of 1983 Bard College, Amherst College, Oberlin College, Simon's Rock of Bard College and Yale University sponsored a three-week educational congress, "The Constitution in the Year 2000: Planning for the Nation that Will Be Ours." Ninety high school juniors from around the country devoted six days each week to the study of the Constitution as a living, changing document. Six broad topics were considered: "The Individual in a Technological Age," "The Changing Nature of Property," "The Future of our Freedoms: The Bill of Rights," "The Executive, The Legislative, and The Judicial: Can They Still be Balanced?" "The Promise of Equality: How Will It Be Defined?" "The States vs. The Federal Government: The Future of Centralized Power."

Bard College has in the planning stage a Summer Institute for High School Teachers that will be held either in the summer of 1984 or the summer of 1985. The focus of the planned Institute will be the development of a novel and interesting approach to the teaching of the Constitution at the high school level.

THE NATIONAL COMMITTEE FOR THE BICENTENNIAL OF THE TREATY OF PARIS

3117 Hawthorne Street, N.W.
Washington, D.C. 20008
Contact: Joan R. Challinar, Chair

The National Committee for the Bicentennial of the Treaty of Paris has been founded to organize an observance of the signing of the Treaty that ended the Revolutionary War and ushered the United States into the world of sovereign states and diplomacy. The theme of the celebration is the importance of diplomatic negotiations between nations.

The celebration of this Bicentennial began in the Spring of 1983. The fall celebratory events include:

September 1-3: A celebration at Old North Church, Boston; a Treaty of Paris stamp to be issued in Philadelphia; an exhibit of portraits of figures connected with the Treaty, along with private and official documents and memorabilia at the National Portrait Gallery in Washington.

Indiana University, the American Legion and the Benjamin Franklin Guild will sponsor a symposium in Bloomington, Indiana. The two-day meeting will feature papers entitled "France and the United States: Contrasting Images of Each Other," "America in the French Imagination," "France in the American Mind," "Benjamin Franklin in Paris," "Franklin, the Eighteenth Century Man," "Benjamin Franklin and the American Revolution," and "The United States and the French National Interest." Activities are also planned for secondary school students, their teachers, and the general public.

September 4: The National Symphony Orchestra will perform at a special concert on the grounds of the U.S. Capitol.

September 18 to October 16: The National Museum of American History in Washington will offer a series of British films in honor of the Treaty of Paris.

September 29-30: The American University and the Smithsonian Institution will sponsor a symposium entitled, "The Work of Peace." In addition, the annual Washington Croquet Tournament will have a Treaty of Paris theme and a special Treaty of Paris exhibit will be mounted at the Massachusetts Historical Society in Boston.

November: The Smithsonian Institution will hold a symposium on eighteenth-century horticultural exchange between Britain and America.

CONVENTION II, INC. CENTER FOR THE STUDY OF FEDERALISM

300 Third St., N.E. #1
Washington, D.C. 20002
(202) 543-8000
Contact: Robert Higgins

Convention II, the youth program of the Center for the Study of Federalism, hosts an annual Constitutional Convention in Washington, D.C., for high school delegates who meet each February to propose, discuss, investigate, and vote upon prospective Amendments to the federal Constitution.

While in Washington, the students meet with Members of Congress and Administration officials, but the emphasis is on the students' own debates. The delegates themselves propose the Amendments, research the issues, conduct the deliberations, and cast the votes. The debates show excellent student preparation.

Each delegate receives an extensive *Delegate Handbook* to guide his or her convention preparations; the *Handbook* includes workshops and reading lists. Teachers receive a *Manual* expanding upon the *Handbook* and suggesting additional trip preparation. Academic guidance comes from Southeastern University, the institutional parent of the Center for the Study of Federalism.

Project '87

Project '87 would like to know about events being planned for the Bicentennial of the United States Constitution, which we will report on in ***this Constitution.*** Please send notices to:

this Constitution
1527 New Hampshire Avenue, N.W.
Washington, D.C. 20036

INSTITUTE OF GOVERNMENT

207 Minor Hall
University of Virginia
Charlottesville, Virginia 22903
Contact: Timothy G. O'Rourke

The Institute of Government of the University of Virginia has been designated by Governor Charles Robb as the institution to provide staff support for the development of commemorative activities for the constitutional Bicentennial throughout the Commonwealth of Virginia. The Institute's efforts are being guided by a Statewide Coordinating Committee, comprised principally of scholars drawn from colleges and universities in Virginia.

The Institute is now involved in the performance of three general functions relating to the 1987 commemoration. As a clearinghouse and publicist, the Institute is collecting and disseminating information about upcoming or ongoing activities related to the Constitution. Thus, the University of Virginia *News Letter*, a monthly public affairs series published by the Institute, carries a page or more of notes on commemorative activities; the *News Letter* reaches more than 4,000 subscribers, including all of the state's major papers.

As a consultant and collaborator, the Institute is working with various groups in helping them to plan and to carry out Bicentennial projects. The Institute, for example, is assisting the State Department of Education in the development of a program of publications and events for the primary and secondary schools in Virginia. Among the activities being considered are: a state-wide conference for teachers; a Bicentennial brochure listing practical ideas and suggestions applicable to local school divisions; a packet of facsimilie documents, such as the Virginia statute of Religious Freedom and the Virginia Declaration of Rights for classroom use; a teaching unit on the Constitutional era; skills packets for classroom use; oratorical contests; and a bibliography of relevant microcomputer software. (Persons with inquiries about this aspect of the program should contact Dr. Thomas Elliott, Educational Department, P.O. Box 6-Q, Richmond 23216)

As a planner and organizer, the Institute will itself carry out several projects to commemorate the Constitution. The most ambitious of these is a series of twenty public forums entitled "The Constitution and the Commonwealth: The Virginia Court Days Forums." The forums will run from 1984 through 1986 and will be staged in courthouses around the state; each of the forums will address a constitutional controversy of historic and contemporary significance with special reference to Virginia.

GEORGE MASON UNIVERSITY

4400 University Drive
Fairfax, Virginia 22030
Contact: Josephine Pacheco

The George Mason University Project for the Study of Human Rights was established in 1981 for the purpose of promoting research and publication concerning the life, thought, and political influence of George Mason in his time and throughout the nation's history. The focus is especially his concept of charters of rights as integral parts of written constitutions. The project is cosponsored by the Virginia Endowment for the Humanities and Public Policy and several private foundations.

1976 bicentennial quilt. *State Historical Society of Wisconsin.*

In 1982 the Project's major effort was a series of four public lectures by recognized authorities on the struggles for bills of rights in the 18th century and on their subsequent interpretation at the state, national and international levels. The second series of lectures held in March and April of 1983 was titled "The Legacy of George Mason: The First Amendment." The lecture series for the Spring of 1984 is expected to be on the topic of Natural Rights and to include considerations of (1) the "unwritten Constitution," i.e. the courts' fashioning of rights beyond those explicitly enumerated in the Constitution; (2) the meaning of the "right to life" in the context of abortion, capital punishment, and death with dignity; and (3) human rights in the international context. In 1985 federalism is the tenatively scheduled topic and in 1986 the theme will be popular sovereignty and suffrage.

The format for the lectures has been and will continue to be a lecture relating the thought of George Mason and his era to the general topic; two lectures developing aspects of the topic as they have evolved at the national and state levels; and a final lecture highlighting the international impact. Each series is published in book form and will be videotaped if possible.

In the Fall of 1985 a two-and-a-half-day conference is planned to consider the relationship of state constitutions and bills of rights to the federal Constitution and Bill of Rights. The speakers at the conference will compare and contrast various state constitutions to demonstrate varying cultural influences such as the English colonial experience in New England, the French influence in Louisiana and the Spanish impact on New Mexico. The conference participants will be state legislators, public officials, political scientists, constitutional historians, and legal scholars.

The Project for the Study of Human Rights is also investigating ways in which it can bring the results of its scholarship into the public schools of Northern Virginia. In-service teacher workshops may be developed in this connection.

CENTER FOR THE STUDY OF THE AMERICAN CONSTITUTION UNIVERSITY OF WISCONSIN

Humanities Building, Room 5218
Madison, Wisconsin 57306
Contact: John Kaminski

The University of Wisconsin-Madison proposes to establish The Center for the Study of the American Constitution. Since 1970, two of the most prominent documentary editing projects in the United States, The Documentary History of the Ratification of the Constitution and the Bill of Rights and The Documentary History of the First Federal Elections, have been located at the University of Wisconsin. The research files of these two projects—consisting of over 100,000 documents collected from over 500 libraries and from 150 eighteenth-century newspapers—have been made available to law firms, public interest groups, members of Congress, state and local officials, and scholars from the United States and abroad.

The Center will attract participants from throughout the United States, and will give particular attention to attracting applicants from abroad. Two faculty fellowships will be awarded to scholars of distinction who will be resident in Madison for the academic year. Four fellowships will be awarded to students from the United States or abroad who are working toward a Ph.D. or other advanced degree in history, law, political science, or related disciplines.

Each faculty fellow will be expected to supervise a biweekly seminar for one semester. The seminar will consist of the student fellows and selected graduate students resident at the University of Wisconsin. Both faculty and student fellows will give public lectures presenting their findings to the larger academic community.

In the Spring of 1984 the Center will sponsor its first symposium. The symposium will be open to the public and the media.

The Ratification of the Constitution Project, which will be subsumed under The Center for the Study of the American Constitution, will continue to publish its acclaimed *Commentaries on the Constitution*. In addition, manuscripts that are the product of research done at the Center will be submitted to the University of Wisconsin Press for publication. From time to time, as the occasion warrants, related articles written by the Center's fellows and the symposia speakers will be published by the Center.

Finally, the Director of the Center is committed to the preparation of a syllabus that will assist secondary school teachers in their courses in American History and Social Studies. The syllabus will be developed in association with the Department of Educational Policy Studies of the University and will be made available at nominal cost.

THE UNIVERSITY OF OKLAHOMA

455 West Lindsey Street, Room 205
Norman, Oklahoma 73019
Contacts: Richard S. Wells
Donald F. Maletz

The College of Liberal Studies at the University of Oklahoma has conceived a project for the Constitution's bicentennial which calls for the development of three distinct but related activities: first, establishment of a Constitutional Bicentennial Resource Center, to be housed in the College of Liberal Studies on the University of Oklahoma campus; second, organization of a conference to be called The Symposium of the Constitutional Bicentennial; and third, presentation of a series of Institutes on the American Constitution.

The Constitutional Bicentennial Resource Center: A primary task of the Resource Center will be to collect information about the Constitution. Two types of material will be sought: information on the Constitutional Convention of 1787 and on the ratification process, political implementation of the Constitution, and the major crisis points in its evolution and information about the involvement of the State of Oklahoma in the development of Constitutional meaning through statutes, ordinances, actions or policies of the State that were subjected to judicial review by the U.S. Supreme Court. The Center will be a source of information and ideas for projects that various organizations in local communities may undertake in connection with the 1987 celebration, and the Center will respond to requests from communities and their organizations for assistance in formulating such programs.

Symposium on the Constitutional Bicentennial: In 1985, or early 1986, a symposium will be convened to consider the past, present and future of our society under the Constitution of 1787. Several national figures will give keynote lectures and a panel consisting of local, national, and perhaps international figures will respond to each speaker.

Institute for Education in American Constitutionalism: A series of summer seminars will be offered in the 1984-87 period devoted to the study of the Constitution. These seminars will be designed for secondary school teachers, journalists, members of the Bar, librarians, editors, members of citizen political groups, school personnel and government officials. The seminars will undertake such tasks as reading the Constitution and other major documents of American politics, including major Supreme Court decisions, a reading of the best writing in the last two centuries concerning the meaning of the Constitution, and examining the major controversies within American politics as well as the major controversies among students of the government.

A Special Institute will be offered in the summers of 1985 and 1986 specifically for college teachers of political science, history, economics and related disciplines, principally from the State of Oklahoma and neighboring states.

Finally, the Institute plans to sponsor a series of lectures and colloquia to which outstanding scholars will be invited and for which they will be asked to give a public lecture and to submit a written version of their talk for publication in a volume of essays on the Constitution.

THE DOUGLASS ADAIR SYMPOSIA CALIFORNIA STATE POLYTECHNIC UNIVERSITY

3801 West Temple Avenue
Pomona, California 91768
Contact: John Moore, Dept. of American Studies

The Douglass Adair Symposia, "A Celebration of the Bicentennial of the Constitution," will be a series of major lectures by nationally known scholars and noted figures, with commentaries, given January through March, 1986. The symposia will be held alternately at California State Polytechnic University, Pomona and at the Claremont Colleges, and will be open to the public. Videotapes will be made of the symposia and of follow-up interviews and dis-

The fate of the United States Constitution after its signing on September 17, 1787, can be contrasted sharply to the travels and physical abuse of America's other great parchment, the Declaration of Independence. As the Continental Congress, during the years of the revolutionary war, scurried from town to town, the rolled-up Declaration was carried along. After the formation of the new government under the Constitution, the one-page Declaration, eminently suited for display purposes, graced the walls of various Government buildings in Washington, exposing it to prolonged damaging sunlight. It was also subjected to the work of early calligraphers responding to a demand for reproductions of the revered document. As any visitor to the National Archives can readily observe, the early treatment of the now barely legible Declaration took a disastrous toll.

The Constitution, in excellent physical condition after two hundred years, has enjoyed a more serene existence. By 1796 the Constitution was in the custody of the Department of State along with the Declaration and traveled with the federal government from New York to Philadelphia to Washington. Both documents were secretly moved to Leesburg, Virginia, before the imminent attack by the British on Washington in 1814. Following the war, the Constitution remained in the State Department while the Declaration continued its travels—to the Patent Office Building from 1841 to 1876, to Independence Hall in Philadelphia during the Centennial celebration, and back to Washington in 1877.

On September 29, 1921, President Warren Harding issued an executive order transferring the Constitution and the Declaration to the Library of Congress for preservation and exhibition. The next day Librarian of Congress Herbert Putnam, acting on authority of Secretary of State Charles Evans Hughes, carried the Constitution and the Declaration in a Model-T Ford truck to the library and placed them in his office safe until an appropriate exhibit area could be constructed. The documents were officially put on display at a ceremony in the library on February 28, 1924.

On February 20, 1933, at the laying of the cornerstone of the newly erected National Archives Building, President Herbert Hoover remarked, "There will be aggregated here the most sacred documents of our history—the originals of the Declaration of Independence and of the Constitution of the United States." The two documents, however, were not immediately transferred to the Archives. During World War II both were moved from the library to Fort Knox for protection and returned to the library in 1944. It was not until successful negotiations were completed between Librarian of Congress Luther Evans and Archivist of the United States Wayne Grover that the transfer to the National Archives was finally accomplished by special direction of the Joint Congressional Committee on the Library.

On December 13, 1952, the Constitution and the Declaration were placed in helium-filled cases, enclosed in wooden crates, laid on mattresses in an armored Marine Corps personnel carrier, and escorted by ceremonial troops, two tanks, and four servicemen carrying submachine guns down Pennsylvania and Constitution avenues to the National Archives. Two days later, President Harry Truman declared at a formal ceremony in the Archives Exhibition Hall:

"We are engaged here today in a symbolic act. We are enshrining these documents for future ages. This magnificent hall has been constructed to exhibit them, and the vault beneath, that we have built to protect them, is as safe from destruction as anything that the wit of modern man can devise. All this is a honorable effort, based upon reverence for the great past, and our generation can take just pride in it."

Roger Bruns, *A More Perfect Union: The Creation of the United States Constitution* (Washington, D.C.: National Archives and Records Service, General Services Administration, 1978), p. 17.

cussions with the participants. The tapes will be used to create a media package for high schools and colleges, and possibly made available to commercial and public television outlets. Each lecture and each commentary will also be published in an anthology.

The tentative titles for the proposed symposia are: "Constitutionalism and State Building: Is America Unique?," "Individualism and the Pursuit of Happiness: Private Appetities and the Common Good in a Constitutional Republic," "Mass Sufferage, Mass Media and the Question of Republican Governance," "The Constitution and the Technological Revolution," "Federalism Old and New," "The State of the Separation of Powers: Does Balanced Government Deadlock Democracy or Assure Its Continuence?," "The President and the Constitution: Possibilities for Statecraft?," "Justice and the Constitution: The 200 Year Quest," "The Founders and Foreign Affairs: Can a Constitutional Republic Maintain Its Vital National Interests in the Modern, Interdependent World?," "What Happened to Madison's Vision: Benevolent Pluralism or a Polarized Society."

UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL

209 Abernethy Hall 002 A
Chapel Hill, N.C. 27514

The University of North Carolina at Chapel Hill is planning a project entitled "Church, State, and the First Amendment: A North Carolina Dialogue." The project is intended to establish a statewide conversation on the history, meaning, and significance of the religion clauses of the first amendment. The University plans to commission four scholars to edit brief anthologies on various aspects of the religion clauses and church-state relations. The first booklet would deal with the historical roots as well as the philosophical foundations and implications of the Bill of Rights in general and the religion clauses in particular. The second would contain readings on the tension between America's strong religious heritage and the secularism of her fundamental law. The third would explore church-state educational issues, and the fourth examine church-state relations in other societies.

The resource booklets will be designed to serve as background readings for programs sponsored by local organizations throughout the state and funded through a special call for proposals issued by the North Carolina Humanities Committee. The issues emerging in these local programs will be funneled into two invitational conferences held in the Fall of 1985 in Chapel Hill. These conferences will feature speakers of national reputation in the humanities and law and will be offered to an audience of scholars, religious leaders, government officials, educators, journalists, and civic leaders. Four thirty-minute documentaries and fifteen brief feature pieces of the issues of the Dialogue will be produced for radio and offered free of charge to radio stations in North Carolina.

The dialogue is scheduled to begin October 1, 1983, and to end on March 31, 1986.

Federal Bicentennial Agenda

CONGRESS CONSIDERS BILL TO ESTABLISH FEDERAL BICENTENNIAL COMMISSION

By the time Congress ajourned in August, both houses had passed bills (differing in details) to create a national commission "to promote and coordinate activities to commemorate the bicentennial of the Constitution." The events are to balance "the important goals of ceremony and celebration with the equally important goals of scholarship and education." Commission members would be appointed by the President in consultation with the Chief Justice and majority and minority leaders of both houses of Congress. The legislation stipulates that participants should "have demonstrated scholarship [and] a strong sense of public service."

The commission is instructed to submit a report to the President within two years of its appointment, detailing recommendations for publications, scholarly projects, conferences, programs, films, libraries, exhibits, ceremonies, competitions and awards, and a calendar of events for activities through December 31, 1989, the date the commission terminates.

The legislation charges the commission to "give due consideration" to several aspects of the Constitution and the commemoration, including the historical setting in which the Constitution was developed, the contribution of diverse ethnic and racial groups to the Constitution's evolution, the need to encourage understanding of the Constitution by the public and to improve education about the Constitution in the schools. The commission is also directed to seek assistance from both private and governmental agencies, including learned societies, academic institutions, and historical and professional groups.

A full report on final legislative action will appear in the next issue of ***this Constitution.***

HOUSE CREATES OFFICE FOR THE BICENTENNIAL

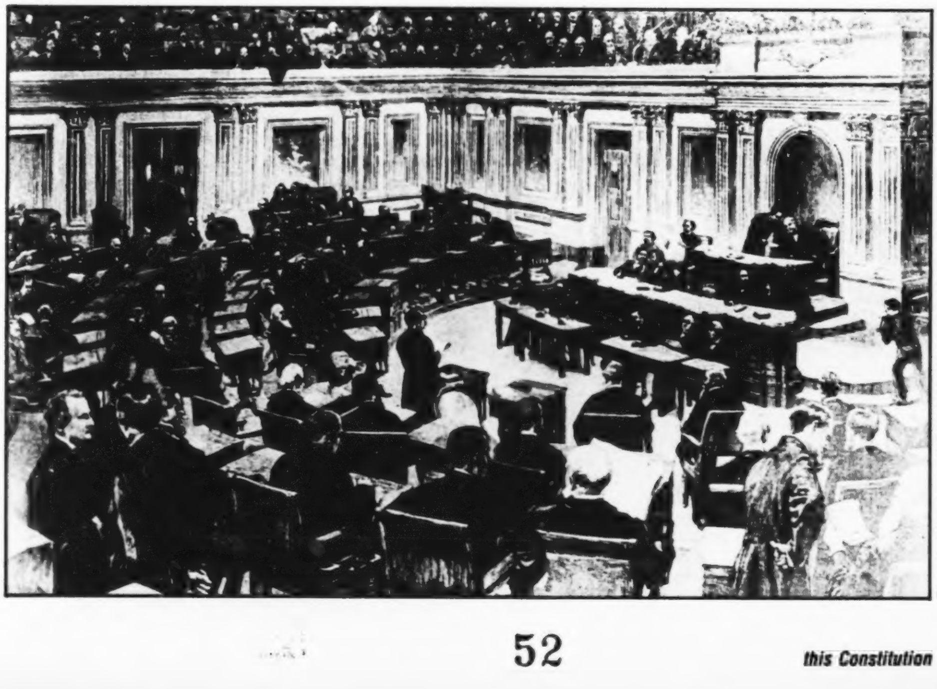
On December 17, 1982, the United States House of Representatives established an office for the Bicentennial to be staffed by an historian who will coordinate planning for the commemoration. Representative Newt Gingrich (R., Ga.), who authored the resolution creating the Bicentennial office, explained that the historian would be responsible for facilitating scholarship on the House of Representatives by developing a plan to make the papers of House members and the documents of the institution accessible to scholars. The resolution stipulates that the Bicentennial office will terminate on September 30, 1989, unless extended by future legislation.

SENATE PLANS PROGRAM TO COMMEMORATE ITS BICENTENNIAL

In December, 1982, the Study Group on the Commemoration of the United States Senate Bicentenary, established by the Senate in 1980, issued a report detailing a program for the Senate observance of its 200th anniversary. The group recommended a "coordinated program of publications, ceremonial events, conferences and a film to inform the nation on the role of the Senate in the workings of the federal government, from its historical beginnings through two hundred years of growth, challenge, and change." Among the specific projects proposed are:

- a biographical directory of the Senate's members from 1789 to 1989
- a guide to the Senate's records at the National Archives
- microform publication of selected heavily-used 18th- and 19th-century Senate records
- a Senate historical almanac
- a single-volume collection of memoirs of Senate officials since 1789
- a guide to the location of all former Senators' manuscript collections.

This last recommendation has already been implemented with the publication of *Guide to Research Collections of Former United States Senators, 1789-1982*, designated U.S. Senate Bicentennial Publication #1. The Guide, which was prepared by the Historical Office of the United States Senate, and edited by Kathryn Allamong Jacob, contains information on the records of more than 1,400 of the 1,659 former Senators, including the location of manuscript collections, oral history interviews, photographs and memorabilia. The Guide may be obtained without charge from the United States Senate Historical Office, Washington, D.C. 20510.



Senate chamber, 1886. *U.S. Senate Historical Office.*

this Constitution
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We're interested in finding out what you thought of ***this Constitution.***

1. Give an overall rating to the magazine. (Check one box).
   - ☐ EXCELLENT
   - ☐ GOOD
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2. How satisfied were you with stories and information on the whole?
   - ☐ VERY SATISFIED
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Tell us how much you agree or disagree with each of the following statements about ***this Constitution.*** For EACH statement, put a check in the box that describes your opinion.

	STRONGLY AGREE	SOMEWHAT AGREE	NEUTRAL	SOMEWHAT DISAGREE	STRONGLY DISAGREE
6. THE ARTICLES ARE INFORMATIVE	☐	☐	☐	☐	☐
7. THE LAYOUT AND ILLUSTRATIONS ARE ATTRACTIVE	☐	☐	☐	☐	☐
8. THE NOTES ABOUT PROJECTS ARE INFORMATIVE	☐	☐	☐	☐	☐
9. THE DOCUMENTS ARE USEFUL	☐	☐	☐	☐	☐
10. THE MAGAZINE GAVE ME IDEAS OR REFERENCES FOR BICENTENNIAL PROGRAMS	☐	☐	☐	☐	☐

11. Would you recommend ***this Constitution*** to your colleagues?
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12. Please indicate your professional affiliation.
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    - __________ GOVERNMENT AGENCY
    - __________ HISTORICAL SOCIETY
    - __________ LIBRARY/MUSEUM
    - __________ MEDIA
    - __________ STATE HUMANITIES COUNCIL
    - __________ OTHER (PLEASE STATE) __________
13. Will you have direct responsibility for initiating or implementing Bicentennial activities?
    - ☐ YES
    - ☐ NO

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The National Endowment for the Humanities is underwriting the publication of ***this Constitution*** as a quarterly magazine so that it may be distributed free to institutions planning Bicentennial Programs. All institutions that have received this copy of ***this Constitution*** will continue to receive one copy of each issue at no cost to them. Other institutions may write and ask to be placed on the free mailing list. Institutions wishing to receive more than one copy may do so by subscribing for additional copies. Individuals who would like to continue to receive the magazine also must subscribe. Subscription rates are listed below. Each issue of the magazine will be available for purchase at bulk rate.

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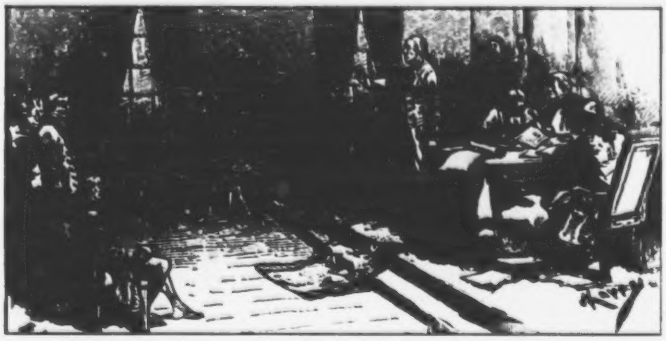
Chronology

continued from inside front cover



August 7, 1786: The Congress of the Confederation considers a motion offered by Charles Pinckney of South Carolina to amend the Articles of Confederation in order to give Congress more control over foreign affairs and interstate commerce. Because amendments to the Articles require the unanimous consent of the states, an unlikely eventuality, Congress declines to recommend the changes.

September 11-14, 1786: ANNAPOLIS CONVENTION. New York, New Jersey, Delaware, Pennsylvania and Virginia send a total of twelve delegates to the conference which had been proposed by Virginia in January to discuss commercial matters. (New Hampshire, Massachusetts, Rhode Island and North Carolina send delegates but they fail to arrive in time.) The small attendance makes discussion of commercial matters fruitless. On September 14, the convention adopts a resolution drafted by Alexander Hamilton asking all the states to send representatives to a new convention to be held in Philadelphia in May of 1787. This meeting will not be limited to commercial matters but will address all issues necessary "to render the constitution of the Federal Government adequate to the exigencies of the Union."

February 4, 1787: THE END OF SHAYS' REBELLION. General Benjamin Lincoln, leading a contingent of 4,400 soldiers enlisted by the Massachusetts governor, routs the forces of Daniel Shays. A destitute farmer, Shays had organized a rebellion against the Massachusetts government, which had failed to take action to assist the state's depressed farm population. The uprisings, which had begun in the summer of 1786, are completely crushed by the end of February. The Massachusetts legislature, however, enacts some statutes to assist debt-ridden farmers.

February 21, 1787: The Congress of the Confederation cautiously endorses the plan adopted at the Annapolis Convention for a new meeting of delegates from the states "for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein."

May 25, 1787: OPENING OF THE CONSTITUTIONAL CONVENTION. On May 25, a quorum of delegates from seven states arrives in Philadelphia in response to the call from the Annapolis Convention, and the meeting convenes. Ultimately, representatives from all the states but Rhode Island attend. Of the 55 participants, over half are lawyers, and 29 have attended college. The distinguished public figures include George Washington, James Madison, Benjamin Franklin, George Mason, Gouverneur Morris, James Wilson, Roger Sherman and Elbridge Gerry.

May 29, 1787: VIRGINIA PLAN PROPOSED. On the fifth day of the meeting, Edmund Randolph, a delegate from Virginia, offers 15 resolutions comprising the "Virginia Plan" of Union. Rather than amending the Articles of Confederation, the proposal describes a completely new organization of government, including a bicameral legislature which represents the states proportionately, with the lower house elected by the people and the upper house chosen by the lower body from nominees proposed by the state legislatures; an executive chosen by the legislature; a judiciary branch; and a council comprised of the executive and members of the judiciary branch with a veto over legislative enactments.

June 15, 1787: NEW JERSEY PLAN PROPOSED. Displeased by Randolph's plan which placed the smaller states in a disadvantaged position, William Patterson proposes instead only to modify the Articles of Confederation. The New Jersey plan gives Congress power to tax and to regulate foreign and interstate commerce, and establishes a plural executive (without veto power) and a supreme court.

June 19, 1787: After debating all the proposals, the Convention decides not merely to amend the Articles of Confederation, but to conceive a new national government. The question of equal versus proportional representation by states in the legislature now becomes the focus of the debate.

July 12, 1787: THE CONNECTICUT COMPROMISE(I). Based upon a proposal made by Roger Sherman of Connecticut, the Constitutional Convention agrees that representation in the lower house should be proportional to a state's population (the total of white residents, and three-fifths of the black).

July 13, 1787: NORTHWEST ORDINANCE. While the Constitutional Convention meets in Philadelphia, the Congress of the Confederation crafts another governing instrument for the territory north of the Ohio River. The Northwest Ordinance, written largely by Nathan Dane of Massachusetts, provides for interim governance of the territory by Congressional appointees (a governor, secretary and three judges), the creation of a bicameral leg-

islature when there are 5,000 free males in the territory, and, ultimately, the establishment of three to five states on an equal footing with the states already in existence. Freedom of worship, right to trial by jury, and public education are guaranteed, and slavery prohibited.

July 16, 1787: THE CONNECTICUT COMPROMISE (II). The Convention agrees that each state should be represented equally in the upper chamber.

August 6, 1787: The five-man committee appointed to draft a constitution based upon 23 "fundamental resolutions" drawn up by the convention between July 19 and July 26 submits its document which contains 23 articles.

August 6-September 10, 1787: THE GREAT DEBATE. The Convention debates the draft constitution, and agrees to prohibit Congress from banning the foreign slave trade for twenty years.

August 8, 1787: The Convention adopts a two-year term for representatives.

August 9, 1787: The Convention adopts a six-year term for Senators.

August 16, 1787: The Convention grants to Congress the right to regulate foreign trade and interstate commerce.

September 6, 1787: The Convention adopts a four-year term for the President.

September 8, 1787: A five-man committee, comprised of William Samuel Johnson (chair), Alexander Hamilton, James Madison, Rufus King and Gouverneur Morris, is appointed to prepare the final draft.

September 12, 1787: The committee submits the draft, written primarily by Gouverneur Morris, to the Convention.

September 13-15, 1787: The Convention examines the draft clause by clause, and makes a few changes.

September 17, 1787: All twelve state delegations vote approval of the document. Thirty-nine of the forty-two delegates present sign the engrossed copy, and a letter of transmittal to Congress is drafted. The Convention formally adjourns.

September 20, 1787: Congress receives the proposed Constitution.

September 26-27, 1787: Some representatives seek to have Congress censure the Convention for failing to abide by Congress' instruction only to revise the Articles of Confederation.

September 28, 1787: Congress resolves to submit the Constitution to special state ratifying conventions. Article VII of the document stipulates that it will become effective when ratified by nine states.

October 27, 1787: The first "Federalist" paper appears in New York City newspapers, one of 85 to argue in favor of the adoption of the new frame of government. Written by Alexander Hamilton, James Madison and John Jay, the essays attempt to counter the arguments of anti-Federalists, who fear a strong centralized national government.

December 7, 1787: Delaware ratifies the Constitution, the first state to do so, by unanimous vote.

December 12, 1787: Pennsylvania ratifies the Constitution in the face of considerable opposition. The vote in convention is 46 to 23.

December 18, 1787: New Jersey ratifies unanimously.

January 2, 1788: Georgia ratifies unanimously.

January 9, 1788: Connecticut ratifies by a vote of 128 to 40.

February 6, 1788: The Massachusetts convention ratifies by a close vote of 187 to 168, after vigorous debate. Many anti-Federalists, including Sam Adams, change sides after Federalists propose nine amendments, including one which would reserve to the states all powers not "expressly delegated" to the national government by the Constitution.

March 24, 1788: Rhode Island, which had refused to send delegates to the Constitutional Convention, declines to call a state convention and holds a popular referendum instead. Federalists do not participate, and the voters reject the Constitution, 2708 to 237.

April 28, 1788: Maryland ratifies by a vote of 63 to 11.

May 23, 1788: South Carolina ratifies by a vote of 149 to 73.

June 21, 1788: New Hampshire becomes the ninth state to ratify, by vote of 57 to 47. The convention proposes twelve amendments.

June 25, 1788: Despite strong opposition led by Patrick Henry, Virginia ratifies the Constitution by 89 to 79. James Madison leads the fight in favor. The convention recommends a bill of rights, comprised of twenty articles, in addition to twenty further changes.

July 2, 1788: The President of Congress, Cyrus Griffin of Virginia, announces that the Constitution has been ratified by the requisite nine states. A committee is appointed to prepare for the change in government.

WASHINGTON PRESIDENT
1791

July 26, 1788: New York ratifies by vote of 30 to 27 after Alexander Hamilton delays action, hoping that news of ratification from New Hampshire and Virginia would influence anti-Federalist sentiment.

August 2, 1788: North Carolina declines to ratify until the addition to the Constitution of a bill of rights.

September 13, 1788: Congress selects New York as the site of the new government and chooses dates for the appointment of and balloting by presidential electors, and for the meeting of the first Congress under the Constitution.

October 10, 1788: The Congress of the Confederation transacts its last official business.

December 23, 1788: The State of Maryland cedes ten square miles to Congress for a federal city.

January 7, 1789: Presidential electors are chosen by ten of the states that have ratified the Constitution (all but New York).

February 4, 1789: Presidential electors vote; George Washington is chosen as President, and John Adams as Vice-President. Elections of senators and representatives take place in the states.

March 4, 1789: The first Congress convenes in New York, with eight senators and thirteen representatives in attendance, and the remainder en route.

April 1, 1789: The House of Representatives, with 30 of its 59 members present, elects Frederick A. Muhlenberg of Pennsylvania to be its speaker.

April 6, 1789: The Senate, with 9 of 22 senators in attendance, chooses John Langdon of New Hampshire as temporary presiding officer.

April 30, 1789: George Washington is inaugurated as the nation's first President under the Constitution. The oath of office is administered by Robert R. Livingston, chancellor of the State of New York, on the balcony of Federal Hall, at the corner of Wall and Broad Streets.

July 27, 1789: Congress establishes the Department of Foreign Affairs (later changed to Department of State).

August 7, 1789: Congress establishes the War Department.

September 2, 1789: Congress establishes the Treasury Department.

September 22, 1789: Congress creates the office of Postmaster General.

September 24, 1789: Congress passes the Federal Judiciary Act, which establishes a Supreme Court, 13 district courts and 3 circuit courts, and creates the office of the Attorney General.

September 25, 1789: Congress submits to the states twelve amendments to the Constitution, in response to the five state ratifying conventions that had emphasized the need for immediate changes.

November 20, 1789: New Jersey ratifies ten of the twelve amendments, The Bill of Rights, the first state to do so.

November 21, 1789: As a result of Congressional action to amend the Constitution, North Carolina ratifies the original document, by a vote of 194 to 77.

December 19, 1789: Maryland ratifies the Bill of Rights.

December 22, 1789: North Carolina ratifies the Bill of Rights.

January 25, 1790: New Hampshire ratifies the Bill of Rights.

January 28, 1790: Delaware ratifies the Bill of Rights.

February 24, 1790: New York ratifies the Bill of Rights.

March 10, 1790: Pennsylvania ratifies the Bill of Rights.

May 29, 1790: Rhode Island ratifies the Constitution, by a vote of 34 to 32.

June 7, 1790: Rhode Island ratifies the Bill of Rights.

January 10, 1791: Vermont ratifies the Constitution.

March 4, 1791: Vermont is admitted to the Union as the fourteenth state.

November 3, 1791: Vermont ratifies the Bill of Rights.

December 15, 1791: Virginia ratifies the Bill of Rights, making it part of the United States Constitution.

Three of the original thirteen states did not ratify the Bill of Rights until the 150th anniversary of its submission to the states. Massachusetts ratified on March 2, 1939; Georgia on March 18, 1939; and Connecticut on April 19, 1939.

Project'87

The American Constitutional Bicentennial

Project '87 is a joint undertaking of the American Historical Association and the American Political Science Association. It is dedicated to commemorating the Bicentennial of the United States Constitution by promoting public understanding and appraisal of this unique document.

The Project is directed by a joint committee of historians and political scientists that is chaired by two scholars of international reputation—Professor Richard B. Morris of Columbia University and Professor James MacGregor Burns of Williams College. The Chief Justice of the United States serves as Honorary Chairman of Project '87's Advisory Board.

The implementation of Project '87 has been divided into three distinct but interrelated stages. Stage I, devoted to research and scholarly exchanges on the Constitution, has been underway for the past several years. The Project has awarded fifty-one research grants and fellowships and supported five major scholarly conferences dealing with various aspects of the Constitution. Activities in connection with Stage II—teaching the Constitution in schools and colleges—began in 1980, and Project '87 is now planning Stage III, the development of programs for the public designed to heighten awareness of the Constitution and to provoke informed discussion on constitutional themes.

It is the hope and expectation of the Project's governing committee that, through its activities and those of others, both students and the public alike will come to a greater awareness and comprehension of the American Constitution.

Project '87 is supported by grants from the National Endowment for the Humanities, the William and Flora Hewlett Foundation, the Lilly Endowment, the Rockefeller Foundation, the Ford Foundation, and the Andrew W. Mellon Foundation.

For further information, write: Project '87, 1527 New Hampshire Avenue, N.W., Washington, D.C. 20036.

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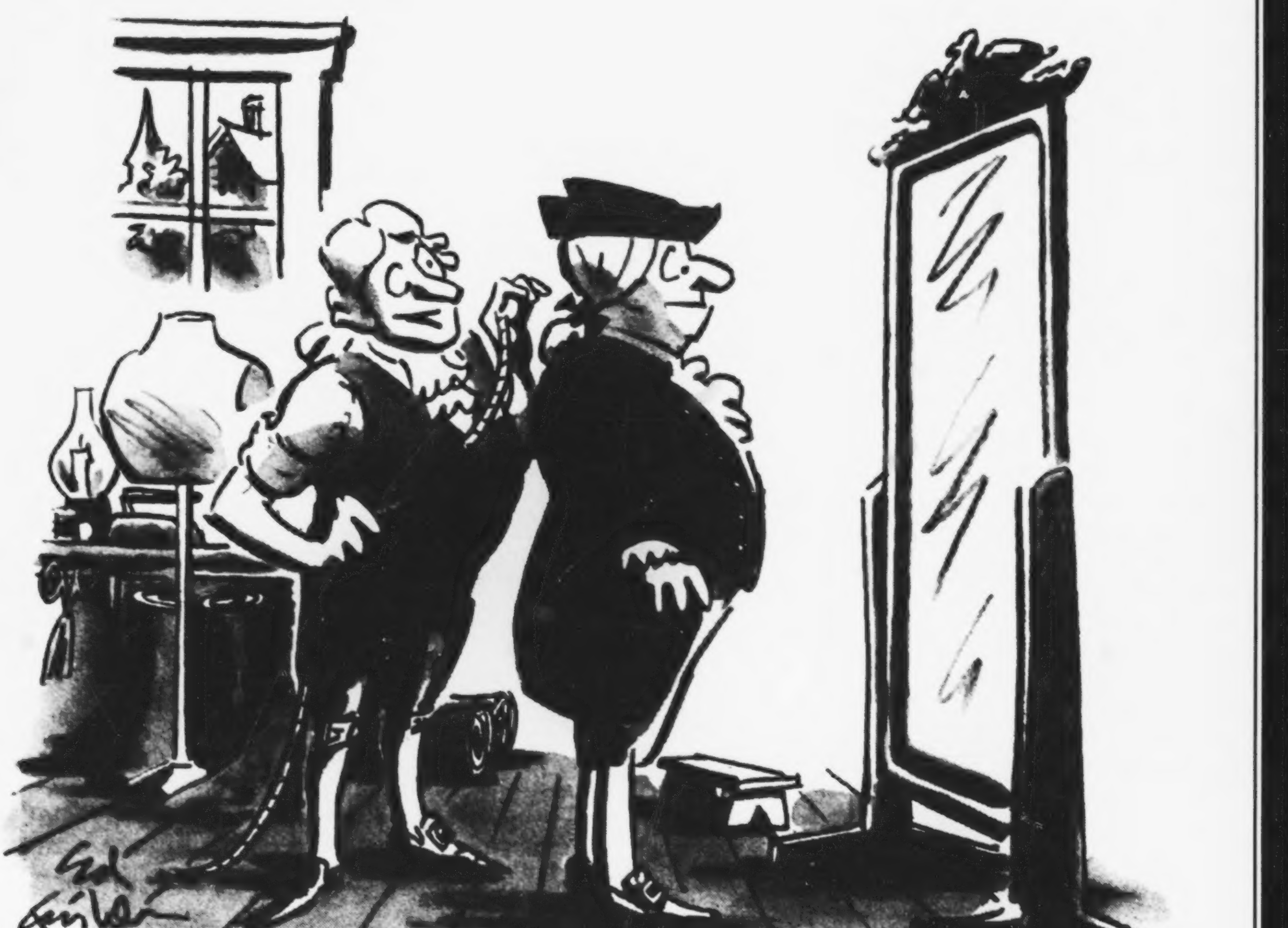
...do ordain and establish

this Constitution

for the United States of America.

A Bicentennial Chronicle Spring 1984. No. 2

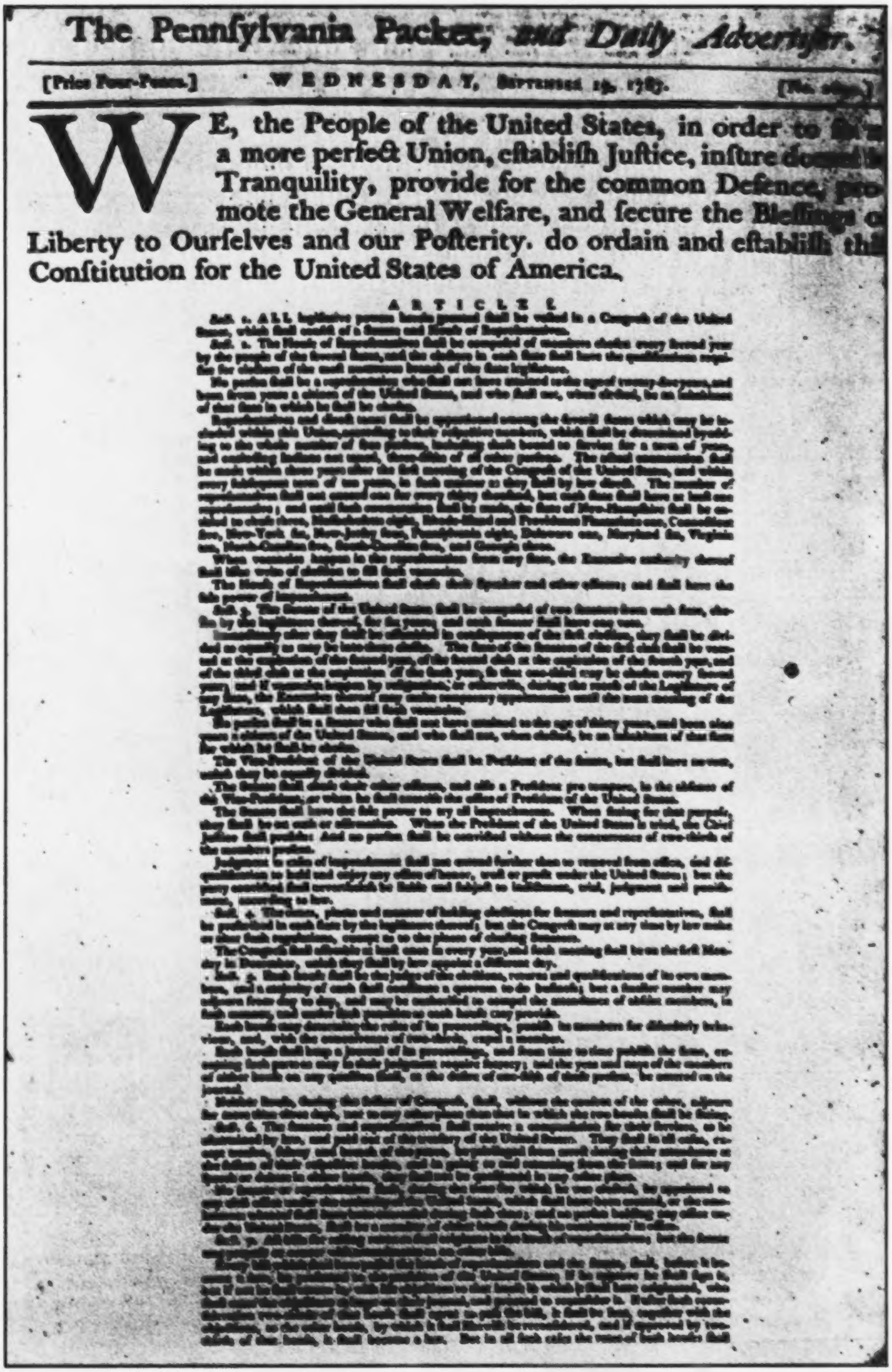


"Splendid, sir! It gives you that Founding Father look!"

Project '87

The United States Constitution

Text as it appeared in The Pennsylvania Packet, and Daily Advertiser *on September 19, 1787, two days after its adoption by the Constitutional Convention.*



The Pennſylvania Packet, and Daily Advertiſer.

[Price Four-Pence.] WEDNESDAY, September 19, 1787.

WE, the People of the United States, in order to
a more perfect Union, eſtabliſh Juſtice, inſure
Tranquility, provide for the common Defence, pro
mote the General Welfare, and ſecure the Bleſſings o
Liberty to Ourſelves and our Poſterity. do ordain and eſtabliſh thi
Conſtitution for the United States of America.

ARTICLE I.

Library of Congress.

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...do ordain and establish this Constitution for the United States of America.

A Bicentennial Chronicle

No. 2 **Spring, 1984**

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this Constitution **is published with the assistance of a grant from the National Endowment for the Humanities as part of its special initiative on the Bicentennial of the United States Constitution. Editorial offices are located at 1527 New Hampshire Avenue, N.W., Washington, D.C. 20036.**

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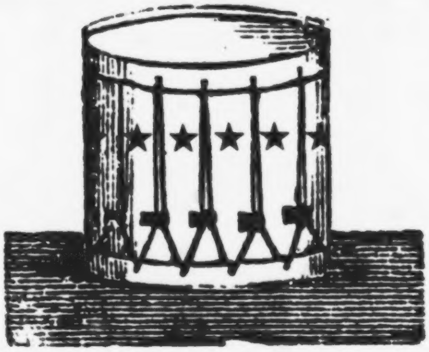
this Constitution



published by Project '87 of the American Historical Association and the American Political Science Association

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From the Editor

Last fall, with the support of a Bicentennial planning grant from the National Endowment for the Humanities, Project '87 published the inaugural issue of ***this Constitution***. It gives us great pleasure to announce that the Endowment has agreed to support the publication of ***this Constitution*** as a quarterly through 1986.

The response to the first issue has indicated that the audience for which the publication is intended—planners of Bicentennial programs—did indeed find the magazine informative and useful. In fact, our circulation is now international, through the Asia Foundation and the United States Information Agency. It is our intention to publish articles, features, and news items that will continue to be sources of ideas, resources and practical information.

With the publication of number 2 of the magazine, we begin a series of articles based upon the Thirteen Enduring Constitutional Issues, introduced in the first issue of the magazine. Professor Philip B. Kurland of the University of Chicago Law School explores the nature of the judiciary as it has developed under the Constitution. The Documents section highlights letters from early Supreme Court justices, described by the editors of the Supreme Court Documentary History Project, in order to evoke a sense of what life was like for them during the Court's infancy.

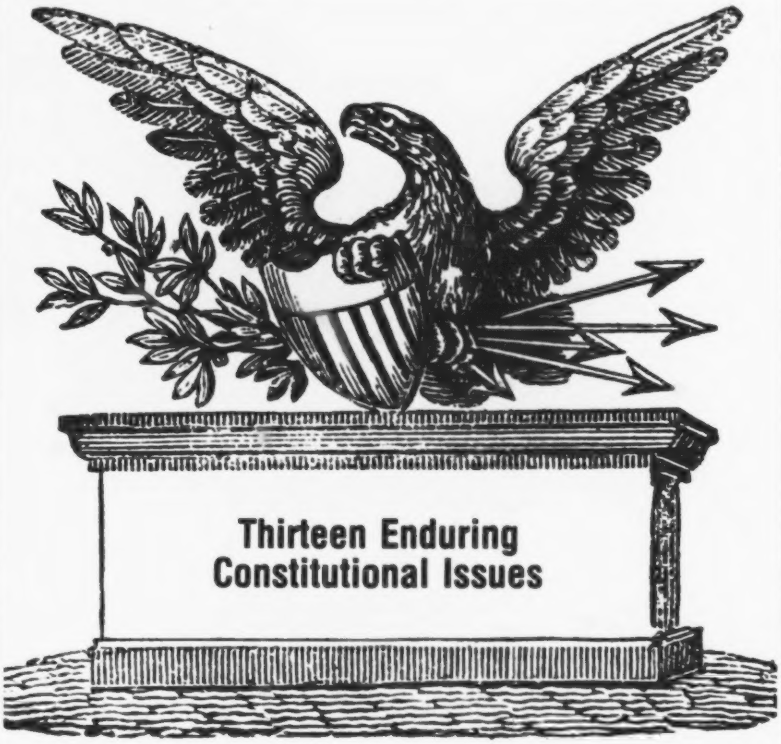
The article by Professor Barbara Melosh, of the Smithsonian Institution and George Mason University, discusses the uses of the Constitution in the plays of the Federal Theatre Project of the 1930s. This article, like many others we will publish in ***this Constitution***, serves to examine the Constitution as a cultural, as well as a political, document, part of Project '87's commitment to a broad and eclectic study of our fundamental principles of governance.

In this issue, we also include a piece by Senator Charles McC. Mathias, Jr., who considers the evolution of the Constitution as we approach the twenty-first century. In future issues of the magazine, we will include other pieces by public officials who serve in the institutions created by the Constitution. They offer us insight and observations about how our constitutional system responds to public problems. We look forward to our readers' responses to all of these articles.

In the Bicentennial Gazette, we focus once again on some of the programs developed for the 1976 Bicentennial of American Independence. We wanted to share as much information as possible on the many valuable projects that we uncovered which can provide useful models and materials for the coming commemoration.

It is most appropriate that this first quarterly feature the text of the Constitution. The copy we have chosen (which begins on the inside front cover) is one of the first printings of the document in a public newspaper after its adoption by the Constitutional Convention. In the next issue, we will include the text of the Amendments to the original document.

We hope that you will tell us how you are using ***this Constitution***. Since our clientele consists of Bicentennial program developers, we would like to know how the material in the magazine finds its way to *their* constituents, i.e., the public who will participate in these programs. Such information will enable us to provide the features that will prove most useful. We look forward to serving you in the coming years.



Thirteen Enduring Constitutional Issues

- National Power—limits and potential
- Federalism—the balance between nation and state
- **The Judiciary—interpreter of the Constitution or shaper of public policy**
- Civil Liberties—the balance between government and the individual
- Criminal Penalties—rights of the accused and protection of the community
- Equality—its definition as a Constitutional value
- The Rights of Women Under the Constitution
- The Rights of Ethnic and Racial Groups Under the Constitution
- Presidential Power in Wartime and in Foreign Affairs
- The Separation of Powers and the Capacity to Govern
- Avenues of Representation
- Property Rights and Economic Policy
- Constitutional Change and Flexibility

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The Origins of the National Judiciary

by PHILIP B. KURLAND

A reading of the Constitution as originally drafted and as it has existed for almost two hundred years quickly reveals that the judicial branch was probably the least well-defined of the three great divisions of national government in terms of its organization and its powers. The provisions of Article III, although listing the various jurisdictional categories, made few of them compulsory on the national courts. Only some original jurisdiction of the Supreme Court was made compulsory. But no constitutional provision established any national courts other than the Supreme Court. The Convention of 1787 could not reach agreement as to whether there should be such national courts. The Founders were certainly ambivalent about the utility of a national judiciary and compromised the question by leaving the issue for resolution by Congress.

There can be little doubt that the statesmen no less than the people of the time feared a strong judiciary. But they also recognized that some judicial power had to be vested in central government because the national government could founder without tribunals to resolve questions that could not be left to the partisanship of State courts—this lack had been one of the weaknesses of the Articles of Confederation. Yet history had shown that the judiciary, if it had a great potential for centralization of power, also stood fair to become an engine of repression. Thus, the Founders included provisions in the Constitution specifically to limit the authority of the judges. They carefully defined the crime of treason, lest that concept be allowed to grow as inordinately as it had under royal tutelage in the mother country. They also provided for jury trials in the original document. Insistent demands for still more assurance of the supremacy of the jury over the judiciary led to the addition of the Sixth and Seventh Amendments as well. "We, the People," were to safeguard the freedoms of the citizenry from invasion by the judiciary.

In Anglo-American history, the judiciary had always been the handmaiden of the Crown. It enforced the wishes of the King, serving him as a political tool, whether enhancing the royal treasury, or punishing the King's political enemies, or imposing the "king's peace" on the barons and their vassals. Two particularly egregious examples of judicial tyranny remained well-remembered bugaboos for those who had the task of framing a new government—"Bloody Jeffreys," the Chief Justice under James II known for his profligate imposition of the death penalty, and the Star Chamber, a political court completely devoid of judicial temper used by the Crown to punish its enemies.

The Declaration of Independence iterates charges against the Crown for imposing its despotism, in no small part through the machinations of the royal courts at Westminster and the Vice-Admiralty courts in the colonies themselves. Americans clearly saw that the courts were devices for centralization of power, no less than tools for subordination of the popular will. Concentration of political power was one of the great fears of the constitutional era, but so, too, was the danger of disseminating that power among the people. "Democracy" was as dirty a word at the end of the eighteenth century as "elitism" has become in the twentieth. With the examples of the abuse of judicial power under the Crown on the one hand, and the problems of operating without a centralized judicial authority under the Articles of Confederation on the other, there were good reasons for the ambivalence about making provision for a judicial branch in the original Constitution.

In order to overcome resistance to the notion of a judicial branch in the new government, the framers contended that this branch of government would be innocuous, rather than desirable or useful. In a famed passage from *The Federalist* No. 78, Alexander Hamilton argued:

> Whoever attentively considers the different departments of power must perceive, that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

However inaccurate a description of the judicial power of today, such rhetoric sounded good in its own time.

Perhaps Hamilton meant what he said—although *The Federalist* did have the aura of propaganda about

The Old Royal Exchange Building, New York City, the first temporary home of the Supreme Court. *Office of the Curator, U.S. Supreme Court.*

"It is emphatically the province and duty of the judicial department to say what the law is," said John Marshall.

it. Perhaps Hamilton's arguments were even valid. But their validity depended on the dubious proposition—dubious even then—that the sole function of a judicial body was to resolve the particular "case" or "controversy" before it on the basis of law that was already existent. When, however, one takes into account the well-known dictum that he who interprets and applies the law is the true lawmaker and not he who promulgates it, the Hamiltonian argument seems more preachment then substance. If one looks backward from the Hamiltonian argument adopted by Marshall in *M'Culloch* v. *Maryland*, doubts about the candor of *The Federalist* No. 78 are turned into certainties about its sophistical nature.

In any event, in *Marbury* v. *Madison*, John Marshall announced, in the great tradition of Louis XIV, that "le loi, c'est moi," and this dictum has been accepted by every court since, right down to the Burger Court. "It is emphatically the province and duty of the judicial department to say what the law is," said Marshall. From *Marbury* to date there has been continual debate about the legitimacy of the power of judicial review, the power to declare national statutes to be invalid because they contravene the Constitution. And none has gainsaid Judge Learned Hand's proposition: "There was nothing in the United States Constitution that gave courts any authority to review the decisions of Congress; and it was a plausible—indeed to my mind an unanswerable—argument that [judicial review] invaded that 'Separation of Powers' which, as so many then believed, was the condition of all free government." But then, "there was nothing in the United States Constitution" that provided for the doctrine of "Separation of Powers." Judicial review, like separation of powers, was part of the background against which the Constitution was painted. Failure to include either in the words of the text did not bespeak their rejection.

Learned Hand.
Drawing by Charles S. Snyder.

With all respect to the gallons of ink and forests of paper spent on the subject, the legitimacy of judicial review is not now, and has never been, the real issue. The question is what the scope of that power should be. We do know that the authors of the Constitution specifically rejected the concept of a council of revision, that is, a government body, whether judicial in whole or part, which would substitute its judgment for the legislature's as to the desirability of the legislation. If not so broad a discretion, what limits of the judicial power did the Founders intend in determining when a law contravened the Constitution and was, therefore, invalid? To say that courts could pass on the question of Congressional power is not the same as saying that their discretion is unlimited on this score. The Justices were to measure infringement of the Constitution, not the degree to which their own sensibilities had been violated.

At the same time that Marshall proclaimed the power of judicial review, he announced the limited way in which it could be invoked:

> If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary Act of the Legislature, the Constitution, and not such ordinary Act, must govern the case to which they both apply.

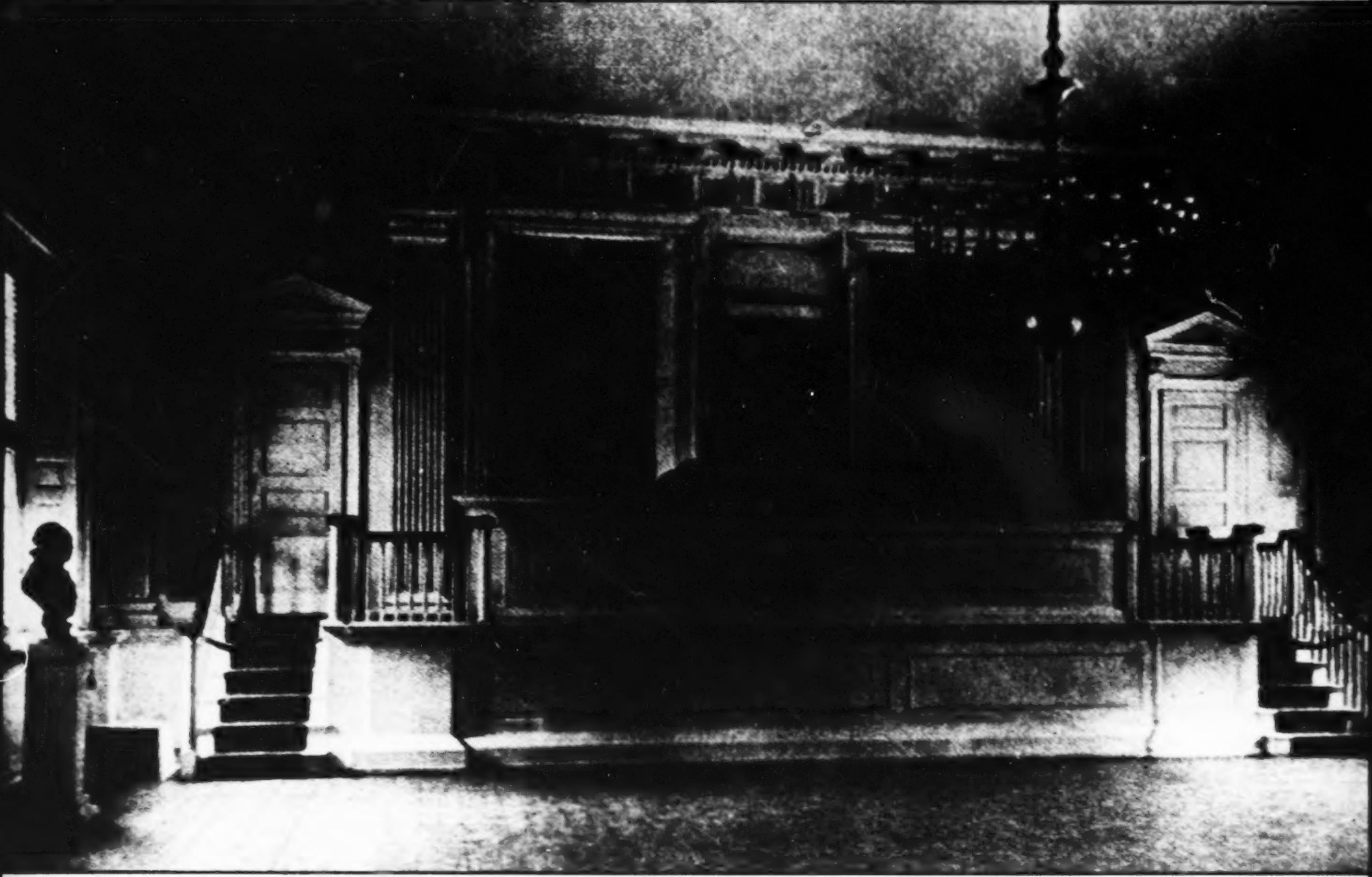
Marshall's argument, here as in other important decisions that he wrote, closely parallels Hamilton's arguments. Neither of them charge the Court with the function of rewriting the Constitution to the taste of the Justices. Both of them justify judicial review of national legislation within the context of deciding a case or controversy properly before the court for adjudication. There is no suggestion that such decision was to be treated as a general rule of public policy for the governance of other branches of the national government or of the behavior of persons who had not submitted the cause for judgment.

Clearly, however, the power of

judicial review did invoke some discretion on the part of the judiciary. Neither the Constitution nor most legislation was so lucidly written that their meanings were obvious to anyone who read them. Thus, when a question arose as to whether a tax on carriages was a "direct tax" which had to be apportioned to meet the terms of the Constitution, the courts had to decide what a "direct tax" was. This was a judicial problem that had to be resolved before the conflict between the Constitution and the legislation could be said to exist.

There was less doubt about the authority of the national courts to review state legislation. The Supremacy Clause specifically subordinates the actions of state courts as well as state legislatures to the terms of the Constitution, and section 25 of the first Judiciary Act makes specific provision for such judicial review. Section 25 was promulgated by those who were "present at the creation." Even so, our earliest constitutional history records the hard-pressed efforts of the states to negate the provisions of section 25 as invalid.This effort was unavailing, not least for the reason that the Supreme Court had the last word on the subject. As Justice Holmes once said: "I do not think that the United States would come to an end if we lost our power to declare an Act of Congress void. I do think that the Union would be imperilled if we could not make that declaration as to the laws of the several states."

However often the fight has been joined over judicial review during



The Court's chamber in the State House in Philadelphia, where it sat in February,1791. *Office of the Curator, U.S. Supreme Court.*

With the advent of the "second American Revolution," when the states'-rights Jeffersonians replaced the nationalists in the executive and legislative branches, the federal judiciary became the bulwark of nationalism.

the course of American history, the First Congress faced more pressing difficulties in creating a judicial system from scratch. The system had to serve as a cement and not a solvent of the Union; it had to disperse its courts among the countryside and not emulate Westminster by compelling the people to come to the capital for justice; it had to mediate disputes largely without a body of law of its own, for there was little legislation and the common law was not a property of the national judiciary. The First Congress did well; its Judiciary Act has long been admired as a remarkably effective response to practical needs. Some of the original law remains in effect today.

The keystone of the Judiciary Act provided for national courts in addition to the Supreme Court which the Constitution itself created. This national court system, together with judicial review by the Supreme Court of state court action on matters of federal concern, lay at the center of the conception of a national judicial function. No other modern confederation of states has established national courts for trial and intermediate appellate review, not even in nations covering so wide a territorial expanse, as do Australia and Canada.The decision of the First Congress to afford such national courts was probably a response to the deficiencies of the Articles of Confederation, which lacked any such system. The plan devised by the First Congress under the leadership of Oliver Ellsworth consisted of three judicial components to be administered by two sets of judges. District courts were to be manned by district judges. Circuit courts were to be presided over by a district court judge and one or two Supreme Court Justices.

Since marine commerce was at the heart of the nation's economic structure, the district courts were given jurisdiction over cases in admiralty, a body of judge-made law common to the United States, England, and compatible with the law of most maritime nations of that era. The protection of internal but interstate commerce was effected by giving jurisdiction to the federal circuit courts when residents of different states were involved in litigation. This tactic protected merchants and creditors from the parochialism of state courts which might diminsh their willingness to engage in interstate trade. Again, the applicable law was largely judge-made law in the form of the common law of the state of trial. The circuit courts were also given a modest role of appellate review of district court judgments.

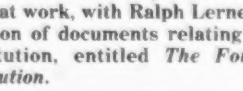
Admiralty and maritime causes, and disputes between citizens of different states, formed the bulk of the national judicial realm, although there was provision too for other areas such as enforcement of national criminal law, which included only federal statutory offenses and not common-law crimes. The Supreme Court exercised appellate review of the judgments of the lower federal courts and the highest state courts.

The burden on Supreme Court Justices, if not on the Supreme Court itself, was inordinate because of the need for the Justices to ride circuit. From the beginning the Justices sought relief from some or all of their circuit-riding duties, which tested their endurance and capacities to the limit, and made the position of a Supreme Court Justice less than attractive to the lawyers of greatest capacity in the new nation. Still, relief from circuit riding was not fully obtained until well into the nineteenth century.

With the advent of the "second American Revolution," when the states'-rights Jeffersonians replaced the nationalists in the executive and legislative branches, the federal judiciary became the bulwark of nationalism. The judges of the federal courts, both in their lawmaking roles and as administrators of the national grand jury system, took every chance they got to forward the idea of centralized power. The effort of the Jeffersonians to reduce the federal courts' power resulted in several constitutional crises but did not control the courts. Thus, the Federalists retained an imposing nationalist counterforce against the Jeffersonians which helped shape the new nation.

The origins of the national judiciary are to be found in the words of the Constitution and the Judiciary Act of 1789, but they were only adumbrated there. Like the national executive, if not the national legislature, the national judiciary has created itself in its own image. The words of Thomas Reed Powell describing the development of the power of judicial review are equally applicable to the development of the national judicial power generally: "Those of you who recall how Topsy characterized her own genetic process may not be offended if I find a similarity between her origin and that of what we know as [the judicial power].... Like Topsy, it just 'growed.' "

Philip B. Kurland is William R. Kenan, Jr., Distinguished Service Professor in the College and Professor in the Law School at the University of Chicago. He is now at work, with Ralph Lerner, on a collection of documents relating to the Constitution, entitled *The Founders' Constitution*.



History as Drama: The Constitution in the Federal Theatre Project

by BARBARA MELOSH

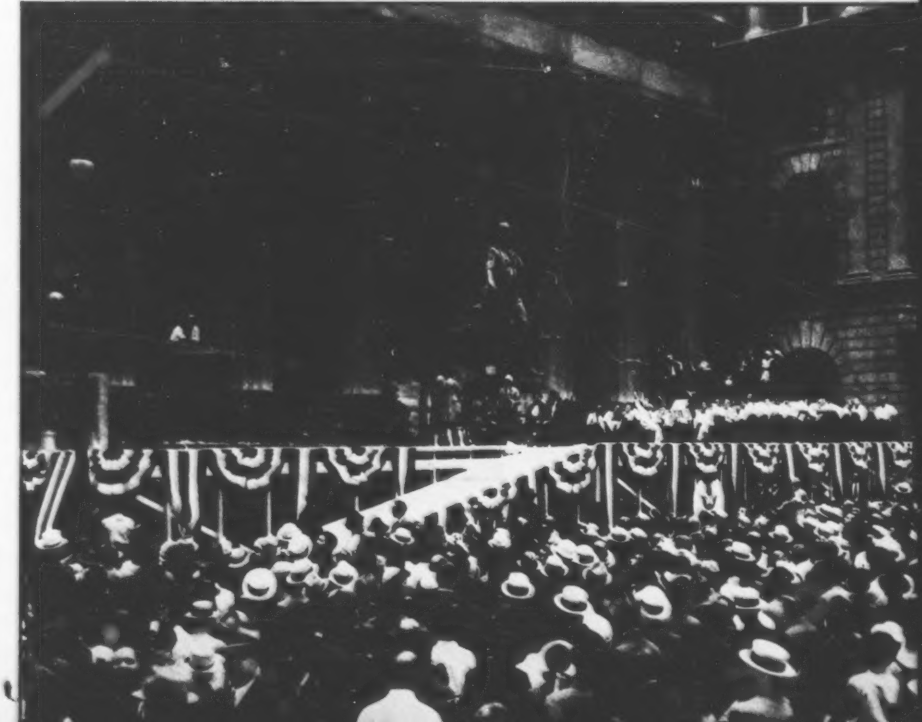
During the 1930's, constitutional issues assumed a prominent position, both as a focus for debate over the New Deal and as symbolic terrain for the struggle to shape America's future. Franklin D. Roosevelt's broad reform program raised troubling questions about the scope of Presidential power and the role of the federal government within the constitutional objective "to promote the general welfare." When the Supreme Court ruled against the National Recovery Act and other key New Deal programs, the conflict escalated: Roosevelt's attempts to reorganize the Supreme Court dramatically challenged the meaning of the balance of power mandated by the Constitution. Less familiar, perhaps, is the contemporary impact of this discussion: its reverberations reached far beyond the well-known leaders of political life and the arenas of government and judiciary. The plays of the Federal Theatre Project--a source far removed from the usual domains of constitutional history--reveal the intensity and significance of these issues for other Americans in the thirties. Making drama of current events, several of the productions depicted the ongoing battles over the New Deal. Two plays and two pageants took their plots directly from American history; in these, the Constitution is cast as a central character. Together, the plays offer a new angle of vision on the political and social meaning of the conflicts.

The Federal Theatre Project was part of what came to be known as "Federal One," the New Deal program for the arts. Funded by the Works Progress Administration, the FTP operated under WPA rules for relief agencies. Ninety percent of its operating funds were reserved for personnel, and its mission was to employ theatre professionals from the relief rolls. Many of those working on the Project also harbored hopes that it would become a model for a national theatre, a dream that collapsed under the intense controversy that surrounded the project from the start. In the end it was the most short-lived of all the arts projects, established in 1935 and cut in 1939 as the conservative attack on the New Deal mounted.

Nonetheless, the accomplishments of its brief existence were considerable. It employed thousands of actors and other theatre workers in a diverse array of activities. It revived old forms like vaudeville; innovated with new production techniques; encouraged promising new playwrights; produced dramatic classics, pageants, children's plays, foreign-language dramas, and modern plays. Regional theatres were organized in twenty-nine states and the District of Columbia, ranging from the tiny thirteen-person Rhode Island unit to New York's company, the largest with over five thousand employees in 1936. Areas already most active in theatre naturally developed the biggest projects: New York, California, Illinois and Massachusetts all had troupes employing over a thousand people in 1936. Everywhere, the Federal Theatre expanded the audience for drama. Charging little or no admission, the productions attracted many people who had never before seen a play. By the end of March, 1939, attendance figures totaled more than thirty million.

The Federal Theatre Project

An open air production of *The Constitution* on Wall Street. ***Used with permission from the Library of Congress WPA-FTP collection at George Mason University Libraries.***



In a world ravaged by war and depression, valued American institutions seemed newly fragile; and Americans, as ever, looked to the Constitution as a mooring.

pulsed with the energies of thirties' reform and radicalism, political commitments both compelled by fear of fascism and charged with the optimistic sense of bold new possibilities. Hallie Flanagan, national director of the Project, declared that "the theater must grow up," engaging the critical issues of modern life with language and forms suited to its new subjects.

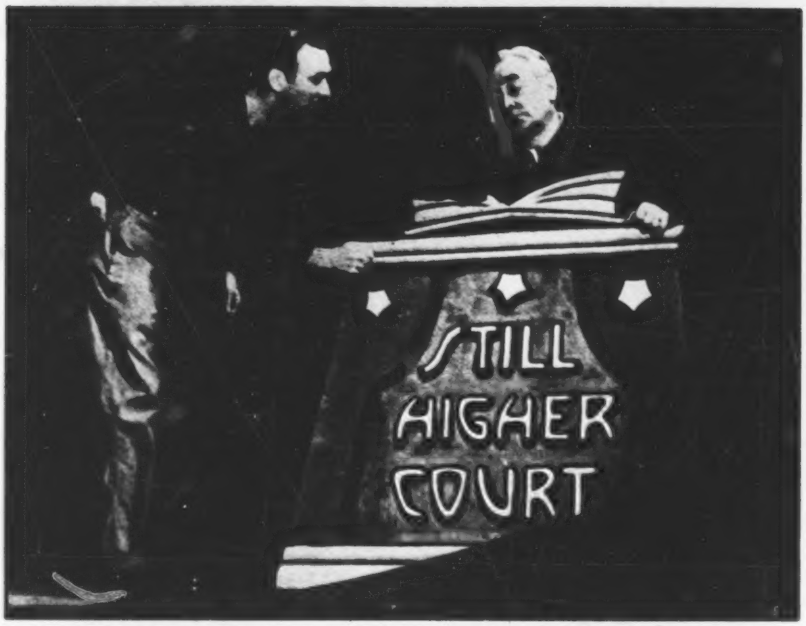
Several FTP productions brought the Constitution to the stage. Of all of them, only two were clearly intended to commemorate the 150th anniversary of the drafting and ratification in 1937 and 1938. *The Constitutional Convention*, a short historical pageant, played outdoors on Wall Street in September, 1937, drawing curious crowds. A short play, it nonetheless reproduced the historic debates over the Constitution in detail. Befitting the pageant style, actors delivered set pieces that conveyed the arguments of historical protagonists. *Arena*, the memoir of FTP director Hallie Flanagan, lists another pageant titled *A Constitutional Celebration* and records a single performance in Philadelphia on July 20, 1937; unfortunately, the Federal Theatre Project collection contains no records on this production. A full-length play, *The Constitution*, covered a broad range of American history and rehearsed the early national debates at length. In the first ten scenes, the play dramatized the growing conflict between the colonists and Great Britain. Thirty-four more scenes then provided a chronology of events between 1776 and the convening of the first Congress in 1789. Although only the script survives, it seems likely that this play was also intended to commemorate one or more of the several anniversaries of the Constitution that occurred in the thirties—the opening of the first Constitutional Convention (May 25, 1787), the ratification (July 2, 1788) or the first Congress and president under the new system (1789). Produced in Buffalo, New York, it was apparently played as a puppet show for high school audiences.

The historical context of that decade lent a new immediacy and intensity to constitutional issues. Shaken Americans of all political persuasions sought to understand the economic collapse and to recover the buoyant optimism of the American dream of a new society. Labor conflict at home threatened the view of an essentially classless society; troubled observers worried that the experience of depression would replace the fabled hope of upward mobility with the class consciousness of Europe. As economic troubles at home undermined traditional American aspiration, worldwide depression clouded the vista of limitless frontiers for an expanding capitalism. Meanwhile, Americans who had recently participated in the devastating World War under the banner of the Progressive mission "to save the world for democracy" regarded European affairs with foreboding; the rising tide of fascism threatened an uneasy peace. In a world ravaged by war and depression, valued American institutions seemed newly fragile; and Americans, as ever, looked to the Constitution as a mooring.

In the FTP plays, the Constitution claimed its most prominent role in the Living Newspapers, documentary dramas that reflected both the

Pioneer men and women settled the frontier as comrades, no longer "beaux and belles," in *Created Equal* (Boston production). *Used with permission from the Library of Congress WPA-FTP collection at George Mason University Libraries.*

Masked figures represent the Supreme Court's distance from "the people" in *Power* (New York production). *Used with permission from the Library of Congress WPA-FTP collection at George Mason University Libraries.*



"Still Higher Court," from *Injunction Granted* (New York production). *Used with permission from the Library of Congress WPA-FTP collection at George Mason University Libraries.*

dramatic innovations and the characteristic political vision of the project. Meticulously researched, footnoted, and accompanied by voluminous bibliographies, the scripts were constructed from clipping files and held to requirements of journalistic accuracy. The presentations brought an electrifying new style to the American stage. Quick scenes, stripped down stages, and dramatic lighting techniques captured the pace and intensity of twentieth-century life. Characterization was minimal, emphasizing social types rather than individual personalities; and the large casts of Living Newspaper productions filled the stages to give a sense of the diversity and anonymity of life in a large industrialized society. Over the loudspeaker, the Voice of the Living Newspaper linked the scenes with connecting narrative; berating, cajoling and instructing the Everyman characters on stage, the Voice became a character in itself.

Intensely concerned with contemporary problems, these plays depicted the interpretation of the Constitution as a part of current conflict over the New Deal. As allies of the New Deal, FTP writers often criticized the tradition of judicial review and portrayed both the Supreme Court and the Constitution itself as the tools of conservatives who would defend property over the "inalienable rights" of persons that Jefferson proclaimed in the Declaration of Independence. But in other ways, the plays celebrated the Constitution, especially the Bill of Rights, claiming it as a mandate for the New Deal. The document represented the momentous American experiment, the historical effort to embody the promise of democracy in political institutions. Even as the productions took a critical view of the Constitution, then, they also sought to defend the American democratic tradition and to honor the ordinary Americans portrayed as its rightful inheritors. In the plays we can read one telling version of the cultural history of the thirties' reform and radicalism.

The playwrights mined the past for the sources of contemporary problems, confident that the "lessons" of history would make the present comprehensible and point the way to a better future. *One Third of a Nation* traced the housing crisis to a history of land speculation and urban development tailored to private profit rather than public need. *Power* indicted utilities' companies and heralded the Tennessee Valley Authority, the New Deal's solution for underserved rural areas. *Injunction Granted* presented a sympathetic portrait of labor organizing. *Triple-A Plowed Under* and *Dirt* (the latter never produced) probed farm problems and New Deal responses. In *Spirochete* and *Medicine Show*, the Living Newspapers proclaimed that citizens' health was the legitimate concern of the state. Finally, in *Created Equal*, the Constitution itself became the central symbol of a drama that considered "the birth and growth of the American spirit."

The Living Newspapers all explore the role of the state in mediating between property rights and public welfare. In *One Third of a Nation* (1938) *Spirochete* (1938) and *Medicine Show* (1939), the argument is indirect. Opening with a spectacular production in New York, *One Third of a Nation* also played in nine other cities. Two dramatic tenement fires framed the play; between the opening scene and the finale, the script built a case for strong federal support and regulation of housing. *Spirochete* ran for 38 shows in Chicago and opened in four other cities. Its public health message urged state legislation and action to control venereal disease through education, mandatory premarital examination, and required medical reporting of new cases. *Medicine Show*, written as the Federal Theatre Project struggled to survive in Congress, played just once (in revised form, it later opened on Broadway); it was a searching indictment of private medicine and a call for a state-supported system. As self-conscious arguments for social welfare legislation, the plays all defend the idea that the New Deal programs lay within the mandate "to promote the general welfare."

Other Living Newspapers confront Constitutional issues head on, depicting court battles over New Deal legislation. All criticize the role of the courts, and two directly question the legitimacy of judicial

The Constitution represented the momentous American experiment, the historical effort to embody the promise of democracy in political institutions.

review itself. Posing the common welfare over the rights of property, the Living Newspapers criticize the prerogatives of employers and owners, and invoke the legislatures and courts in defense of majority rights. All emphasize that the will of the people is the final arbiter in social conflicts: government maintains its legitimacy only insofar as it embodies popular will.

Power opened in February 1937 and played for ninety-nine performances in New York; FTP units in Chicago, San Francisco, Seattle and Portland, Oregon also mounted productions of the play. The first scene showed a blackout, dramatizing the many uses of electricity and the interdependence of citizens in urban communities. Historical scenes of discovery and invention emphasize the liberating potential of power. But entrepreneurs soon claim control over the development and distribution of this resource, robbing the people of their rightful inheritance. Power, which should be "the slave of humanity," has been appropriated by a few who have made consumers into "the slaves of monopoly." Consumer suits opposing rate increases fail; the courts affirm the companies' right to set rates. Public ownership promises a more just order. With the Tennessee Valley Authority, lights go on in rural America, long ignored by private utilities' companies.

The final scenes showed the embattled TVA in the Supreme Court. Written in 1937, the script celebrates the victory of TVA in an initial ruling, a narrow decision that allowed construction to continue on one contested dam. But then an added scene reports that the program is meeting new opposition; private companies charge that the TVA violates legal standards of fair competition. Dramatizing the continuing suspense, *Power* ended with a giant question mark projected onto a backdrop.

The device used to represent the Court cast doubt on the legitimacy of judicial review through ridicule and caricature. Performance photographs show large masks of the Nine Old Men. Their sour expressions, wrinkled countenances, and downturned features suggest the judges' lack of empathy with ordinary people. The masks themselves provide a sense of social distance, an effect heightened by staging that places the large heads behind and above the assembled crowd. Even though the play ends with a conditional victory for the TVA, the Supreme Court comes across as an unreliable instrument, unresponsive to popular will. An earlier scene affirms, "The government is the people"; but the play ends on a note of doubt: will the Court act in the public interest? Written in the midst of Roosevelt's court-packing campaign, *Power* seems to lend support to his effort to create a more sympathetic Supreme Court.

The criticism of judicial review, implicit in *Power*, is extended in *Injunction Granted* (1936). The third Living Newspaper, the play was popular with New York audiences though its strident rhetoric drew Hallie Flanagan's disapproval. The script offers a sweeping panorama of American labor history, beginning with the story of seventeenth-century indentured servants and slaves and ending in a triumphant pageant of industrial unionism. The twenty-eight scenes cover a dizzying array of legislative and judicial decisions concerning the conflict between labor and capital. Hopeful immigrants, lured by the promise of "bread and freedom in America," soon discover a grimmer reality of hard work and harsh conditions. Their disillusionment fuels resistance, but these heroic efforts are repeatedly crushed in one generation after another. An early scene dramatizes an 1806 court battle: Philadephia shoemakers are indicted for criminal conspiracy for trying to organize. The words of reformer Frances Wright convey one theme of the script: "This is a war of class, and ... this war is universal!"

Three scenes show court or legislative decisions portrayed as partial victories for working men and women. In "*Commonwealth* vs. *Hunt*, 1840" (scene 7), the Supreme Court defends the right of combination. Two jubilant onlookers exult, "The first time in history! Say, it practically admits that unions got a right to exist!" "Injunction Granted" (scene 20) announces many rulings that support employers against workers, but ends by announcing labor's triumph, the Norris-LaGuardia Act. The script explains that the legislation outlaws yellow-dog contracts (employment conditional on workers' agreeing to stay out of unions) as violations of the constitutional right to freedom of association. William Green, head of the American Federation of Labor, appears in the play to proclaim: "As a result of the enactment of this legislation the word 'freedom' would take on a new meaning, and the Bill of Rights would have added significance for all classes of labor." But the new legislation is weak: employers quickly find that the courts are still willing to issue injunctions against labor organizers. Dramatizing the National Recovery Act, the script quotes General Hugh S. Johnson as he defends the right to strike; but the next scene exposes him as an undependable ally, vehemently opposed to the 1934 San

In *Triple A Plowed Under*, rural and urban dwellers unite to form a Farmer-Labor party against the backdrop of a monumental farmer (New York production.) *Used with permission from the Library of Congress WPA-FTP collection at George Mason University Libraries.*

Francisco general strike. At best, the play suggests, legislative initiatives and court rulings are uncertain aids in labor's quest for justice.

In scene after scene, *Injunction Granted* shows court decisions weighted in favor of the owners of capital. The play dramatizes the use of the Sherman Anti-Trust Act to curb union organizing, portraying Grover Cleveland's arrest of Eugene Debs in the 1894 Pullman strike. In the next scene, two workers discuss the injunction. In a common Living Newspaper device, the play's version of the truth is spoken by the naive worker, who has the unclouded perception of political innocence. As his savvy friend explains the arbitrary procedure of arrest by injunction, the innocent replies incredulously, "Without trial by jury?" and his educator solemnly emphasizes, "Without trial by jury." The narrative reveals the significance of the Debs case, depicting the courts as they justify a series of temporary injunctions against unions (1922) on the basis of this precedent. The set for this scene effectively conveys the message of judicial indifference to working people. Cut-out desks occupy different levels of the stage; they are marked "lower," "higher," "still higher," and "highest" court. At each level, bored or snoring judges grant injunctions without even listening to the evidence. A later scene, cleverly choreographed, reinforces the message: judges toss around a large ball labeled "INJUNCTION."

The finale brings the argument up to the present. Astounded laundry workers get the news of the passage of a minimum wage law in New York; but the employers immediately challenge it and the court strikes it down for interfering with individual contractual rights. The National Labor Relations Act meets the same resistance from the judiciary. Reviewing this history, workers agree that conditions must change, but that legislation and court decisions will not be the source of justice. "Then the answer is in ourselves. In you . . . in me. All workers must be brought into unions." The play ends with a speech from John L. Lewis, head of the new Congress of Industrial Organizations, and a stage full of men and women carrying the banners of different CIO unions celebrates the emerging power of organized labor.

Triple-A Plowed Under explores production and distribution in agriculture from the point of view of the struggling farmer. Early scenes sketch the inflation and overproduction of World War I, followed by collapsing markets in the twenties. "Vicious Circle" emphasizes the devastating impact of agricultural depression on the whole economy. In the next scene, farmers fight back. The script sympathetically presents farmers dumping milk and burning wheat to protest low prices, and shows neighbors resisting foreclosure by buying out the banks in penny auctions.

Like *Injunction Granted*, *Triple-A Plowed Under* portrays class divisions as a fundamental threat to democratic ideals. In one scene, an elegantly dressed couple dines in an expensive restaurant; the man boasts of his investments and promises his pampered companion a new car and a sable coat. On the other side of the stage, a shabbily dressed man tries to buy a bowl of oatmeal at a lunch counter, but is turned away hungry. In a parallel scene played later, one half of the stage is a drab farmhouse living room. The farmwife's mother is dying, dust blows outside, food is scarce. The heavy-hearted farmer goes outside to shoot his favorite horse to make soup for the sick woman. In pantomime on the other side of the stage, a fat woman, laden with jewelry and using a lorgnette, disdains the offerings of an obsequious waiter. Finally she accepts a roast pig. The playwright notes in parentheses, "I think the audience will get that this matches her own piggishness." These juxtapositions condemn the injustice of class privilege in a dramatic rhetoric that implicitly calls for redistribution of wealth.

In its central message, the play seeks to undermine both passive acceptance of inequality and passive dependence on established authority. The New Deal appears as well-intentioned but often ineffectual against powerful vested interests. The play renders a harsher judgment on the judiciary. Implacable opponents of the New Deal, the courts have betrayed their trust as the representatives of justice.

Triple-A (The Agricultural Adjustment Act) is shown as a partial solution for farm problems. Henry A. Wallace, Secretary of Agriculture, is the hero of the play; the script approvingly quotes his interpretation of the crisis. "As our economic system works, the greater the surplus of wheat on Nebraska farms, the larger are the breadlines in New York City." But the New Deal alone cannot remedy the ills of farm depression. The script goes on to depict a farmer buying a shirt with the money he has received for not growing wheat, only to find that clothing prices have gone up because of cotton price supports. In another scene, a farmer rebuffs sharecroppers who try to claim their share of the allowance. In the cities, rising meat prices spark a consumer boycott. Meanwhile, many still go hungry.

The judiciary eviscerates even the faltering and imperfect justice of the New Deal. In a climatic scene, the Supreme Court holds Triple-A unconstitutional. The script uses the language of Earl Browder, head of the Communist Party-USA, to challenge judicial review. "The reactionaries seek to turn both 'Americanism' and the Constitution into instruments of reaction, but neither of these things belong [sic] to them. Nowhere does the Constitution grant the Supreme Court power over Congress, but it does make Congress the potential master of the Supreme Court. I repeat, the Constitution of the United States does not give the Supreme Court the right to declare laws passed by Congress unconstitutional." Thomas Jefferson provides a more traditional authority for the scene; the script also quotes him, to affirm that the ultimate arbiter is neither Congress nor the Supreme Court, but the people. The scene calls for a constitutional convention. The Voice of the Living Newspaper intones, "Farmers voted, by more than six to one, for continuance of Triple-A." A crowd gathers to discuss the Court's decision; in angry murmers, some complain that it does not represent the popular will. In defense of the Court, one man muses, "They say the people wrote the Constitution . . . ", but another cuts him off brusquely: "Them people have been dead a long time." The Court's betrayal is complete in scene 23, "The Big Steal," which reports the later decision that held processing taxes for AAA unconstitutional and ordered the levies returned. The title of the scene comes from Wallace's denunciation of the decision as "probably the greatest legalized steal in American history."

Many scenes urge direct action as the only effective response and as the authentic expression of democratic will. An early segment portrays Milo Reno's farm holiday as a promising movement that compromised too readily. The play applauds various grass-roots organizations of small farmers, quoting the Secretary of the Farmers' National Relief Conference who praises the " . . . real dirt farmer . . . He has taken matters in his own hands because he knows that no one else can do the job as well as he can." The finale underscores the message. Against a silhouette of a farmer of heroic scale, farmers and urban dwellers gather to form a Farmer-Labor Party, and the people prepare to reclaim their government.

The unproduced *Dirt* endorses direct action in a polemical scene that shows the people educating the judiciary. This play dramatizes a farmers' revolt not mentioned in *Triple-A Plowed Under*, the 1933 incident in LeMars, Iowa, where a masked group of farmers threatened to lynch Judge Charles C. Bradley in an effort to force him to stop signing foreclosures. The script deliberately challenges deference to authority for its own sake, endorsing rebellion when law fails to embody popular will. In the courtroom, the judge provokes the angry petitioners by ordering them to stop smoking and to remove their hats in "his" courtroom. The defiant farmers retort, "Th' hell it's *your* courtroom! We built it with our tax money . . . or our fathers did!" When the judge equivocates on the petition to stop foreclosures, the farmers forcibly remove him to a country road, where their harsh words and rough handling of the unyielding judge proceed to a threat of lynching. The judge represents the claims of traditional authority and the rule of law. He prays for the farmers, a gesture they rebuff, and refuses to yield in defense of his oath of office: he is sworn to uphold the law, and foreclosures are legal. At a stalemate, the farmers finally back off; one even offers to drive the judge home. Though he has not given in, the judge is shaken and humbly acknowledges the farmers' perspective on the law. Declining the ride, he says, "No thanks. I'll walk. I want to think this out. *Maybe the bench isn't so sacred . . . after all*" [ellipses and emphasis in original].

John Hunter Booth's *Created Equal* (1938) opened in Salem, Massachusetts and played in Newark, New Jersey, Springfield, Mass., and Boston. Taking its title from the Declaration of Independence, the drama contrasts Jeffersonian natural rights with Hamiltonian concern for order in a straightforward Beardsian interpretation of the Constitution. Booth's preface to the script explains his revisionist view: "The Declaration of Independence promised equality. The Constitution

Created Equal *illustrates the thirties' intense concern with the meaning and realization of democratic promise, and the importance of the Constitution as symbol and structure for Americans during the depression.*

established a propertied class. Amendments to the Constitution are slowly fulfilling the promise of the Declaration." The wide-ranging script interprets American history through this lens. Early scenes dramatize the years of the Articles of Confederation, elite pressure for a stronger federal government, the debates over writing and ratifying the Constitution, the designing of the Bill of Rights. The dramatic tension of the play comes from the depiction of a growing threat to democratic promise: The Constitution places property over liberty; slavery poisons national life; "this dollar civilization" compromises the frontier spirit. Constitutional amendments offer a gleam of hope. The play celebrates the Thirteenth, Fourteenth, and Fifteenth Amendments abolishing slavery and guaranteeing the rights of free blacks, and, in several variant versions, the script depicts women's suffrage as a victory for democracy.

Booth floundered for an appropriate ending. Extant scripts in the Federal Theatre Project archives contain final scenes that vary considerably in tone and content, and internal reports commenting on earlier scripts suggest that still other versions existed. The New Jersey script, the most didactic, gives pointed speeches to the Voice of the Living Newspaper throughout and emphasizes the Declaration of Independence; a recurring refrain warns, "Men aren't free by merely saying so." Its economic interpretation is the most explicit. For example, this announcement prefaces a scene of the Gettysburg Address: "A Truth isn't self-evident by merely saying so. One truth for the people ... another for the men of land and money. In 1861 we again fought a war to maintain a united nation under tyranny of land and money—or a self-evident truth of the people" [ellipses original]. But the ending is mild, endorsing the Works Progress Administration as "the voice of the American people" and "the vanguard of the new economy." The musical finale, "This is the Song of the People," proclaims social welfare as the mandate of the Founders, an interpretation which would probably have come as a surprise to them:

... Democracy is not a word.
It means work and food.
And schools for our kids.

A place when we're old and care when we're sick.
To build for all men, than no man may need,
This is democracy.
That we the people build ...

In another script, marked "Final Version" in pencil, a crowd in a breadline discusses the depression; the speakers castigate themselves for allowing the rich to run the government. WPA workers call themselves "the new pioneers," part of "the new order of things that places human welfare before cash dividends," as "First Laborer" notes, "Sort of trying to make good the promise of the Declaration." The last speeches underscore the message of the earlier Gettysburg scene in the call to action: "Now-before it's too late! Let us reaffirm to a world turning to tyranny;" (crowd): "That government of the people, by the people, and for the people, shall not perish from the earth!"

Booth's uncertainty about the promise of the New Deal comes through in yet another script, also labeled "Final Version." In this play, the last scene directs actors to "make a lot of vague, meaningless motions with their tools" as pantomime of WPA work. The first worker explains to the audience, "This expedient, this sop to idle millions, is not the answer." The group choruses, "No, it's a compromise." The leader replies, "And compromise we longer cannot ... In 1776 equality was promised." The chorus affirms, "It's written in our Declaration," and the leader cries, "A Pledge that is made should be redeemed." The last lines, spoken directly to the audience, exhort the listeners' participation. "... Make good the promise. For you are the People and the People—You! Come! Say it with me—(points to audience) You and You and You. I am the People and the People Me!"

Contemporary response to the play gives a sense of the controversy surrounding the Federal Theatre Project, particularly these Living Newspapers. The Boston *Christian Science Monitor* in June, 1938, praised the play's revisionist view: "Many spectators will doubtless get a new notion of history, for the telling differs materially from that of the school textbooks. It contains less of illusion and whitewashing, more of realism. For that, it should be welcomed ... the play makes it clear that the battle for democracy has not been won yet. Is this subversive doctrine?" In a more skeptical vein, another reviewer wrote in the Boston *Globe*, "... This may be termed a vivid dramatization of history. On the other hand it is probably no more complete a picture of the American past than the rose-colored spectacles method."

In Springfield, Massachusetts, an energetic publicity man promoted the drama as a celebration of America. With more enthusiasm than accuracy, he declared that "The plot is based entirely on the Constitution, laying special emphasis on the fact that 'all men are Created Equal.'" He assured potential audiences, "there is no political propaganda, no Communistic or Socialistic tendencies or trends involved, and it is historical only," hastening to add, "history in the form of interesting entertainment, neither dull nor dry, but very pleasing." A parade featuring seven drum-and-bugle corps led the way through town to the first performance; promotional banners read, "Restore Your Faith in America, see *Created Equal*." But despite the vigorous advertising, the play received tepid reviews. One reviewer thought it was mere historical pageantry; the other, from the *Springfield Daily Republican* (May 25, 1938), described its "socialist preaching" and "laudatory" attitude toward the New Deal.

In New Jersey, the actors themselves split over the play. The conservative Veterans of the Theater League denounced it as subversive, citing its deliberate emphasis on crowds and slight attention to the Great Men of American history. Others in the New Jersey unit defended the script and demanded that the play go on. Unfortunately no records of this performance remain; the account of the controversy comes from *Arena*. Flanagan writes that the New Jersey protestors reported the play to the Dies Committee, and the hearings on the Investigation of UnAmerican Propaganda Activities contain a brief discussion of *Created Equal*.

The play illustrates the thirties' intense concern with the meaning and realization of democratic promise, and the importance of the Constitution as symbol and structure for Americans during the depression. Though *Created Equal* was produced in 1938, the 150th anniversary of the ratification of the Constitution, nothing in the scripts, production records, or reviews indicates that it was part of a self-conscious commemoration of that historical event. The only allusion to the anniversary appears in the purple prose of the irrepressible Springfield publicity man, Robert V. Johnston, who wrote, "It is undoubtedly the consensus of opinion that the presentation of this play at this particular time is more than opportune and is probably timed so, with the re-enactment of the deeds accomplished by our forefathers, and the trying times thru [sic] which they lived, that our faith in America may be reborn, and the love of our country remain unshaken." The passive voice, over-insistent emphasis, and uncharacteristic qualifier "probably" all suggest that the idea of a commemoration existed only in Johnston's fertile imagination. Instead, in *Created Equal*, as in other Living Newspapers, the Constitution assumed a role not as historical artifact but as a document with vital relevance to America's present and future.

Nor was Booth's revisionist view simply an aberration. The Buffalo play, *The Constitution*, contains many similar elements. Though Flanagan's *Arena* indicates that it was produced as a puppet show for high school audiences, suggesting that it was probably part of a constitutional commemoration, the script itself is clearly modeled after a Living Newspaper. The short scenes portray history in a series of dramatic vignettes with connecting narration supplied by the "Voice of the Living Newspaper." Less wide-ranging in its historical scope and more understated in its rhetoric, the play nonetheless sets forth a Beardsian interpretation. Like *Created Equal*, *Injunction Granted*, and *One Third of a Nation*, the play opens with a scene that dramatizes the promise of America; hopeful sailors dream of "land and freedom" in the new country. Subsequent vignettes celebrate popular revolts against arbitrary rule, whether imposed by the imperial British or the colonial elite. Scene 10 matter-of-factly proclaims, "the colonists divide on class lines"; the play shows farmers, artisans, and small businessmen as one group united by common interests against a dominant elite of large landowners, merchants, lawyers and speculators.

Making common cause against British excesses, Americans fall into new divisions after the Revolution. The play's argument becomes confused here. A number of scenes suggest that government under the Articles of Confederation was ineffectual; various interest groups implore a paralyzed Congress to do more. But as the Constitutional Convention frames a stronger central government, the same constituencies protest that the new plan is undemocratic. The Federalists receive a uniformly bad press: the script indicts them for the substance of their plan; for the secrecy of the Constitutional Convention; and for coercion and assorted dirty dealings in the fight for ratification. In scenes that sympathetically portray popular resistance to the ratification, anti-Federalist farmers condemn the "Rich Man's Constitution." In the last minute the true defenders of democracy recover the initiative: the ending celebrates the compromise that incorporated the Bill of Rights into the Constitution.

In these plays, the Constitution was a symbol with complex meaning. On the one hand, it represented the political structure as it was, a history and current reality viewed

The Bill of Rights, seen as preserving the Jeffersonian values of the Declaration of Independence, was repeatedly invoked and affirmed in plays that celebrated the American experiment in democracy.

critically in the documentary plays. Often the courts, the legislature, and the executive branch were portrayed as captives of special interests, "slaves" to capital; and the Constitution, which embodies representative government rather than direct democracy, often stood for what had gone wrong with America. On the other hand, the Bill of Rights, seen as preserving the Jeffersonian values of the Declaration of Independence, was repeatedly invoked and affirmed in plays that celebrated the American experiment in democracy. Though the Living Newspapers were often sharply critical, their rhetoric was never couched in the language of alienation. Rather, the plays criticized the disenfranchisement of ordinary men and women and called for a more directly responsive government. The dramas directly addressed the issue of twentieth-century political alienation, challenging Americans to shake off helplessness and passivity, to understand their history, to take responsibility for their futures. Beset on all sides by evidence of the overwhelming problems of mass society, the Living Newspapers reconstructed an ideal of democracy that resembled the direct government of the town meeting.

These interpretations did not go unchallenged. The Living Newspapers were the most highly visible of all the Federal Theatre Project productions, both because of their dramatic innovations and because of their contemporary subject matter. Making drama of current events, the plays brought new life to theatre but also took the Project along a risky political course. The Living Newspapers could not have been done if the official mandate of objectivity had been strictly observed; writing plays demands selection and arrangement of materials, a process which in itself imposes an implicit interpretation on the subject. Committed to an art that spoke to contemporary issues, Flanagan inevitably ran aground on questions of the proper role of a federally funded theatre. Conservative critics of the New Deal resented the Living Newspapers as propaganda for Roosevelt. Others charged that the plays went beyond the politics of the New Deal to preach socialism or communism. And meanwhile, Communist Party members themselves sometimes found the Living Newspapers too vague and conciliatory; for example, the *Daily Worker* criticized *Injunction Granted* because the finale championed labor unions unstead of calling for a workers' party. The House Select Committee to Investigate UnAmerican Propaganda Activities had the last word. Among the plays they challenged were *One Third of a Nation*, *Medicine Show*, *Power*, *Triple-A Plowed Under* and *Created Equal*. The investigation made the Federal Theatre politically untouchable; when the New Deal ran into growing opposition in Congress, this program was one of the first to be traded off as New Dealers scrambled to hold together a crumbling coalition.

The politics of the Federal Theatre Project, seen in its depictions of the Constitution, embodied a populism that was characteristic of many thirties' reform and radical movements. Most of the specific programs endorsed in the plays came straight from the agenda of the New Deal: *One Third of a Nation* favorably presented the New Deal's housing program; *Medicine Show* called for a federal program for state-supported medicine then under consideration in Congress; *Power* praised the Tennessee Valley Authority; *Injunction Granted* urged working people to exercise their legal rights to organize; *Triple-A Plowed Under* supported the Agricultural Adjustment Act, though it also suggested that the New Deal had not done enough to cure farm depression. Still, in important ways, the rhetoric and vision of the plays did depart from the traditional language and aims of New Deal liberalism. While most New Dealers sought to cure the excesses or imbalances of capitalism, the Living Newspapers implicitly (and sometimes explicitly) portrayed capitalism itself as a distortion of the American dream of liberty and equality. These positions drew fire from anti-New Dealers eager to label its programs as subversive.

Whether self-consciously radical or simply New Deal liberal, in retrospect their solutions seem naive in their simplicity and forced in their optimism. Nonetheless, in a world menaced by fascism, the Living Newspapers made a committed stand against mass political apathy. They pushed their audiences to think about their place in a collective social life, to challenge the claims of established authority, and to believe anew in the possibilities of citizenship. If these plays seem dated, it is perhaps because we are more deeply resigned to our distance from political power. The Living Newspapers were electric with the special intensity of political culture in the depression. Turning back to them, we can glimpse the fears and hopes of that critical moment in American history. And, during the Bicentennial of the Constitution, the history of these plays can challenge us to celebrate that anniversary by reflecting again on the meanings and future of our democratic institutions.

Sources:

The Library of Congress Federal Theatre Project Collection at George Mason University Libraries, Fairfax, Virginia, contains most of the production records of the Project. It includes scripts (often in multiple versions), posters, programs, lighting plots, ground plans, sketches of stage sets and costume designs, photographs, clippings, reviews, and other material related to the productions. The Institute on the Federal Theatre Project and New Deal Culture, administered by Lorraine Brown at George Mason, has undertaken a large oral history project that provides a rich resource supporting the collection. These interviews with participants in the FTP are well-catalogued and most have been transcribed.

For an excellent and well-illustrated introduction to the FTP and the collection, see Lorraine Brown and John O'Connor, eds., *Free, Adult, Uncensored: The Living History of the Federal Theatre Project* (Washington, D.C.: New Republic Books, 1978). Jane DeHart Mathews, *The Federal Theatre, 1935-1939: Plays, Relief, and Politics* (Princeton Univ. Press, 1967), written before the Library of Congress materials became available in 1974, is nonetheless an invaluable institutional history of the Project. Hallie Ferguson Flanagan Davis, *Arena: The History of the Federal Theatre* (1940; reprinted in 1980, Arno) is the director's colorful and informative memoir.

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This work was supported by a grant for research in New Deal culture jointly administered by the Smithsonian Institution and George Mason University, 1982–83. I also wish to acknowledge the very able and good-humored assistance of the fine staff of the Library of Congress Federal Theatre Project Collections at George Mason University. Finally, I thank Carl Zitmann and Laura M. Evans for their work on the photographs illustrating this article.

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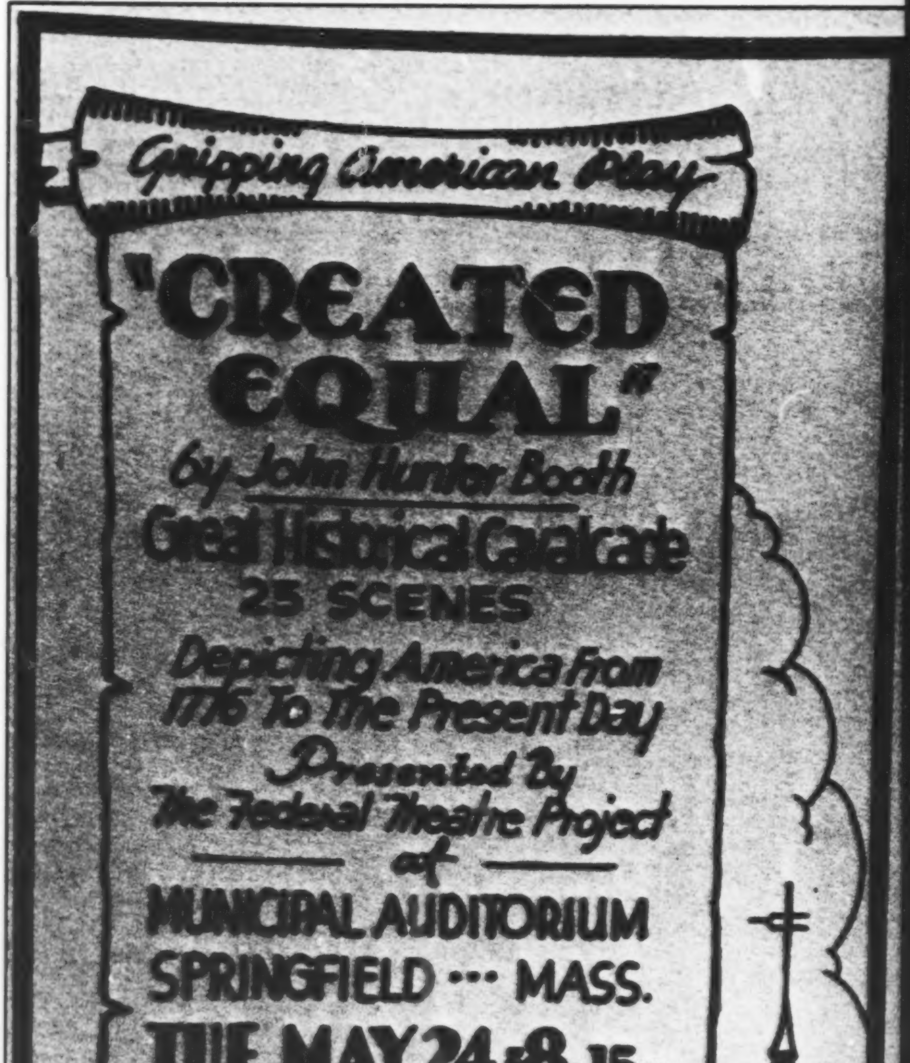
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Public Forum

This article by Senator Charles McC. Mathias, Jr., inaugurates a feature which will appear from time to time in **this Constitution**: *observations by public officials about constitutional issues. Senator Mathias raises thought-provoking questions about the application of constitutional protections of privacy in the age of sophisticated computer networks. We look forward to your response.*

The Constitution in the Twenty-First Century

by SENATOR CHARLES McC. MATHIAS, JR.

This article is excerpted from a speech Senator Mathias delivered on Constitution Day, 1982.

The guide to the burning constitutional debates of the twenty-first century will not be found in the text of the Constitution itself. The best way to predict the future of the Constitution is to try to foresee the social problems which American society will face in the century ahead. The research of the futurists gives us a pretty good idea of some of the developments that will shape our society in the decades to come. One of those developments is already well underway: the phenomenal increase in the power of the computer, and the threat it poses to the privacy of Americans.

Today, the computer has become indispensable in commerce, industry and government. Increasingly, information is shared from one computer to another, covering vast distances in seconds. The financial, credit, medical, and business records of almost every American are stored away in some electronic memory. Computers do not discard information, unless ordered to. They do not forget it. They amass it, retain it and produce it indiscriminately at the touch of a button.

The accelerating tempo of developments in computer science can only mean more complications ahead. One knowledgeable futurist predicts that a century from now computers will have developed to the point where "it would be possible for a central computer to keep detailed tabs on every human being in any country, and to update the information every minute or so."

That is a chilling prospect. It calls up visions of George Orwell's *1984*, with Big Brother watching every citizen's every move. Where would that leave the citizen's right to privacy?

Although that right is not mentioned anywhere in the Constitution, it has been implied by judicial decision from a number of provisions, notably the Fourth Amendment, which guarantees the right to be free from "unreasonable searches and seizures". The history of the development of the right to privacy may shed some light on how the Constitution will meet the challenges of the future.

The practical problem which the Fourth Amendment was designed to deal with was the so-called "writ of assistance". This was a general warrant which authorized officers of the Crown to search homes and property for smuggled goods. The warrants did not specify whose property was to be searched, or what evidence was to be looked for. Colonial outrage over these writs helped fuel the fire of revolution. So it was not surprising that the Fourth Amendment was included in the Bill of Rights.

It is fair to suppose that Madison and his colleagues believed that they had protected the people once and for all from unwarranted intrusions. But, of course, they could not foresee the electronic age. They could not foresee that technology would make our homes and our private lives accessible, even when our doors are locked and our shades are drawn.

In our time, however, increasingly sophisticated electronic technology has spawned opportunities for unauthorized intrusions never dreamed of by the framers of the Constitution. With electronic prying threatening to burst the restraints of the Fourth Amendment, another practical problem cried out for a solution.

At first, only a few far-sighted people realized this. For example, in 1928, the Supreme Court dealt with wiretapping for the first time, in the case of *Olmstead* v. *United States*. Chief Justice William Howard Taft wrote the majority opinion. He ruled that wiretapping was not a search and seizure at all. There had been no illegal entry, he wrote, because the tap had been placed outside the defendant's property. Only the spoken word had been seized, and the spoken word was not protected by the Fourth Amendment. In short, Chief Justice Taft applied eighteenth-century concepts of property law to the twentieth-century problem of wiretapping.

Fortunately, we also find in the *Olmstead* case a more practical approach to the Fourth Amendment. Justice Brandeis, in his famous dissent, produced an historic definition of the right to privacy. "The makers of our Constitution," he wrote, "sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against

"The makers of our Constitution sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."
—Justice Louis Brandeis

William Howard Taft.
Office of the Curator, U.S. Supreme Court.

the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."

Brandeis understood that the Constitution protected this right to privacy against all sorts of threats, posed by all sorts of technology. It prevented a modern police force from an unwarranted telephone tap as surely as it prevented a redcoat from rifling a colonist's desk, and, he emphasized, it would have to meet similar challenges in the future. As he put it, "the progress of science in furnishing the government with means of espionage is not likely to stop with wiretapping. Ways may someday be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home .... Can it be," Brandeis asked, "that the Constitution affords no protection against such invasions of personal security?" To Brandeis, the answer was obvious. "Every unjustifiable intrusion upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment".

It took almost forty years, but eventually the Supreme Court decided that Brandeis was right. In a 1967 decision, the Court held that warrantless wiretapping violated the Fourth Amendment. "The Fourth Amendment," the Court declared, "protects people, not places". (*Katz* v. *United States*).

The futurists tell us that an all-seeing, all-knowing computer surveillance system will be technologically possible within a few decades. So, Justice Brandeis' frightening prediction is coming true and the computer and the Fourth Amendment may be on a collision course.

I have no doubt that the Fourth Amendment would forbid compulsory computer surveillance throughout the society—the Big Brother of Orwell's vision. Such an intrusion—silent, continuous, pervasive—would rip away the veil of privacy without a specific, sufficient justification. Certainly a regime of universal surveillance would utterly destroy "the right to be let alone."

But harder questions cluster around the margins of the problem. Let me suggest a few.

First: what if there *is* sufficient justification for some surveillance? The Fourth Amendment was never intended to outlaw searches. It simply requires, with limited exceptions, that the police satisfy an impartial magistrate that probable cause exists to search a specific place for a specific item. If probable cause is shown, a search may be undertaken.

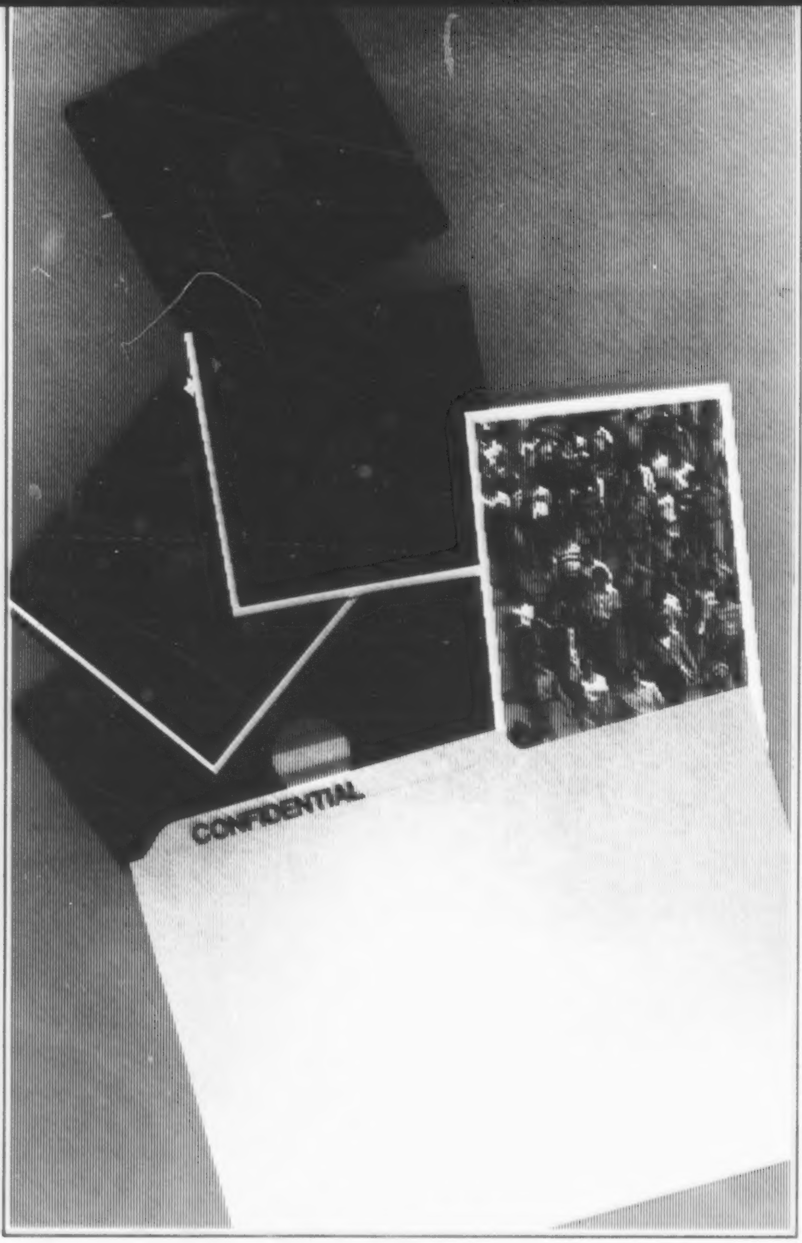
Louis Brandeis, as a young man.
Office of the Curator, U.S. Supreme Court.

In a society in which a "search" can be conducted by a central computer, silently, from a distance of thousands of miles, without the subject's knowledge—does the same principle apply? Or is more protection needed to safeguard the right to privacy?

Second: what about surveillance as punishment? Our society is increasingly troubled by violent crime. We are particularly frustrated when criminals emerge from prison to commit more crimes, and when crimes are committed by persons on probation after conviction, or on parole after imprisonment.

Computer surveillance could help to break this cycle. A person on probation or parole is already required to adhere to restrictions on his or her movements, associations and activities. The computer could make it easier to enforce these restrictions.

A pilot project underway in New Mexico demonstrates the system in a primitive form. There, some mis-



demeanor offenders are outfitted with electronic anklets, which transmit an alarm to a central computer if the probationer strays more than a thousand feet from the telephone. Every morning, the computer prints out a list of the subject's comings and goings on the previous day. It would be a relatively simple matter to add the capability to monitor all the probationer's conversations. Before long, we may see more and more offenders sentenced to continuous surveillance by the state.

A more effective deterrent to the repeat offender could hardly be imagined. The careers of professional criminals would be cut short, at a fraction of the cost of incarceration. And only the criminals would feel the cold eye of Big Brother.

What would the Constitutional response to all this be? After all, a person who has been convicted of a crime can legitimately be deprived of many constitutional rights. Is the "right to be let alone" one of them? Or is this right, which Justice Brandeis called "the most comprehensive and most valued," preserved, even though others have been forfeited?

Or what about the growing number of Americans, who, in recent years, have been willing to trade some of their privacy for increased personal safety? Many have retreated behind walls, into closed communities, where visitors can be screened, common areas monitored, suspicious strangers challenged and ejected. It is easy to imagine the voters of an entire town deciding to wire their community for sound and video, for monitoring by the all-seeing central computer. The town would bar entry to all who refused to wear a transmitting device. A society tortured by the fear of crime might establish Big Brother by popular demand. Those who valued their privacy more highly could try to reverse the policy at the next election, or simply move away. To many, that might sound like a fair and reasonable solution to a difficult problem. Then it could be that all that would stand in its way would be the Constitution.

These are complex questions which our society has never before had to face. It seems to me that one of our purposes in observing the Bicentennial of the Constitution should be to stimulate some thought and discussion of the survivability of the Constitution in the twenty-first century.

The future crowds us. As Thomas Jefferson so wisely observed during our nation's infancy:

> Laws and institutions must go hand in hand with the progress of the human mind. . . . As new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.

Charles McC. Mathias, Jr., is the senior senator from Maryland and the ranking majority member of the Senate Judiciary Committee. Since 1975, he has sponsored legislation calling for a federal commission to commemorate the Bicentennial of the Constitution.

DOCUMENTS

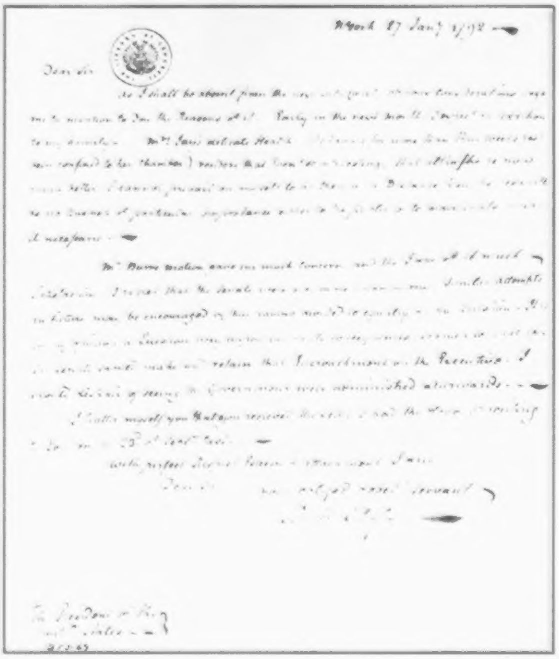
"It is my wish as well as my Duty to attend the court": The Hardships of Supreme Court Service, 1790–1800

by MAEVA MARCUS, JAMES R. PERRY, JAMES M. BUCHANAN, CHRISTINE R. JORDAN, and STEPHEN L. TULL

The most novel governmental institution created by the Constitution of the United States is the Supreme Court. Yet Article III of the Constitution provides only a brief sketch of this most important third branch of the federal government. It remained Congress's task to flesh out the judicial system, which it did in "An Act to establish the Judicial Courts of the United States," passed on September 24, 1789. Never having had a full-blown national judiciary in America before, those associated with its formation knew they were undertaking a great experiment. Experience would furnish the best guide for fine tuning the system. Thus the early years of the Supreme Court's history are crucial to understanding how this institution came to occupy the place it holds in American government today.

Both Congress and the president appreciated the importance of the judicial branch of government. Congress, for example, awarded the justices of the Supreme Court higher salaries than most other officials of the federal government. President George Washington chose the most eminent men for his first appointments to the Court. But service on the new nation's highest bench brought with it a particularly heavy burden of hardship as well as honor, a burden that may have been in some part responsible for slowing the development of the Supreme Court into an esteemed coequal branch of the federal government.

Most burdensome for the justices was the extensive travel necessary to fulfill their judicial duties. Each year, they attended two terms of the Supreme Court—one in February and one in August. Court was held in the nation's capital (New York in 1790, Philadelphia from 1791 to 1800); since no more than one of the justices ever happened to live in the capital, the others had to travel from their home states in order to attend. In addition, the justices were required by law to ride circuit around the country. In the Judiciary Act of 1789, Congress had created in every state a federal district court with a federal judge presiding; Congress then had grouped the district courts into three circuits and required two Supreme Court justices to attend circuit courts at two places in every district twice each year. Thousands of miles of travel were thus necessary. Because of the many complaints from Supreme Court justices regarding the onerous duty placed upon them, Congress, in March, 1793, amended the Judiciary Act to require the presence of only one Supreme Court justice at each circuit court.



John Jay to George Washington, January 27, 1792. George Washington Papers, Library of Congress.

In letters to family and friends, the justices recorded the difficulties of traveling to sessions of the circuit courts and the Supreme Court. Through all sorts of weather, the justices journeyed great distances over poorly marked and badly made roads. They endured the hazards of crossing rivers and streams, sometimes at the height of spring flooding. They occasionally stayed with friends or with individuals to whom they had been recommended; but more frequently they lodged at taverns, ordinaries, or other public houses. Accommodations at these public houses were often crowded and dirty. The quality of food varied from very good to very bad. As might be imagined, these conditions took a toll on the health of the justices.

The rigors of this extensive travel directly affected the ability of the justices to attend sessions of

George Washington, painting by Rembrandt Peale. National Portrait Gallery, Smithsonian Institution, Washington, D.C.

the Supreme Court itself. Illness was the single most important factor preventing or limiting their presence on the bench, but the difficulty of getting to New York or Philadelphia also contributed to absenteeism. That the Court met in the blistering heat of August and the wintry cold of February augmented these problems. The letters and newspaper items that follow, taken from the period January, 1792, to August, 1800, provide contemporary accounts of the difficulties in attending meetings of the Supreme Court during the Court's first decade. These documents reveal the justices' awareness of their constitutional duty as well as their sometimes heroic efforts to fulfill that duty despite physical discomfort and danger. Several justices did not serve long terms because of the hardships involved, and two died in office. In the course of the initial ten years—during which time the Court was composed of only six justices—twelve different men held the position of Supreme Court justice.

Minor changes have been made in order to transfer the following documents into print. Only a few of the documents have been reproduced in full. Most begin and end with ellipses to indicate that extraneous text has been left out. Spelling, capitalization, and punctuation (including the ubiquitous baseline dash) have been retained as they appear in the original. For technical reasons, marks of punctuation appearing beneath superior letters— a common eighteenth century practice— have been deleted. Editorial insertions appear in italic type within brackets. All the letters published here are recipient copies, and all were written and signed by the sender.

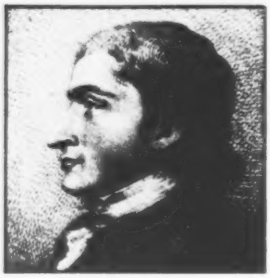
The letter from Chief Justice John Jay that begins this collection is a good illustration of the early justices' problem in solving the conflict between the great burden of their official duty and their personal affairs. Jay tries to balance his desire to perform his duties responsibly with the necessity to take care of his family. He is so concerned about absenting himself from the Court that he addresses his explanation to the president. Jay states that his coming absence is attributable to his pregnant wife's precarious state of health but also indicates that his decision to remain at home was influenced by the lack of significant business before the Court. It is interesting that both Chief Justice Jay and Associate Justice William Cushing (in the next letter in the collection) chose to write to President Washington, the head of the executive branch. These are the only such letters found from a justice of the Supreme Court explaining his absence to the president in the first decade.

Chief Justice John Jay to President George Washington
January 27, 1792— New York, New York
(George Washington Papers, Library of Congress)

> . . . As I shall be absent from the next sup: Court, obvious Considerations urge me to mention to You the Reasons of it: Early in the next month I expect an addition to my Family__ M^{rs} Jay's delicate Health (she having for more than three weeks past been confined to her Chamber) renders that Event so interesting, that altho she is now much better, I cannot prevail on myself to be then at a Distance from her; especially as no Business of particular Importance either to the public, or to Individuals, makes it necessary__ . . .

Associate Justice William Cushing to President George Washington
February 2, 1792— New York, New York
(George Washington Papers, Library of Congress)

> . . . I take the liberty to inform you that being on my journey to attend the Supreme Court, which is to sit next monday, I have had the misfortune to be stopt here, since Friday last, by a bad cold attended with somewhat of a fever, so that the probability, at present, seems against my being able to reach Philadelphia by the time court is to sit. Assoon as my health permits, however, I design to proceed there. The travelling is difficult this Season: __ I left Boston, the 13th Jan^{y} in a Phaeton, in which I made out to reach Middleton as the Snow of the 18th began, which fell so deep there as to oblige me to take a Slay, & now again wheels seem necessary. If Judge Blair & Judge Johnson attend there will be a Quorum, I suppose, as two other Judges are upon the Spot. The Chief Justice, I perceive, cannot be present this term. __ . . .



John Jay, engraving by B.B. Ellis. National Portrait Gallery, Smithsonian Institution, Washington, D.C.

Chief Justice John Jay to Associate Justice William Cushing
January 27, 1793— New York, New York
(Robert Treat Paine Papers, Massachusetts Historical Society)

New York 27 Jan^{y} 1793_

Dear Sir

I am prepared and purpose to set out for Ph^{a} Tomorrow if the weather should prove fair. for altho I have regained more Health than I had Reason to expect to have done so soon; yet I find it delicate, and not sufficiently confirmed to admit of my travelling in bad weather. I mention this that in Case the ensuing week should be stormy, my absence from you may not appear singular_ It is my wish as well as my Duty to attend the court, and every Exertion that prudence may permit, shall be made for that purpose_ I hope the Benevolence of Congress will induce them to fix the Terms at more convenient Seasons, especially as the public good does not require that we should be subjected to the Cold of Feb^{y} or the Heat of August_ M^{rs} Jay joins me in requesting the favor of you to present our best Comp^{ts} to M^{rs} Cushing_

I am Dear Sir your affect^{te} & h'ble Serv^{t}

John Jay

The Hon'ble Judge Cushing_

Associate Justice James Iredell to Chief Justice John Jay
January 21, 1794— Williamston, North Carolina
(John Jay Papers, Columbia University)

. . . It is with the most sensible mortification that I have to inform you of the disappointment of my expectation of attending at the Supreme Court in February, at which time I was extremely anxious to attend on account of the variety of important business which probably will then come on, and of the novel and peculiar nature of a part of it. I accordingly set off so early as the 14th, but was unfortunately taken sick when I had rode about 40 miles, and obliged to return. My health has since got better, but not so much so as to enable me to proceed. . . .

If the present System is to continue, I beg leave to submit to you and the other Gentlemen whether the first Monday in January will not be a better time for the Supreme Court to meet than the first Monday in February. It is a much more certain time of travelling from the Southward, and no particular objection occurs to me in respect to it. . . .

You will be so good as to inform the other Judges of the circumstance which has unfortunately prevented my having the pleasure to meet them, and I beg the favour of you at the same time to assure them of the high respect I constantly feel for them. . .

In the next documentary excerpt Jeremiah Smith, a congressman from New Hampshire and a frequent observer of the Supreme Court, writes to William Plumer, a leading federalist in his home state, about absenteeism on the bench. Smith seems particularly upset by the absence of John Jay who was in England negotiating a new treaty.

Jeremiah Smith to William Plumer
February 7, 1795— Philadelphia, Pennsylvania
(Plumer Papers, New Hampshire State Library)

. . . The Supreme Court commenced their session on monday._ Much of the dignity of the Court is lost by the absence of the Chief Justice_ Judge Cushing has not attended every day_ He is under the Care of a Physician for a Cancer on his Lip_ He attends part of the Time & in those Causes where they cannot make a quorum without him._ . . .

Associate Justice John Blair, one of George Washington's original appointments to the Supreme Court, gives evidence in the following letter of the great efforts made by justices to perform

John Blair. *Supreme Court Historical Society.*

their official duties. Here Blair describes his experiences while attempting to meet his obligation to ride the southern circuit and his fear that he will not be able to attend the Supreme Court in August in Philadelphia. In fact, Blair sent his letter of resignation to President Washington on October 25, 1795.

Associate Justice John Blair to Associate Justice William Cushing
June 12, 1795— Williamsburg, Virginia
(Robert Treat Paine Papers, Massachusetts Historical Society)

> . . . I ought to inform you, that a malady which I have had for some years, in a smaller degree, has since I had the pleasure of seeing you increased so greatly as to disqualify me totally for business— It is a rattling, distracting noise in my head— I had much of it at Savannah; besides almost continual cholic. I would fain have declined the decision of several Admiralty cases there, if I had not been told that delay would be greatly injurious, on account of the prize-goods being stored at a very great daily expense— This circumstance prompted me to go thro that business, altho in a condition not fit for any; & I have some reason to fear that in doing so I have effected nothing but work for the Supreme court, ~~by~~ to undo~~ing~~ what I have done. It is, however, a consolation to me, that there is yet a court where my errors may be corrected— When I came to Columbia, I found much business of the same sort; but as in those cases bond & security had been given, & the goods not stored, altho I heard an argument on two of them, I thought it adviseable (my disorder still increasing) to decline making any decree & adjourn the court— The same cause induced me to decline holding the court at Raleigh, but make the best of my way home, having first done every thing I could to prevent the fruitless attendance of others; & from every thing I have experienced since my being at home, I have little encouragement to think that I shall be able to attend court in August; I fear I never shall; & if I find no speedy amendment, so as to justify an expectation that I may be again qualified to execute the duties of my office, I shall certainly resign it— . . .

The next letter, from Justice James Iredell to his wife Hannah, furnishes a vivid description of the troubles faced by the early justices and the toll these hardships took on their well-being.

Associate Justice James Iredell to Hannah Iredell
July 2, 1795— New York, New York
(Charles E. Johnson Collection, North Carolina State Department of Archives and History)

> . . . I arrived here the day before yesterday, after a very agreeable passage from Newport of about 51 hours. The latest letter I received from you was of the 7th of June, but Mr Lenox told me he forwarded one to Newport, which I expect will be returned here. I am perfectly well, but extremely mortified to find that the Senate have broke up without a Chief Justice being appointed, as I have too much reason to fear that owing to that circumstance it will be unavoidable for me to have some Circuit duty to perform this fall— Four Judges out of five were upon duty the last time, and there is some business, which will make it indispensably necessary that two Judges shall be on the Eastern Circuit. Judge Blair (owing to the Chief Justice's absence) went upon the Southern Circuit this last spring when he was entitled to stay at home if possible, and Judge Wilson had also several Courts to attend tho' it was his turn to stay, and they had additional duty on the same account 12 months before— At least four Judges must be on the Circuit this fall, and I hear with great concern that Judge Blair was so sick in South Carolina that he was not able to do any business there. If I have to attend any I presume it will be the middle Circuit, which begins at Trenton on the 2d October.

William Paterson. Supreme Court Historical Society.

Should I be so unfortunate as to find this unavoidable, I will at all events go home from the Supreme Court if I can stay but a fortnight— but how distressing is this situation? It almost distracts me. Were you & our dear Children any where in this part of the Country I should not regard it in the least— But as it is, it affects me beyond all expression. The state of our business is now such, that I am persuaded it will be very seldom that any Judge can stay at home a whole Circuit, so that I must either resign or we must have in view some residence near Philadelphia, I don't care how [retired?], or how cheap it is. The account of your long continued ill health has given me great pain, and I am very apprehensive you will suffer relapses during the Summer. My anxiety about you and the Children embitters every enjoyment of life. Tho' I receive the greatest possible distinction and kindness every where, and experience marks of approbation of my public conduct highly flattering, yet I constantly tremble at the danger you and our dear Children may be in without my knowing it in a climate I have so much reason to dread. May God Almighty, in his goodness, preserve you all! At this distance, & not capable of judging, I must depend altogether on your discretion to do what is for the best, whether to remain in Edenton during the summer or not— Draw upon me for what ~~you~~ money you want— I will endeavour to send you some Sherry and Port Wine from here. Mr Jay was sworn in as Governor yesterday. He was in danger of dying on his passage, and does not look well now. I am told, which has greatly astonished me, that he did not send his resignation of Chief Justice till two or three days ago, since the Senate broke up. Whatever were his reasons, I am persuaded it was utterly unjustifiable. The President may himself make a temporary appointment, but it is not much to be expected, I fear, as few Gentlemen would chuse to accept under such circumstances. I expect to go in a few days to Philadelphia. . . .

Almost three years have passed between the writing of the previous excerpt and the next two excerpts. Oliver Ellsworth of Connecticut is now the chief justice. He replaced John Rutledge who had served one term as chief justice on a temporary commission but was not confirmed by the Senate for a permanent appointment. Rutledge had succeeded John Jay who, upon his return from England, had resigned in June, 1795, to become governor of New York. Samuel Chase is the associate justice who had replaced John Blair. Both William Paterson, appointed to the Court in 1793, and James Iredell, commissioned in February, 1790, write to their wives about their concern that, with important business before the Court, only a bare quorum of the judges has arrived in Philadelphia for the February 1798 term.

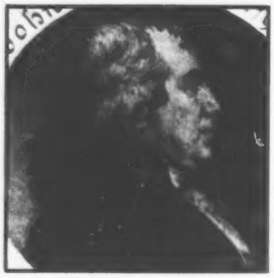
Associate Justice William Paterson to Euphemia Paterson
February 5, 1798— Philadelphia, Pennsylvania
(William Paterson Papers, The State University at Rutgers)

. . . The Chief Justice has not yet come on, and it uncertain, whether he will be here, as he has not been well for some time. Judge Wilson is in North Carolina, and in such a bad state of health as to render it unsafe for him to travel. The other judges are here, and to-day court was opened. I can form no opinion as to the length of time we shall sit; but, I hope, we shall rise in the course of three weeks at furthest. . . .

James Iredell to Hannah Iredell
February 5 and 8, 1798— Philadelphia, Pennsylvania
(Charles E. Johnson Collection, North Carolina State Department of Archives and History)

[February 5:] Our Court is to begin to day, but we have barely a quorum consisting of the Judges Cushing, Paterson, Chase, and myself: the Chief Justice being unfortunately in very bad health, and we have now no reason to expect he can attend. . . .

[February 8:] Our Court has been very



James Iredell, engraving by Saint-Mémin. National Portrait Gallery, Smithsonian Institution, Washington, D.C.

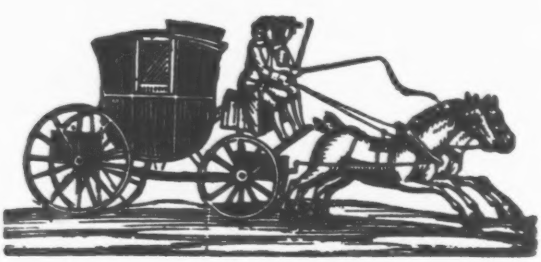
busily employed since Monday, being in Court every day from ten till three. Unluckily, the Chief Justice is in such bad health, that he has not been able to come on, nor is now expected. . . .

In the following excerpt Samuel Chase provides a graphic account of the illness that kept him from the February 1799 term of the Supreme Court and that would cause him to miss the circuit court in New York. James Iredell, on his way to Philadelphia to attend the Supreme Court, had visited Chase in Baltimore.

Associate Justice Samuel Chase to Associate Justice James Iredell March 17, 1799— Baltimore, Maryland
(James Iredell Sr. and Jr. Papers, Duke University)

. . . For five weeks after you left Me I was *[letters inked out]* confined to my Bed-Chamber, and three to my Bed. for some Days I was very ill. I was so very weak, that I could not walk across my Room without assistance. it is 14 Days, this Day, since I came below Stairs, and I have been only able, this last Week, to go in a close Carriage into the City for Exercise. I have not the least Hope of being able to travel in time to attend the Circuit Court at New York, on the 1st day of next Month. a Relapse would be fatal. my Cough is still bad and the Spitting continues. my Lungs are so very weak, that I cannot bear ~~the least~~ any but very gentle Exercise. . . .

The next letter relates to James Iredell's absence from the Supreme Court during the August 1799 term. Iredell's circuit the previous spring had been very arduous because of the trial in Pennsylvania of John Fries and the Northampton insurgents. The increasing emotional strain on Iredell during the course of the trial is apparent in the letters he wrote to his wife Hannah in May, 1799 *(Charles E. Johnson Collection, North Carolina State Department of Archives and History)*. Two months after Bushrod Washington wrote the following letter, James Iredell died on October 20, 1799.



Associate Justice Bushrod Washington to Associate Justice James Iredell August 20, 1799— Alexandria, District of Columbia
(Charles E. Johnson Collection, North Carolina State Department of Archives and History)

. . . Upon my arrival at Baltimore about the first of the month, I heard from Judge Chace, with great concern that you were too much indisposed to attend the supreme Court. The fatigue to which you had been exposed during the Circuit was well calculated to produce this consequence, and you would have acted imprudently I think to venture upon so long a Journey in your then state of health. It will afford me very sincere pleasure to hear of your recovery.

Judge Cushing was seized upon the road by an indisposition so severe as to prevent his proceeding. Fortunately, there was no business brought on which involved any question of importance or difficulty, & the term was consequently short. I went from and returned to Baltimore with our brother Chace, whose excellent flow of spirits & good sense rendered pleasant a Journey which would otherwise have been fatiguing & disagreeable. . . .

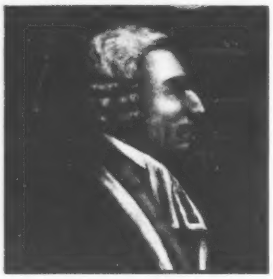
The next group of documents, composed of letters and newspaper articles, demonstrates the continuing difficulties faced by the early justices as the decade wore on. A letter from Associate Justice Samuel Chase to his wife illustrates in minute detail the hazards of travel that faced the justices as they attempted to get to Philadelphia in time for the opening of the Court. The remaining documents show how the absence of the justices from the Supreme Court affected the conduct of business.

Philadelphia Gazette **February 3, 1800**

Samuel Chase, painting by John Wesley Jarvis. National Portrait Gallery, Smithsonian Institution, Washington, D.C.

Associate Justice Samuel Chase to Hannah Chase
February 4, 1800— Havre de Grace, Maryland[1]
(Dreer Collection, Historical Society of Pennsylvania)

. . . It has pleased God once more to save Me from the most imminent Danger of sudden Death. my Son also in his great Exertions to save Me fell in three times and was in very great Danger. a young Officer of the Name of Alexander was the chief Instrument. he tied a Leather Strap round my leg, and my Son held Me the whole time, by my Coat near my Neck, I beleive about five Minutes. I once exerted myself so far as to get my Breast on the Ice, but it broke. I was perfectly collected, but quite exhausted, I relied only on the protection of my god, and he saved Me. I ~~am~~ was concerned to see my son in such Danger, but he would not save himself without saving Me. a Negroe Fellow (called Ben) was the only Person besides Mr Alexander, who gave any assistance. there were two french gentlemen, who were so frightened they ran ashore.— the other Negroes were also so alarmed that they did not assist, but running up all together but my Son called and stopped them, as all would have broke in and probably all perished. when I was haled[2] out I got on the Baggage Sledge, and was drawn ashore by two Negroes.— again all would have come to the Sledge but my Son prevented them. I was brought in Arms of all to the House. I immediately was rubbed dry and put into Bed between Blankets. I fell in before Sunrise— At 10 oClock Sammy[3] wrote Tommy,[4] and Capt Barney sent to the post office; by Neglect of the ~~post~~ Deputy Post Master [~~he~~?] it was not sent. after 12 oClock Capt Ketty was so kind (with Mr Pleasants) to call to see Me. I was then in a little perspirabal,[5] which came on with Difficulty. My Head was rubbed all over with Brandy. I took a little burnt,[6] and drunk [Whey?] and Tea. I was afraid to sit up to write, and sent You a Message by Capt Ketty. in the Morning I set up to have my ~~the~~ Bed [made and?] yesterday Morning I got up and shaved, and I cannot discover that I have taken Cold, and I think I am as well as if the accident had not happened. for fear You should think I was hazardous I will give You the particulars.— We got here on Fryday about 4 o'Clock. Capt Barney said the Ice would not bear. and could not easily be cut. on Saturday afternoon some Persons crossed on the Ice. on Sunday before Day light one of the Negroes came into my Room. and desired me to get up, that the passengers were going over, that the Ice had been tried and would bear a Waggon and horses. when I came down I asked Capt Barney, who said the Ice had been tried, & there was no Danger.— two Negroes went before Me with the Baggage on a sleigh. I followed directly on the Track. Sammy went about ten feet on my right Hand. the other Passengers followed. Myself and Son carried a long Boat-Hook. about 150 Yards from the shore, (in about fifteen feet Water) one of my feet broke in, I stepped forward with the other foot, and both broke in. I sent the Boat-Hook, & across, which prevented my sinking. Sammy immediately ran up, and caught hold of my Cloaths, and fell in.— he got out and lay on the Side of the Hole, and held Me and broke in twice afterwards.— I was heavily cloathed. my Fur Coat was very heavy when it got wet.— I must inform You of our Circumstance. I had just offered up a prayer to god to protect Me from the Danger, when I instantly fell in. You know I have often mentioned Instances of the special Intraposition[7] of providence in my favor, among several, last December in Annapolis. I believe I was saved by his special favor. and I feel myself most grateful, and shall now have cause to remember and to give Thanks.—



William Cushing. *Supreme Court Historical Society.*

> Sammy wrote Tommy on yesterday, & I hope it got safe and made You easy.— In the afternoon Judge Washington got here, & immediately passed in the Mail Boat.— I will pass when I can go in the large Boat. the people are now breaking over, and the passengers are preparing to go over[.] I shall stay, at least until the Boat returns, and be satisfied I ~~will~~ will not go until there is no possible Risque. . . .

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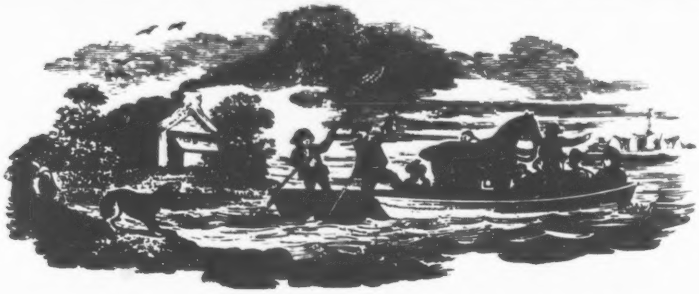
1. Samuel Chase misdated this letter as January instead of February. When he wrote it, he was "At Captain Barneys," a tavern, formerly called Rodger's Tavern, at Havre de Grace, Maryland, on the west bank of the Susquehanna River.
2. "To draw or pull." *OED.*
3. Samuel Chase, Jr. (1773–1841), son of Samuel Chase.
4. Thomas Chase (1774–1826), son of Samuel Chase.
5. Samuel Chase, who was thawing out from his fall in the icy river, means here that "in a little" time, as he warmed up, he was perspirable, or able to perspire.
6. I.e., burnt brandy.
7. I.e., interposition.

***Philadelphia Gazette* August 12, 1800**

> On Saturday last, the Supreme Court of the United States commenced its session in this city. The indisposition of Judge Chase prevented the Court from proceeding to business on the first day of the term. Several important causes will be heard and determined in the course of the present week. . . . Judge Cushing (owing to indisposition) has not attended. . . .

Associate Justice William Paterson to Associate Justice William Cushing August 19, 1800— New Brunswick, New Jersey *(Robert Treat Paine Papers, Massachusetts Historial Society)*

> . . . Judge Chase, being indisposed, did not arrive at Philad^{a} till saturday, the 9^{h} of the month, when we made a court, and went through the business by friday afternoon of the following week.— . . .



The conclusion to be drawn from this collection of documents is that the Supreme Court justices were acutely aware of the importance of their official duties and made sincere efforts to meet their obligations. But the impediments Congress had placed in their way made it difficult for the early justices to carry out their duties in a way that added dignity and importance to the judicial branch. The justices' absence from Supreme Court and circuit court sessions, whether caused by illness, the hazards of travel, or additional tasks imposed on them by the president and Congress, undermined their effectiveness and hampered the development of the Court. Thus at the end of the first decade of the Court's existence, the justices, though faithfully discharging their duty to interpret the Constitution, had not yet molded the Supreme Court into the governmental institution of tremendous consequence that it is today.

Maeva Marcus is Visiting Professor of Law at Georgetown University Law Center. She and James R. Perry are editors of *The Documentary History of The Supreme Court of the United States, 1789–1800.* James M. Buchanan and Christine R. Jordan are associate editors, and Stephen L. Tull is assistant editor. Volume 1 of this multivolume series will be published by Columbia University Press in 1984.

WHAT DOES THE CONSTITUTION SAY ABOUT SEPARATION OF POWERS AND CHECKS AND BALANCES?

The lesson which follows has been designed for use in the high school classroom, in courses which teach American history and government. It is one of more than sixty lessons developed by Project '87 with a grant from the National Endowment for the Humanities. This lesson may be photocopied for classroom application with the attribution noted on page 1.

The complete book of ***Lessons on the United States Constitution*** will be published and distributed to high schools throughout the nation for use in conjunction with standard high school textbooks. The lessons were designed and developed by John J. Patrick of the Social Studies Development Center, Indiana University, and Richard Remy of the Citizenship Development Program, Ohio State University. Paul Finkelman of the University of Texas served as consulting historical editor.

Project '87 would like to hear of other curriculum materials on the Constitution developed for all grade levels, but especially pre-collegiate. We will consider publishing samples in this section of the magazine. Please contact ***this Constitution,*** 1527 New Hampshire Avenue, N.W., Washington, D.C. 20036. Attention: Educational materials.

Read each of the following hypothetical statements. Decide whether or not each statement describes a situation that is in accord with the words of the U.S. Constitution. *If so*, answer YES. *If not*, answer NO. Circle the correct answer under each statement.

Identify the number of the Article and Section or the Amendment to the Constitution which supports your answer. Write this information on the line below each item.

CLUE: Answers to these items can be found in Articles I, II and III.

1. The Chief Justice of the Supreme Court died. Thus, the Senate chose a replacement.

YES NO

____

2. The President passed a new federal law, which was needed, because Congress was not in session.

YES NO

____

3. The Omnibus Crime Bill passed both Houses of Congress. The bill has been on the President's desk for 15 days while Congress has been in session. Then the President vetoed the bill.

YES NO

____

4. The U.S. Supreme Court announced that it had established, by a unanimous vote of the Justices, a new federal appeals court to help with the large load of cases.

YES NO

____

5. Actions of the President that violate the law may lead to impeachment by the House of Representatives.

YES NO

____

6. Congress passed a law, which the President signed, setting 70 as a mandatory retirement age for Justices of the Supreme Court.

YES NO

---

7. It is the duty of the President to declare the punishment for citizens convicted of treason.

YES NO

---

8. Congress has the power to limit the President's use of federal money.

YES NO

---

9. The President signed a treaty with the head of an African nation. After approval by 2/3 of the Supreme Court, it went into effect.

YES NO

---

10. Congress may pass a law over the President's veto by a 2/3 vote of both Houses.

YES NO

LESSON PLAN AND NOTES FOR TEACHERS

What Does the Constitution Say About Separation of Powers and Checks and Balances?

Preview of Main Points

The purpose of this lesson is to increase students' knowledge of two related constitutional principles: (1) separation of powers and (2) checks and balances. In addition, students should become more familiar with certain parts of the Constitution that pertain to separation of powers and checks and balances.

Connection to Textbooks

This lesson can be used to reinforce American government textbook treatment of separation of powers and checks and balances. The lesson can be used to supplement American history textbook discussions of main principles of the Constitution, which usually follow treatments of the Constitutional Convention.

Objectives

Students are expected to:

1. demonstrate knowledge of the constitutional principles of separation of powers and checks and balances by responding correctly with a "YES" or "NO" answer to each item in this lesson;
2. support their responses to each item by listing the correct reference in the U.S. Constitution (Article and Section);
3. increase knowlege of certain parts of the Constitution that pertain directly to the principles of separation of powers and checks and balances;
4. practice skills in locating and comprehending information in the U.S. Constitution;
5. increase awareness of how the Constitution applies to the concerns of citizens.

Suggestions For Teaching The Lesson

Opening The Lesson

- Inform students of the main points of the lesson.
- Be certain that students understand the directions for the lesson.

Developing The Lesson

- Have students work individually or in small groups to complete the items in this exercise.
- You may wish to have different students report their answers to the items in this lesson. An alternative is to distribute copies of the answers, when appropriate, so that students can check their responses against the correct answers.

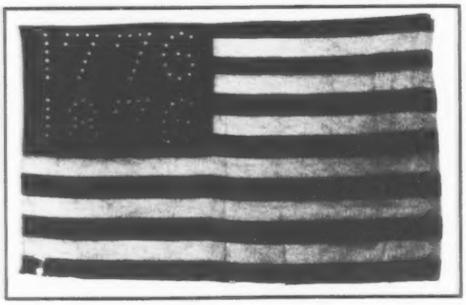
Concluding The Lesson

- Ask students to explain what each item in the exercise has to do with either separation of powers or checks and balances. By doing this, students can demonstrate comprehension of the ideas of separation of powers and checks and balances.
- You may wish to have students examine and discuss in more detail issues and questions associated with the items in this exercise.

Answers

1. NO, Article II, Section 2, Clause 2.
2. NO, Article I, Section 1.
3. NO, Article I, Section 7, Clause 2.
4. NO, Article III, Section 1.
5. YES, Article II, Section 4 (Also:
   Article I, Section 2, Clause 5).
6. NO, Article III, Section 1.
7. NO, Article III, Section 3.
8. YES, Article I, Section 7, Clause 1.
9. NO, Article II, Section 2, Clause 2.
10. YES, Article I, Section 7, Clause 2.

Bicentennial Gazette



Centennial flag. *Division of Political History, Smithsonian Institution, Washington, D.C.*

The Bicentennial of the Constitution in 1987 is only one in a long line of historic occasions Americans have celebrated. Historian Milton M. Klein describes some events which marked the Centennial and Sesquicentennial of the Declaration of Independence.

1876 marked the centennial of independence, and the use of the Big Birthday as spectacle and as booster of American achievements reached a high water mark in the great Philadelphia Exposition on 450 acres of Fairmount Park. The nation had fair warning of the mammoth caricature a few years earlier. Johann Strauss, the "Waltz King," had been paid $100,000 to come to Boston to conduct a gigantic concert to commemorate the centennial of the Battle of Bunker Hill. So huge was the giant assembly of musicians—there were 8,500 singers and a 1,500-piece orchestra—that it required 100 sub-conductors to lead them. The signal for beginning the "Blue Danube" was a cannon shot. All that Strauss remembered of the occasion was that "the noise was fantastic." Of the musical rendition he said that the best thing about it was the money he received for conducting it. The centennial of the Battles of Lexington and Concord degenerated into a planner's nightmare. Fifty thousand people crowded into the little town of Concord; a tent holding 6,000 was ready to received them. So massive was the press of humanity in the tent that the platform on which President Grant and the other dignitaries sat collapsed at the start of the services. Those who could not get into the tent kept warm on a frigid day by consuming all the liquor available in Concord and wandering about the town singing Civil War ballads—of which the favorite was "Saw My Leg Off Quick." Grant left by train the same day for the concurrent celebration at Lexington, but the tracks were snarled by a monumental traffic jam. It took a troop of horsemen to escort him into town by carriage.

At Philadelphia in 1876 a great Hall of Machinery displayed 8,000 mechanical devices all powered by a 40-foot high Corliss steam engine. It had taken sixty freight cars to transport it from Rhode Island to the fair grounds. Visitors viewed the new typewriter, telephone, pin-packing machine, reaper, refrigerator car, and elevator, but they were more intrigued by the Chinese exhibit of 6,000 silkworms, Germany's giant steel Krupp cannon, and a plaster cast of Washington ascending to Heaven on the back of an eagle. On the grounds, hawkers sold Centennial fans, doilies, aprons, plates, glasses, hats, scarves, soda pop, coffee, cigars, matches, and buckwheat cakes. When the exhibition opened on May 10, 100,000 visitors stormed the gates along with what one newspaper correspondent called—in a perfect malapropism—"an awful congregation of dignitaries." The guest of honor at this commemoration of the birth of the greatest republic in the world was Dom Pedro, the Emperor of Brazil. (The Emperor had a sense of humor. He and Grant started the great Corliss engine. When the Emperor was told how many revolutions per minute the engine generated, he quipped: "That beats our South American republics.") The Centennial March was especially composed for this American occasion by a German—Richard Wagner. On July 4, visitors heard a Centennial Hymn, especially commissioned; the composer was a Brazilian, Carlos Gomes.

Americans abroad added their own ludicrous touches to the Centennial. In Monrovia, Liberia, there was only one American resident in the city, the United States Minister. He observed July fourth by firing a 21-gun salute with a weapon borrowed from the Liberian government. In Honolulu, the United States Minister and his wife appeared at an anniversary dinner dressed as George and Martha Washington, with background music provided by Hawaiians in ancestral dress singing native songs.

The hoopla of the Centennial could not be equalled fifty years later when the nation celebrated the Sesquicentennial of American independence with another huge exposition at Philadelphia's League Island Park and the Navy Yard. But the exposition ran into trouble from the start. Churchmen protested the Sunday openings, France could not be persuaded to lend the Mona Lisa for display, and it rained for eighty-six of the fair's first 130 days. Sixteen nations sent exhibits; Germany contributed the largest group of midgets ever assembled in one place. But public interest continued to flag. A nation-wide bell-ringing ceremony planned for 11:11 a.m. on July fourth fizzled in confusion over whether standard or day-light-saving time was meant. In any case, the exposition could not compete for public favor with the luminaries of the silent-screen—Mary Pickford, Douglas Fairbanks, and Rudolph Valentino—or the heroes of the Golden Age of Sports—Knute Rockne and Red Grange on the gridiron, Helen Wills on the tennis court, Man 0' War on the turf, Gertrude Ederle swimming the English Channel, and Jack Dempsey and Gene Tunney in the ring. The championship boxing match that year was staged in Philadelphia in the hopes that it would draw some of the crowd to the fair grounds. But while over 100,000 persons paid almost $2,000,000 to see Tunney outbox the Manassa Mauler, they failed to bail out the exposition, which ended its six months' existence in bankruptcy.

Milton M. Klein, "Commemorating the American Revolution: The Bicentennial and its Predecessors," *New York History*, July, 1977, pp. 271-73.

The Bicentennial of American Independence: a look back

INDIANA HISTORICAL SOCIETY
315 West Ohio Street
Indianapolis, Indiana 46202

In observance of the bicentennial of the American Revolution, the Indiana Historical Society sponsored a series of symposia and lectures. A number of lectures given at a variety of conferences and workshops in 1972–73, took the theme of "1876, The Centennial Year." These papers, later published as a pamphlet by the Society, included: "Engines, Marbles, and Canvases, The Centennial Exposition of 1876," by Lillian B. Miller, Smithsonian Institution; "Seed Time of Modern Conflict: American Society at the Centennial," by Walter T. K. Nugent, Indiana University; "Art and Culture in the Centennial Summer of 1876," by H. Wayne Morgan, University of Oklahoma.

The first Bicentennial symposium was held at New Harmony, Indiana, May 16–17, 1975. The topic of this meeting was "Contest for Empire, 1500–1775." A second Bicentennial symposium was held at Vincennes, Indiana, May 14–25, 1976 with papers centered around the subject of "The French, the Indians, and George Rogers Clark in the Illinois Country." A third Bicentennial symposium took place at Purdue University, West Lafayette, Indiana, April 29–30, 1978 on the theme "This Land of Ours, the Acquisition and Disposition of the Public Domain." The final Bicentennial symposium was held at Fort Wayne, Indiana, April 24-26, 1981 on the subject of "Transportation and the Early Nation."

Five pamphlets which include the papers presented at these conferences are available from the Indiana Historical Society.

OREGON HISTORICAL SOCIETY
1230 S.W. Park Avenue
Portland, Oregon 97205
Contact: Elizabeth W. Buehler

The Oregon Historical Society made two major contributions to the 1975–76 Revolutionary bicentennial celebration. First, the Society researched, prepared, and staffed the *Bicentennial Express*, a rolling museum covering 10,000 years of Oregon history. The Bicentennial Express traveled the state for eight months in 1976. Second, the Society presented a series of "Brown-bag lunch-lectures" on the Bill of Rights. The series which lasted 16 weeks was held at the Historical Center, and provided noon-time lectures by speakers—teachers, judges, lawyers, religious leaders and writers—who discussed the Bill of Rights in its original context. The informal lectures were followed by discussions of the Bill of Rights and its application in modern times.

The National Museum of American History, Smithsonian Institution

"A Nation of Nations," still a major Smithsonian exhibit, had its genesis as a bicentennial project of the Museum of History and Technology (as the museum was then known). It includes more than five thousand prints, photographs, and original objects organized in four sections. The first, "People for a New Nation," begins with prehistoric Indian artifacts, and then explores the variety of cultures that appeared in the North American settlements prior to 1800. The second, "Old Ways in the New World," continues the ethnic theme, focusing on the material culture of the nineteenth century. Objects portray travel, work, art, religion, and symbols of status and prejudice. "Shared Experiences," the third section of the exhibit, introduces the theme of assimilation. The social and institutional forces that Americanize immigrants are dramatized by reconstructions of a public school room, an army barrack, a balloon-frame house. Exhibits about naturalization, politics, sports, work and entertainment emphasize that everyone here was expected to become an American. The final section, "A Nation Among Nations," examines America's give-and-take relationship with the rest of the world.

* * * *

Over 200 exhibits, including more then 30 international displays created by foreign nations in recognition of the Bicentennial, were circulated by the Smithsonian Institution Traveling Exhibition Service (SITES), in cooperation with the American Revolution Bicentennial Administration.

While the international exhibits were traditional in format—that is, designed for high-security institutions—the domestic ones generally consisted of movable self-contained panels that could be placed in schools, libraries, and other low-security areas. These displays contained reproductions of original documents and objects. Among the most popular was a 1975 collection of manuscripts of the American Revolution—a collection of letters and other documents with illustrations and interpretive text. Exhibits dealing with black history and the black presence in America also elicited a high degree of interest. The show on the contributions of black women in America continues to travel to museums around the country.

CONNECTICUT HISTORICAL COMMISSION

The American Revolution Bicentennial Commission of Connecticut sponsored and encouraged many activities, exhibits, and publications during the 1976 Revolutionary bicentennial. Every town in Connecticut participated in this celebration to some degree.

A series of 35 pamphlets edited by Professor Glenn Weaver of Trinity College, Hartford, Connecticut, contains the following issues:

Vol. I *Connecticut Joins the Revolution* by Thomas C. Barrow.
Vol. II *Connecticut in the Continental Congress* by Christopher Collier.
Vol. III *Connecticut's Revolutionary War Leaders* by North Callahan.
Vol. XII *Connecticut Signer: William Williams* by Bruce Stark.
Vol. XX *Connecticut Congressman: Samuel Huntington, 1731-1796* by Larry R. Gerlach.
Vol. XXI *Connecticut Society in the Revolutionary Era* by Jackson Turner Main.

Other volumes in the series range from colonial music and colonial literature through colonial economic conditions and work conditions. For additional titles and further information, contact the Connecticut Historical Commission, 59 South Prospect Street, Hartford, Connecticut 06106.

STATE OF CONNECTICUT
1776

1976 Bicentennial balloon. American Revolution Bicentennial Commission of Connecticut.

New Jersey

The New Jersey Historical Commission's Revolutionary Bicentennial efforts produced a written record of aspects of New Jersey Revolutionary life and made it usable and accessible to the people of New Jersey.

As a featured project, NJHC published twenty-six pamphlets dealing with New Jersey during the American Revolution. The series, which is suitable for secondary and college students, consists of concise and readable essays, each about thirty pages in length. In addition, the series includes two *Teachers' Guides*, one for elementary and one for secondary school teachers. These guides contain activity suggestions, indicate community resources, give bibliographies, and list non-book classroom aids. The scope of the material encompassed by this project is indicated by the titles:

The Press in Revolutionary New Jersey (Richard F. Hixson)
Morristown: A Crucible of the American Revolution (Bruce W. Stewart)
The New Jersey Soldier (Mark E. Lender)
New Jersey's Five Who Signed (John T. Cunningham)
New Jersey's Revolutionary Economy (James H. Levitt)
The Religious Issue in Revolutionary New Jersey (Edward J. Cody)
The Music of Eighteenth-Century New Jersey (Charles H. Kaufman)
Medicine in Revolutionary New Jersey (David L. Cowan)
William Franklin: New Jersey's Last Royal Governor (Larry R. Gerlach)
The Constitution of 1776 (Richard J. Connors)
New Jersey Society in the Revolutionary Era (Thomas J. Archdeacon)
Elian Boudinot (Donald W. Whisenhunt)
New Jersey's Whigs (Dennis P. Ryan)
New Jersey's Loyalists (Dennis P. Ryan)
William Livingston: New Jersey's First Governor (Carl E. Prince)
The Fine and Useful Arts in New Jersey, 1750-1800 (Suzanne Corlette)
Education in New Jersey in the Revolutionary Era (Douglas Sloan)

A complete list of pamphlets in this series can be obtained from the Commission's offices. The Commission also has a listing of its publications in print, and a listing of its out-of-print publications. Contact: The New Jersey Historical Commission, 113 West State Street, C.N. 520, Trenton, New Jersey 08625.

In addition to this series, the Commission published several related pamphlets. Among them are: *New Jersey in the American Revolution, 1763-1983: A Chronology* (1974, reprinted 1975); *New Jersey in the American Revolution, 1763-1783: A Documentary History* (1976); and *The Governors of New Jersey, 1664-1974: Biographical Essays* (1982).

The first two of five letterpress volumes of the Papers of William Livingston, the first Governor of the State of New Jersey (1776-1790), have also been published, another bicentennial project of the NJHC.

Beginning in 1973 the New Jersey Historical Commission held the first of four workshops designed to assist teachers in preparing materials about the role of New Jersey in the Revolution. These workshops have gone on to become annual events; they are now devoted to historical topics other than the Revolution. The 1982 Teachers' Workshop was entitled "From Many Lands We Came: Ethnic Groups and Oral History in New Jersey."

As a parallel activity, the Historical Commission offered a grant-in-aid program to assist teachers preparing classroom projects about New Jersey in the Revolution. This too became an annual grant program which can now be utilized for teaching any aspect of New Jersey history.

Finally, the New Jersey Historical Commission contributed to a major exhibition mounted jointly by it, the New Jersey Historical Society and the State Museum. "The Pulse of the People; New Jersey 1763-1789" presented artifacts and documents of the colonial period. A version of this exhibit traveled around the State for three years.

Hawaii

The Hawaii Bicentennial Commission sponsored many public celebrations and restoration projects. Commission funds also supported a number of books, pamphlets and films. They include the following:

Thomas Jefferson Still Lives: This publication sets forth the fundamental world view of Thomas Jefferson; it explores three basic influences on Jefferson's philosophy—Greek thought, Christian thought and scientific materialism. Authored by Professor Winfield Nagley, Department of Philosophy, University of Hawaii, the booklet was distributed through the University and the Commission.

Tools for Teaching American History: To assist teachers of American history, an inventory of published and audiovisual materials available in Hawaii has been prepared. It consists of highly selective annotated entries. The publication was distributed to schools and libraries, and was available through the Commission.

Pride in America/Hawaii: The National Retired Teachers Association, as part of its Pride in America Bicentennial program, collected stories, remembrances, anecdotes and photographs from the late eighteen-hundreds and early nineteen-hundreds and published them in book form.

Annotated Bibliography on Pacific Cultures: This publication makes available information on music, dance, crafts, art, and the general culture of Hawaii, Samoa, Tahiti, Tonga, Fiji and New Hebrides, to teachers, students, libraries, bookstores, and the general public. It cites 236 sources, most of them dealing with Hawaii, and includes 132 books, 91 recordings, 13 periodicals, maps, films and other audiovisual material. The publication was available at no charge and distributed through the Commission.

Books about Hawaii: A series of 14 pamphlets covered ancient Hawaiian culture, art, biography, children's books, crafts, economy, music and dance, history, language, folklore and mythology, literature, natural history, recreation and travel. Each book contains briefly annotated bibliographical entries of readily available printed matter on every aspect of the State. The pamphlets were distributed free of charge by the Commission.

Encyclopedia of Hawaii: This major Commission project is a complete reference book on the State of Hawaii. A single volume of approximately 1,000 pages, the book is illustrated and cross-referenced.

Hawaiian Language Newspapers: Dr. Rubellite Johnson researched, compiled, translated and published political and social essays, letters and editorials that appeared in some 100 separate Hawaiian language newspapers between the years 1830 and 1948. The result is an overview of the historical processes that took place during this transitional period.

Among the movies produced under the auspices of the Bicentennial Commission are:

Cable TV Feedback—Face the Issues: A series of one-hour shows dealing with current issues has been produced for viewing on cable television channels. The subject matter of the shows ranges from Women's Liberation to the opening of the Legislature to the Legal Aid Society. The programs are available to Hawaii Public Television as well as the Department of Education.

"In Pursuit of Democracy": Three half-hour television films seek to explore the way in which democracy in Hawaii has been developing through the contributions and struggles of the various ethnic groups that make up Hawaii. The films present school teachers, government office workers, professionals, blue collar workers, farmers and so forth on the job, at home, or at play, talking about their efforts and successes, their feelings and motives, and the lessons learned in bringing about a more just and democratic society in the Islands. The films are available for use in public and private high schools, church groups and community organizations, labor unions and business associations and for television.

Legal History/Land Tenure in Hawaii: The Hawaiian Coalition of Native Claims and its director, Mr. Gail Prejean, have produced a slide show presentation reflecting the legal history of land tenure in Hawaii. Reprints of the slides are available to schools and civic groups through the Hawaiian Coalition of Native Claims.

We the People: This is a film project dealing with the applicability of the Bill of Rights to the people of Hawaii. Eight 30-second and four 60-second public service announcements were produced for use on commercial and Hawaii public television. The subject matter for the announcements is based on actual Hawaiian experience, depicting the fundamental freedoms that the country cherishes in a Hawaiian setting. The public service spots are available through the American Civil Liberties Union.

One additional project developed for the '76 bicentennial should be noted in connection with the '87 bicentennial. Professor Theodore R. Becker, with the University of Hawaii School of Law, developed a radio show entitled "Making a Constitutional Revolution," a radio equivalent of a college level course. The objective of the course was to help the people of the state better understand the current controversies in American government in terms of traditional American Revolutionary and American government values, and to prepare them for the forthcoming state constitutional convention.

1976 Bicentennial medallion.
The Bicentennial Record of the State of Georgia, 1977.

Georgia

The Georgia Bicentennial Commission encouraged many celebrations, aided in historic preservations, and sponsored exhibits and publications. Among its educational programs were:

The Governor's Bicentennial Youth Congress: Outstanding high school seniors from all over the state gathered in Savannah in February 1976 to address the problems they face in the future and to suggest possible solutions. Students attended workshops and drafted a *Declaration for the Future*, which was later presented to the Georgia General Assembly.

Governor's Intern Program: This program allowed college students to earn credit toward graduation for work on Bicentennial projects sponsored by various approved agencies and committees.

Bicentennial Teaching Mini-Grants: Grants-in-aid were made available to Georgia teachers to stimulate interest in the Bicentennial in the public school system.

Discovery '76: This program of educational workshops fostered a sharing of ideas and instructional techniques and resources. As a further incentive to teachers to undertake worthwhile history projects in their schools, Discovery Grants, not in excess of $400 each, were made available.

Bicentennial Youth Debates: The BYD was a historical debate program sponsored by the Speech Communications Association and coordinated in Georgia through the Department of Management at the University of Georgia in Athens. Open to all high school seniors and college undergraduates, the program focused on questions about the values that underlie the American experience and encouraged participation from those never previously involved in academic debates.

Some of the publications sponsored by the Georgia Bicentennial Commission are of continuing interest. The *Revolutionary Georgia Pamphlets* are: "Revolutionary Background!" "The Stamp Act in Georgia," "Military History," "The Georgia Indian Frontier," "The Impact of the Revolution on Georgia's Economy," "Governor James Wright in Georgia," "The Negro in Revolutionary Georgia," "Georgia and the United States Constitution," "Political Changes in Revolutionary Georgia," "Loyalism in Revolutionary Georgia," "Social Change in Revolutionary Georgia," "Results of the Revolution and Independence in Georgia." These pamphlets may be obtained from: Administrative Services, Georgia Department of Archives and History, 330 Capitol Avenue, S.E., Atlanta, Georgia 30334.

Wisconsin

From its inception the Wisconsin American Revolution Bicentennial Commission believed that everything it undertook should be of state-wide significance and of lasting value. The Commission developed some unique programs, encouraged local communities to plan their own activities, and disbursed thousands of federal dollars as matching grants to qualified projects.

In addition to the celebratory events of the July 4th period, the Commission identified and supported several other activities:

"We the People. . .": Through this project the Commission sought to engage the people of the state in an assessment of whether the values of the Revolution had persisted and how well they serve both today and for the future. The project employed newspaper questionnaires printed throughout the state and a professional sampling of citizen attitudes. The "Wisconsin 2000" Conference at UW-Milwaukee was a key element of the program. The Commission published a report on the project's findings.

The Old Northwest in the American Revolution: An Anthology: In cooperation with Commissions from the states of Ohio, Indiana, and Illinois, the Wisconsin Commission assisted the State Historical Society of Wisconsin's publication of this work.

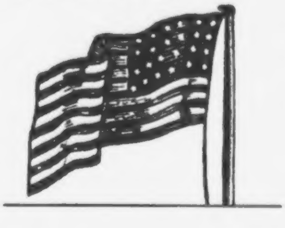
"Stockbridge-Munsee Traveling Exhibit: The Munsee tribe of patriot Indians who now live in Bowler, Wisconsin, and who fought in the Revolutionary War as allies of the colonists, prepared a graphic exhibit of their history. Done in a traditional long house format, the exhibit toured extensively throughout the state of Wisconsin.

Bicentennial Fellowships: In 1974, the Commission provided fellowships for Wisconsin high school teachers to attend a special University of Wisconsin-Madison seminar on the teaching of the American Revolution.

Historymobile: A special grant to the State Historical Society funded a summer 1976 tour of the traveling Historymobile exhibit "New World, New Nation, New State."

Wisconsin Heritage Project: The Commission wished to preserve the memories and voices of elderly citizens as a legacy of our heritage. The Commission supported community-based oral history programs throughout the state.

Newberry Library Symposium: A symposium "The American Indian and the American Revolution" was cosponsored by the Center for Indian Studies at the Newberry Library, Chicago and the Commissions of Ohio, Michigan, Illinois, and Wisconsin. Native Americans and scholars from Wisconsin received assistance to attend the symposium.



AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

The national headquarters of the AFL-CIO contributed to the 1976 Bicentennial of the American Revolution primarily through three endeavors: (1) The Working Americans Festival, (2) the Labor History Museum, and (3) the American Issues Forum. In addition, local unions sponsored many events and activities in their areas throughout the country.

The Working Americans Festival represented a major segment of the 1976 Festival of American Folklife, sponsored by the Smithsonian Institution in Washington, D.C. Every presentation focused on the worker and his or her skill rather than on the machinery or equipment. As a part of the '76 bicentennial, local demonstrations were developed along this successful format in cities such as Louisville, Boston, Minneapolis, Baltimore, Los Angeles, Richmond, and Philadelphia.

With the support of the AFL-CIO Education Department and funding from NEH, the Philadelphia Central Labor Council mounted a Labor History Exhibit in that city. The exhibit told the story of working men, women, and children through graphics, audio-visual and theater presentations and modern working demonstrations.

The American Issues Forum provided a master calendar of specific discussion topics keyed to the school year, September through May 1976. The AFL-CIO staff prepared a twenty-five-hundred-word essay from labor's point of view on each of the monthly topics which were collected in a pamphlet entitled *Unions in America*.

The Bicentennial of the Constitution: a look ahead

ARCHIVES and HISTORICAL SOCIETIES

NORTH CAROLINA DEPARTMENT OF CULTURAL RESOURCES

Raleigh, North Carolina
27611

The Division of Archives and History of the North Carolina Department of Cultural Resources is cooperating with North Carolina colleges, universities and historical organizations in order to ensure an appropriate celebration of the '87 bicentennial. More immediately, however, North Carolina is celebrating the 400th anniversary of the first English settlement in America on Roanoke Island, North Carolina. America's Four Hundredth Anniversary Committee and the American Quadricentennial Corporation have been created to coordinate and fund this celebration. Additional information about the 400th anniversary celebration and the exhibits and publications that will be associated with it are available from the Department's office in Raleigh.

WASHINGTON STATE ARCHIVES

Olympia, Washington 98504

The Washington State Archives and the Office of the Secretary of State are developing an extensive display depicting constitutional history and development in Washington State. The project is specifically designed to celebrate the State Constitution whose Centennial is in 1989, as well as the Bicentennial of the U.S. Constitution.

The State Constitution will be the centerpiece of the display; its development will, however, be traced through the U.S. Constitution as well as other charters of government. Materials created for this display will be used to develop a tapeslide show for school and other public presentations. A brochure will be developed to describe, in greater detail, the state's constitutional history.

THE ILLINOIS STATE HISTORICAL SOCIETY

Old State Capitol
Springfield, Illinois 62706
Contact: Olive S. Foster

The Illinois State Historical Society plans to participate in the bicentennial in the following ways:

Publications

a. Two of the publications regularly printed by the Historical Library will have special issues on the Constitution: *The Journal of the Illinois State Historical Society* (a scholarly quarterly), and *Illinois History: A Magazine for Teen-agers* (written by and for Illinois junior and senior high school students).

b. Newsletter of the Congress of Illinois Historical Societies and Museums (*CIHSM News*) will have articles on how to celebrate the event as well as a calendar of events listing what Illinois historical societies and museums are doing for the bicentennial.

Programs

a. The Society sponsors a yearly workshop for junior and senior high school teachers. In 1987 the workshop will deal with Illinois' role in the Northwest Territory as well as discussions on the U.S. Constitution.

b. A two-day yearly Illinois history symposium will have scholarly papers on the two above-mentioned topics.

c. The Society's CIHSM five regional workshops will touch on how to celebrate the bicentennial of both the Northwest Ordinance and the U.S. Constitution.

Special Observances

a. July 13, 1987, the Society will have a special observance for the Northwest Ordinance in the Old State Capitol.

b. On September 17, 1987, there will be another special observance in the Old State Capitol in honor of the U.S. Constitution.

THE CONNECTICUT HISTORICAL SOCIETY

1 Elizabeth Street
Hartford, Connecticut 06105
Contact: John W. Shannahan, Director

The Connecticut Historical Society intends to mount an exhibition on Connecticut's role in the Constitutional Convention in honor of the 1987 bicentennial celebration. The program will feature material on Roger Sherman, Oliver Wolcott, William S. Johnson and the other Connecticut delegates at the Convention who were strong supporters of the Constitutional concept. A biography of Jeremiah Wadsworth should also be published in time for the '87 commemoration.

MARYLAND HALL OF RECORDS

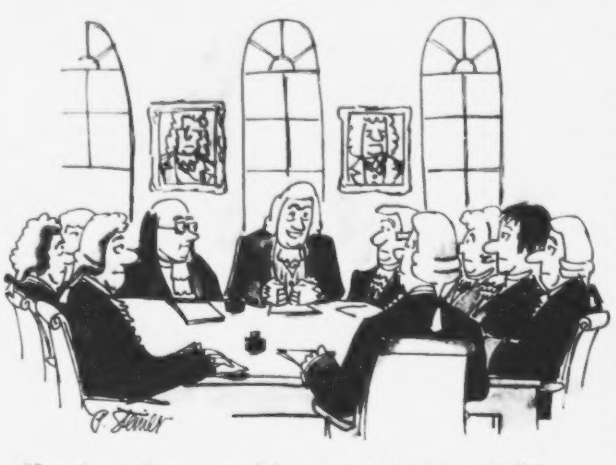
P.O. Box 828
Annapolis, Md. 21404

At the present time preparations are being made for festivities surrounding the anniversaries of Washington's resignation of his military commission from Congress, December 23, 1783 at Annapolis, and the ratification of the Treaty of Paris by Congress also at Annapolis, January 14, 1784.

The Hall of Records intends to have exhibits in the State House on the maps of Maryland, and another exhibit at Annapolis on those who were present in Congress December 23, 1783 to January 14, 1784.

The 350th Anniversary of Maryland will be celebrated on March 25, 1984 with a mass on St. Clement's Island. Further celebrations are planned for June, 1984 centering on St. Mary's City, capital of Maryland from 1634-1694.

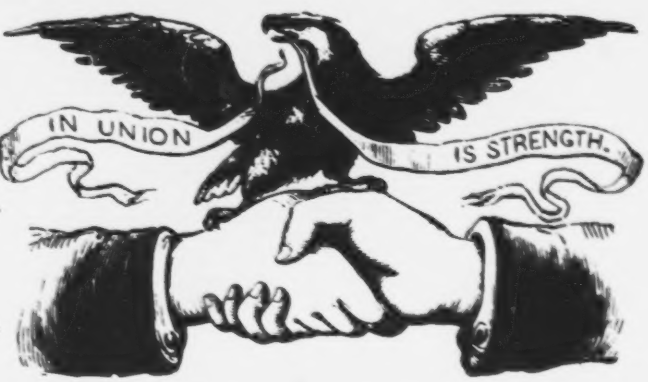
The Hall of Records will be developing plans for appropriate exhibits and publications in connection with the 1987 Bicentennial.



"Remember, gentlemen, we aren't here just to draft a constitution. We're here to draft the best damned constitution in the world."

Drawing by P. Steiner. © 1982, The New Yorker Magazine, Inc.

THE NATIONAL ENDOWMENT FOR THE HUMANITIES SPECIAL INITIATIVE FOR THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION



NEH Program Development Grants Awarded in 1983

American Enterprise Institute
1150 17th St. NW, Suite 1200
Washington, DC 20036
Robert A. Goldwin
"A Decade of Study of the Constitution"
$419,033

To support three annual conferences, three volumes of essays, and six televised public policy forums on the Constitution as the ultimate source of national political life.

American Political Science Association
1527 New Hampshire Ave. NW
Washington, DC 20036
Sheilah Mann
" 'this Constitution: A Bicentennial Chronicle' "
$389,780

To support publication of a quarterly magazine for the years 1984-86 directed to organizations and institutions with the potential for developing programs that promote public understanding and appreciation of the humanities and the Constitution.

Claremont Institute
480 N. Indian Hill Boulevard
Claremont, CA 91711
Ken Masugi
"A New Order of the Ages"
$303,579

To support two annual Constitutional Statesmanship lectures, two annual conferences, a Bicentennial Speakers Program for civic, social, professional, and educational organizations in the Claremont area, two library exhibits in Claremont, and radio programs based on the conferences and lectures for broadcast in southern California.

North Carolina State University
Dept. of Political Science and Public Administration
Raleigh, NC 27650
Abraham Holtzman
"The Constitution: Continuity and Conflict"
$240,596

To support development of five new programs on the Constitution for the Humanities Extension unit of the University for statewide public programming.

Public Research, Syndicated
480 N. Indian Hill Blvd.
Claremont, CA 91711
Larry P. Arnn
"The New Federalist Papers"
$431,376

To support syndication of 216 newspaper articles on the Bicentennial of the Constitution to four thousand local, college, and large metropolitan papers across the United States.

University of North Carolina at Chapel Hill
209 Abernethy Hall
Chapel Hill, NC 27514
Richard R. Schramm
"Church, State, and the First Amendment: A North Carolina Dialogue"
$248,346

To support two conferences, preparation of resource booklets, articles in state newspapers, public affairs television programs, and radio programs to heighten public understanding of the Constitution, especially the religion clauses of the First Amendment.

University of Virginia
Institute of Government
207 Minor Hall
Charlottesville, VA 22901
"The Constitution and Commonwealth: The Virginia Court Days Forum"
$205,000

To support public forums at twenty courthouses around the state and ten public television programs on persistent issues of constitutional governance.

Alaska Institute for Research and Public Service
429 D Street #306
Anchorage, Alaska 99501
"Approaching the American Constitution: 1787–1987"
$15,000

To support planning for an Alaskan conference/lecture series, a newspaper series, and thirteen radio programs recreating the debates in the Constitutional Convention.

STATE HUMANITIES COUNCILS UPDATE

DELAWARE HUMANITIES FORUM

2600 Pennsylvania Avenue
Wilmington, Delaware 19806
(302) 738-8491

The Delaware Humanities Forum is interested in supporting Bicentennial programs. For further information, contact the Forum office.

VERMONT COUNCIL ON THE HUMANITIES AND PUBLIC ISSUES

P.O. Box 58
Hyde Park, Vermont 05655–0058
(802) 888-3183

The Vermont Council has received a grant from the National Endowment for the Humanities to develop reading and discussion projects related to the U.S. Constitution in eighteen Vermont towns in 1984.This project was one of ten "Exemplary Awards" made by NEH Chairman William Bennett.

The first set of discussions began in January 1984. Each series consists of seven bi-weekly evening discussion groups at libraries in eight Vermont towns. The topics for the first three series of discussions are: Biographies from American History, 1750–1820, Vermont and the New Nation, 1760–1800, and The American Social Revolution, 1760–1800. Participants will read both literature about the Constitution, and original documents.

After the initial three series of discussions are completed, the Council will evaluate and modify the program. The next series will begin in the fall.

OKLAHOMA FOUNDATION FOR THE HUMANITIES

2809 NW Expressway, Suite 500
Oklahoma City, OK 73112
(405) 840-1721

Promotion of public humanities programs on the Bicentennial of the U.S. Constitution is a priority set by the Foundation's Board of Trustees more than a year ago. The first result of the initiative was a pilot summer institute for teachers on the Constitution, held this year in Norman, Oklahoma.

The Foundation continues to encourage proposals on various themes related to the Constitution or on specific events leading to creation of the Constitution, and it will consider proposals utilizing any format appropriate for public programming. Proposals are considered through the normal grant application process, with major project proposal deadlines on January 15, April 15, July 15, and October 15 of each year.

Guidelines and applications are available from the Foundation office on request.

Application Deadlines

Every division of the Endowment is seeking proposals on subjects appropriate to the Bicentennial of the Constitution. All applications should be submitted to the appropriate program.

The current deadlines for each program follow:

Program	*Deadline for Receipt of Applications*	*For Projects Beginning After*
DIVISION OF EDUCATION PROGRAMS		
Central Disciplines in Undergraduate Education		
Improving Introductory Courses	October 1, 1984	April 1985
Promoting Excellence in a Field	October 1, 1984	April 1985
Fostering Coherence throughout an Institution	October 1, 1984	April 1985
Humanities Instruction in Elementary and Secondary Schools		
Institutes for Teachers	May 15, 1984	January 1985
Institutes for Principals	May 15, 1984	January 1985
Collaborative Projects	May 15, 1984	January 1985
Planning Grants	May 15, 1984	January 1985
Exemplary Projects in Undergraduate and Graduate Education		
Institutes	May 15, 1984	January 1985
Teaching Materials	May 15, 1984	January 1985
Other Initiatives in Higher Education	May 15, 1984	January 1985
Humanities Programs for Nontraditional Learners	October 1, 1984	April 1985
DIVISION OF FELLOWSHIPS AND SEMINARS		
Fellowships for independent Study and Research	June 1, 1984	January 1, 1985
Fellowships for College Teachers	June 1, 1984	January 1, 1985
Summer Stipends for 1985	October 1, 1984	Summer 1985
DIVISION OF GENERAL PROGRAMS		
Humanities Projects in Media	July 30, 1984	April 1, 1985
Humanities Projects in Museums and Historical Organizations	April 30, 1984	January 1, 1985
Special Projects		
Program Development	August 6, 1984	April 1, 1985
Youth Projects	June 15, 1984	January 1, 1985
Younger Scholars Program	September 15, 1984	June 1, 1985
DIVISION OF RESEARCH PROGRAMS		
Basic Research Program		
Research Conferences	September 15, 1984	April 1, 1985
Humanities, Science and Technology NEH-NSF EVIST Projects (Preproposals required)	August 1, 1984	April 1, 1985
Reference Works Program		
Research Tools	October 1, 1984	July 1, 1985
Editions	October 1, 1984	July 1, 1985
Translations	July 1, 1984	April 1, 1985
Research Resources Program		
Access	June 1, 1984	April 1, 1985
Preservation	June 1, 1984	April 1, 1985
Publications	May 1, 1984	October 1, 1984
United States Newspaper Project	August 15, 1984	April 1, 1985
DIVISION OF STATE PROGRAMS		
Write or call state council offices for further information.		
OFFICE OF CHALLENGE GRANTS		
Challenge Grants	May 1, 1984	December 1, 1984
OFFICE OF PROGRAM AND POLICY STUDIES		
Planning and Assessment Studies		
Unsolicited proposals	September 1, 1984	April 1, 1985

For further information, contact the Endowment's Office of the Bicentennial at (202) 786-0305 or 786-0332.

PUBLICATIONS

THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800

United States Supreme Court
Washington, D.C. 20543
Contact: Maeva Marcus

The "Documentary History of the Supreme Court of the United States, 1789-1800" is a historical research project whose work will shed light on the early history of the nation's highest court. Jointly supported by the Supreme Court, the Supreme Court Historical Society, and the National Historical Publications and Records Commission, the Documentary History project will produce a multi-volume collection of court records, private papers, and other material relating to the Court's early history. Columbia University will publish the series.

The volumes produced by the Documentary History project will bring together and make accessible to scholars and lawyers much hitherto unpublished source material necessary for any examination of the period. In Volume One, for example, the complete administrative record of the Court will be published. Included will be not only the Court's fine minute book, but also the rough minutes and drafts which preceded entry in the fine minute book and which show the evolution of the Court's legal language. Also appearing for the first time in print will be the Court's docket book, a fragmentary docket, a Supreme Court formulary, and documents relating to the Court's bar. Finally, an extensive selection of correspondence and newspaper items will be published which shed light on the appointment of justices during the Court's first decade.

The next two volumes in the Documentary History series will be of particular interest to the Bicentenary celebration of the Constitution. Volume Two will present documents relating to the legislative history of the federal judiciary. What were the intentions of the founding fathers for the structure and function of the federal judiciary and how were these intentions modified by experience during the 1790s? The documents published in Volume Two will help to answer these questions. Volume Three will include documents pertaining to the justices on circuit. Most importantly, all extant grand jury charges delivered by the justices will be published. Sometimes similar to mini-courses in civics, these charges provide remarkable insight on contemporary perceptions of the new government, as well as on law and politics in the early national period.

Subsequent volumes will present detailed treatments of all Court actions between 1790 and 1800. In addition to case papers, the staff of the Documentary History project has collected correspondence, newspaper articles, pamphlets, and other miscellaneous documents relating to specific cases. Concluding the series will be documents touching on several issues: extrajudicial activities of the justices, random comments about the Court or the justices, plans for where the Court would meet, and the financial accounts of the Court.

Upon completion of the series, scholars and lawyers, for the first time, will have access to an incomparable collection of published documentation. This will facilitate a reappraisal of the role played by the pre-Marshall Court in shaping the destiny of the new nation.

THE HISTORICAL ATLAS OF POLITICAL PARTY REPRESENTATION IN THE UNITED STATES CONGRESS: 1789-1987

This Atlas will illustrate for the first time the geographical distribution of political parties represented in the United States Congress for each of the ninety-seven congresses. The centerpiece of this work will be color national-scale maps for each Congress, showing political party representation for every congressional district in the House and for every state in the Senate. The series of maps will illustrate the birth, growth, decline, and trends of congressional political parties for every two-year period in United States history.

The above publication will necessitate the first systematic research effort to identify the political party membership/affiliation, from a wide variety of sources, for every individual who ever served in the United States Congress. Often party membership/affiliation is ambiguous, particularly pre-1870 and for such items as local and state party labels, dual and fusion tickets, and minor party influence or dominance. Therefore, a national panel of contributors is being assembled for the accurate evaluation of the party membership/affiliation of individual representatives and senators. It is presently envisioned that these researchers will be either specialists on particular areas, eras, or parties. Specific examples of expertise might include: New York City 1820-1840, the state of Kansas, the midwest during the Populist era, the Jefferson Congresses, the 58th Congress, the Greenback Party, the Republican Party 1912-1920, or the Free Soil Whig movement. All contributors will be acknowledged. Present research indicates most contributors will be responsible for identifying only a few key individuals. Those researchers making significant contributions will be formally recognized on the title page of the atlas.

The Historical Atlas of Political Party Representation in the United States Congress, 1789-1987 will be published as Volume II of a series of works titled the "United States Congress Bicentennial Atlas Project." Its development is supported by funds from the National Endowment for the Humanities. The initial volume of this series, *The Historical Atlas of United States Congressional Districts: 1789-1983*, was published in December 1982 by The Free Press division of Macmillan. Any individual wishing to participate in this project please write or telephone (304) 293-5603, Kenneth C. Martis, Associate Professor of Geography, Department of Geology and Geography, West Virginia University, Morgantown, WV 26506.

DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS

National Historical Publications and Records Commission and the George Washington University
Washington, D.C. 20052
Contact: Linda Grant DePauw

The Documentary History of the 1st Federal Congress project began in 1966 under the sponsorship of the National Historical Publications

ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION

The *Encyclopedia of the American Constitution* will be published in 1987 as a scholarly enterprise to commemorate the Bicentennial of the Constitutional Convention. Production of the manuscript began in 1979 and will end by the close of 1985 for publication in early 1987 by Macmillan Publishing Co., Inc., in four volumes consisting of 1,500,000 words. The *Encyclopedia* will contain about two thousand alphabetically arranged articles covering the history and present state of American constitutional law, ranging from abolitionism to John Peter Zenger's case. Cross-references will lead the reader to related entries. The standard length of a major topic, such as the First Amendment, is six thousand words, but each principal component of the Amendment—*e.g.* freedom of the press, religious liberty, separation of church and state—will also be the subject of a six thousand word article. Minor topics will receive briefer treatment.

The *Encyclopedia* will bridge three disciplines: political science, history, and law. Of the 1,500,000 words, over 60 percent of the *Encyclopedia* goes to articles that are either conceptual or historical in character, such as the First Amendment, search and seizure, the Marshall Court, the Commerce Clause, equal protection of the laws, the Supremacy Clause, the Burger Court, colonial constitutional history to 1776, and the right against self-incrimination. The remaining 40 percent of the *Encyclopedia* is divided into articles on judicial decisions, public enactments, and individuals of constitutional significance.

The editors, who are writing 20 percent of the Encyclopedia, enlisted the services of the most distinguished specialists in the country to write the remainder. They began by inviting twenty-five of the nations's leading academic lawyers in the field of constitutional law to write major articles and received acceptances from twenty-four: Paul A. Freud, Archibald Cox, Frank Michelman, and Laurence Tribe of Harvard; Dean Gerhart Casper, Philip Kurland, and David Currie of Chicago; Dean Terrance Sandalow, Francis Allen, and Yale Kamisar of Michigan; Dean Jesse Choper, Sanford Kadish of Berkeley; Gerald Gunther and Paul Brest of Stanford; Herbert Wechsler and Louis Henkin of Columbia; Justice Hans Linde of the Oregon Supreme Court; Willard Hurst of Wisconsin; Norman Dorsen of New York University; Robert Stern (retired); and Judge Louis Pollack of the United States District Court in Philadelphia.

The editors recruited a total of 230 contributors and a sixteen-member editorial board, all of whom, except Justice William J. Brennan of the Supreme Court, are contributors. Of the 230 contributors, 140 are from the legal profession, and the remainder are split evenly between historians and political scientists. The contributors include six Pulitzer Prize winners, eight federal judges, eleven law school deans and seven former deans, two past presidents of the American Political Science Association, and such nationally known authors as Raoul Berger, Walter Berns, Robert H. Bork, Henry Steele Commager, Don Fehrenbacher, Erwin Griswold, Harold M. Hyman, Shirley Hufstedler, Samuel P. Huntington, Harry V. Jaffa, Anthony Lewis, Alpheus T. Mason, Harvey Mansfield, Edmund S. Morgan, Paul Murphy, Walter F. Murphy, Merrill D. Peterson, John P. Roche, W.W. Rostow, Arthur M. Schlesinger Jr., Telford Taylor, and C. Vann Woodward.

For further information, contact the editor, Leonard W. Levy, Depart. of History, Claremont Graduate School, Claremont, CA 91711.

Commission and the George Washington University. The project will publish the records relating to that Congress, including: the official records of the Congress, diaries, notes, reports, and other documents that are widely scattered among collections of personal papers and archives; and contemporary publications, official and unofficial, including newspaper articles, pamphlets, broadsides, and other items.

Johns Hopkins University Press will publish the projected 18-volume series. Volume I, the *Senate Legislative Journal*, was issued on July 4, 1972. Volume II, *Senate Legislative Journal and Related Documents*, and Volume III, *House Journal*, have been published subsequently. The four volumes currently in preparation will contain histories of all legislation considered in the First Congress (Volumes IV and V), petitions and other official documents (Volume VI), and the journal of William Maclay (Volume VII).

PUBLIC RESEARCH, SYNDICATED

480 N. Indian Hill
Blvd, Suite 2
Claremont, California 91711
(714) 621-5831

Public Research, Syndicated, of Claremont, California has received a grant from the National Endowment for the Humanities for a series of 216 newspaper articles to commemorate the Bicentennial of the U.S. Constitution. The series, called *The New Federalist Papers*, will be distributed to four thousand newspapers across the country.

The New Federalist Papers will be written mainly by scholars in the field of constitutional law, political science and American history. The essays will be suitably short (500–1000 words), and most will be accompanied by artwork. They will be distributed every two weeks to community newspapers, and weekly to metropolitan daily papers beginning in January.

The purpose of the series is to increase public understanding of the Constitution. According to Thomas B. Silver, President of PRS, it will commemorate the Bicentennial anniversaries of major events, explore the philosophical foundations of the Constitution, and describe the Constitution's major features.

Managing Editor J. Jackson Barlow stressed the project's attempt to create a link between scholarly debate over the meaning of the Constitution and public discussion of the principles and practice of American democracy. "The strictly legal sense of the word 'constitution' dominates discussion and interpretation of our Constitution today," Barlow said. "The study of constitutionalism in the narrow sense is not by itself an adequate way to commemorate the Bicentennial. The Bicentennial is an occasion to celebrate the formation of America and of the American people."

Among the project's board of editorial advisers are several scholars widely recognized for their work on the Constitution. Its six members are Leonard W. Levy of Claremont Graduate School, Don E. Fehrenbacher of Stanford University, Francis Canavan, S.J., of Fordham University, Abigail Thernstrom of the Twentieth Century Fund, Suzanne Garment of the *Wall Street Journal*, and Philip B. Kurland of the University of Chicago.

Public Research, Syndicated, founded in 1978, supplies op-ed and feature articles to more than two thousand newspapers nationwide. Most of its authors are scholars in political science, history, and the humanities.

ORGANIZATIONS and INSTITUTIONS

CENTER FOR THE STUDY OF THE CONSTITUTION

133 W. High Street—P.O. Box 987
Carlisle, Pennsylvania 17013

The Center for the Study of the Constitution is a private, non-profit organization located in Carlisle, Pennsylvania. The purpose of the Center is the study of the Constitution of the United States and its influence on the development of American politics and political thought. The goal of the Center is to elevate the discussion of politics and political thought in America to a higher plane by sponsoring programs and projects which focus on the Constitution and which, thereby, will help us to understand our political situation.

An important aspect of the work of the Center is providing a mechanism through which the general public can be better informed regarding the continuing importance of the Constitution as the framework within which American government and politics operate. All programs sponsored by the Center are open to the public and the publications of the Center are designed to attract a wide readership rather than appealing to a select society of scholars.

In October, 1983, the Center sponsored a conference on "Statesmanship and the Constitution." Speakers included James Ceaser, University of Virginia, on "Statesmanship, rhetoric and the Constitution," Ralph Ketcham, Syracuse University on "Statesmanship and public opinion," Harry Clor, Kenyon College on "Judicial statesmanship and the Constitution," and George Friedman, Dickinson College, on "Politics and the limits of statesmanship."

THE JEFFERSON FOUNDATION

P.O. Box 33108, Farragut Station
Washington, D.C. 20033
(202) 466-2311
Contact: Alice O'Connor

Hoping to generate some of the same enthusiasm and lively debate that characterized the Virginia ratifying convention of 1788, the Jefferson Foundation and the College of William and Mary assembled 150 delegates from March 16–18 in Williamsburg, Virginia for the Virginia Jefferson Meeting on the Constitution.It was the first in a state-by-state series, culminating with the celebration of the Constitution's Bicentennial. The purpose of the Jefferson Meetings is to allow citizens to examine and reassess the institutions of American government.

The agenda was set by the delegates themselves, with discussion restricted to issues relating to the structural reform of the federal government. Among the issues examined were: a single six-year term for the president; campaign contribution limits by constitutional amendment; direct election of the president and electoral college reform; longer terms for members of the House of Representatives; terms of office and compulsory retirement for Supreme Court and federal justices; and the national initiative (enabling the people to initiate federal legislation by petitioning the Congress).

The Virginia Jefferson Meeting was videotaped to be produced as an educational resource for distribution to institutions and groups all over Virginia.Regular newsletters will keep former delegates abreast of the reform exchange at all levels. The Foundation hopes that the Virginia Jefferson Meeting on the Constitution is only the beginning of a continuing national dialogue addressing such critical issues.

Any citizen of Virginia was eligible to apply for selection as one of the 150 delegates participating in the meeting. Delegates were guests of the Jefferson Foundation and were housed in the colonial Williamsburg Lodge, with meetings at The College of William and Mary nearby. For information and application forms for meetings in other states, contact the Foundation at the above address.

INSTITUTE OF EARLY AMERICAN HISTORY AND CULTURE SPONSORED JOINTLY BY THE COLLEGE OF WILLIAM AND MARY AND COLONIAL WILLIAMSBURG, INCORPORATED

Post Office Box 220
Williamsburg, Virginia 23187
Contact: Norman Fiering

The Institute of Early American History and Culture is planning three major projects to commemorate the bicentennial of the U.S. Constitution. First, it is collaborating with the American Philosophical Society and the Philadelphia Center for Early American Studies in sponsoring a conference to be held in October of 1984 with the theme of "The Creation of the American Constitution." Garry Wills and Gordon Wood will be two of the many prominent speakers featured at this three-day event.

The second Institute effort will be the publication of a book series: "Bicentennial Studies on the Constitution and Early American Law and Government." The first volume of this series is to be *Presidential Leadership in a New Republic: American Conceptions of Executive Power, 1600-1837* authored by Ralph Katcher. The second volume, by Stephen Botine, is titled *"Liberty and Property, With Oppression": The Social Origins of Early American Law.*

Finally, in 1987, the Institute of Early American History will sponsor a thematic issue of the *William and Mary Quarterly* devoted to the Constitution. An invitation has been offered to scholars to submit manuscripts for this edition no later than the end of 1985.

Although no definite focus is required, prospective authors may wish to entertain the question "What difference did the Constitution make to . . . (what the authors specific interest is)?" It is hoped that the contributions will range across the fields of politics, law, social and economic history, ideology, iconography, and so forth, and range into the early nineteenth century.

NATIONAL ARCHIVES VOLUNTEERS CONSTITUTION STUDY GROUP

National Archives Building
Pennsylvania Avenue at Eighth Street, N.W.
Washington, D.C. 20408
(202) 523-3183
Contact: Ralph S. Pollock

With the support of the D.C. Community Humanities Council, the National Archives Volunteers have instituted a program of monthly lectures on the Constitution. The speakers are Edwin M. Yoder, a journalist, on "The state of the Constitution" (January 18), Joseph B. Gorman and Thomas M. Durbin, Congressional Research Service, on "American political parties and the Constitution" (February 15), Maeva Marcus, Supreme Court Documentary History Project, on "The Supreme Court: the first ten years" (March 21), R. Gordon Hoxie, Center for the Study of the Presidency, on "The Constitution and the presidency: evolution of the executive" (April 18), Virginia Purdy, National Archives, on "Women and the Constitution" (May 16), and Herman Belz, University of Maryland, on "The Civil War: crisis of the Constitution" (June 20). All meetings are held at noon in room 105 of the National Archives Building; there is no admission charge. In addition, the Study Group has published a pamphlet containing the text of the Constitution. It is available to persons who attend the lectures.

CENTER FOR THE HISTORY OF BRITISH POLITICAL THOUGHT FOLGER INSTITUTE OF RENAISSANCE AND EIGHTEENTH-CENTURY STUDIES

Folger Shakespeare Library
201 East Capitol Street, S.E.
Washington, D.C. 20003
(202) 544-4600
Contact: Lena Cowen Orlin

The principal mission of the Center is to provide a locus for research and instruction in the field of British political thought, and to offer a setting within which a series of ongoing academic programs and publications can be nurtured and carried forward. In recognition of the ties between American revolutionary political ideology and British political thought, the Center will be offering several programs pertinent to the bicentennial of the United States Constitution. In January, 1984, the Center hosted a conference entitled "The Treaty of Paris in a Changing States' System," and from February through April, Professor Gordon Schochet of Rutgers University is offering a seminar entitled "From Bosworth to Yorktown: the Development of British Political Thought from Henry VII through the American Revolution." Additional conferences and seminars are planned. The Center welcomes contacts from interested scholars.

"Cyclorama of American history," *section of a mural on the walls of the Dahl Fine Arts Museum, Rapid City, S.D. S.D. State Historical Society.*

THE NATIONAL ASSOCIATION OF NEGRO BUSINESS AND PROFESSIONAL WOMEN'S CLUBS, INC.

1806 New Hampshire Ave., N.W.
Washington, D.C. 20009
(202) 483-4206

The tenative plans of the National Association of Negro Business and Professional Women's Clubs, Inc. for the '87 bicentennial of the Constitution include drawing upon the Smithsonian exhibit, "Black Women: Achievement against the Odds," and updating it by including some of the Association's currently active members. This exhibit will be used in conjunction with six regional seminars titled "Does the Constitution Protect Black Women Today?" By focusing on this question and looking at how laws have helped or impeded the progress of black women, it is hoped that conclusions may be drawn about what legal actions are now necessary.

These six seminars will be held in each of the Association's six Districts and will involve all of the clubs in each District. The seminars will climax at the Association's national convention with a special program, and with the publication of the seminar findings.

JOINT CENTER FOR POLITICAL STUDIES, INC.

Suite 400
1301 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 626-3500

For the bicentennial of the Constitution, the Joint Center plans to publish a volume that will trace the process by which blacks in America have gradually moved towards the attainment of full and equal citizenship rights. A day-long seminar based on the research of the proposed work is also contemplated.

Consideration is being given as well to the production of a multi-media educational kit on the black members of Congress. The kit will contain slides, a cassette recording, posters or a booklet of profiles and a bibliography. It will be designed to supplement a secondary school reader which the Joint Center plans to publish in early 1984 on black representatives in the U.S. Congress from 1879-1982. The forthcoming work is the product of a research project that the Joint Center conducted in 1977 under a grant from the American Revolution Bicentennial Administration to document the background, careers and contributions of black Congresspersons.

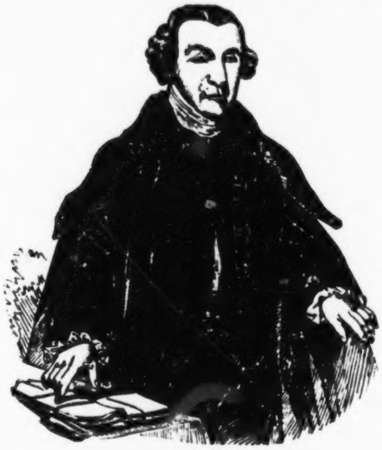
DECISION AT RICHMOND: JUNE 1788

Virginia's decision to ratify the new Constitution was crucial to its success. Yet, ratification did not appear easy to come by. "Decision at Richmond: June 1788," a play in three acts by Robert O. Byrd, attempts to capture the significance and drama of the Virginia ratification convention. The dialogue of the play is drawn directly from the debates in Richmond.

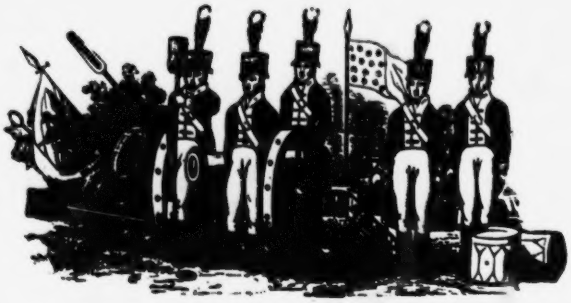
A prologue sets the scene: eight states had ratified by the time the Virginia convention met. Only one more state was needed to adopt the Constitution. New York's vote hinged on the decision by Virginia. It seemed unlikely that the union could succeed without these two states.

During the 23 days the Virginia convention sat, some dozen delegates occupied center stage, among them two future presidents— James Madison and James Monroe, future chief justice John Marshall, Light Horse Harry Lee (father of Robert E. Lee), George Mason and Patrick Henry, who were the major leaders of the opposition to ratification. These luminaries and others brilliantly addressed the perennial issues of government: the balance between liberty and order, between equality and freedom. Patrick Henry painted in vivid and somber hues the alleged result of turning over to the national government the power of both "the purse and the sword." Other issues drew attention as well: the economic development of the new nation, the abuses and uses of standing armies, problems of representation, the inherent expansiveness of power, the efficacy of "checks and balances," taxation, the danger of tyrannous majorities. All are still relevant to the contemporary scene.

"Decision at Richmond" is suitable for use in Bicentennial festivities. For further information, contact Robert O. Byrd at 34 Oxford Street, Richmond Hill, Ontario, Canada L4C 4L5.



Patrick Henry.



THE UNITED STATES CAPITOL HISTORICAL SOCIETY

200 Maryland Avenue, N.E.
Washington, D.C. 20002

The United States Capitol Historical Society was established in 1962 to record and interpret the history of the United States Capitol. In 1978 the Society initiated an annual historical symposia series designed to create interest in the 1987 bicentennial of the U.S. Constitution. The symposia are scheduled to continue through 1990; each conference is devoted to an examination of an important aspect of the American Revolutionary Era, 1763-1789.

The format of the series consists of three components. First, there is the symposium itself, a professional conference, held in Washington, D.C. every March, at which historians present scholarly papers. Second, a high-school program is designed to foster an interest in and appreciation for the study and teaching of history in the public schools. Third, the proceedings of each of the annual meetings are published for the Society by the University Press of Virginia.

The March professional meetings of the society have been and are to be arranged around the following topics: 1978: "Diplomacy and Revolution: The Franco-American Alliance of 1778;" 1979: "Sovereign States in an Age of Uncertainty;" 1980: "Slavery in the Age of the American Revolution;" 1981: "Arms and Independence: The Military Character of the American Revolution;" 1982: "An Uncivil War: The Southern Backcountry during the American Revolution;" 1983: "Peace and Peacemakers: The Treaty of 1783;" 1984: "The Economy of Early America: The Revolutionary Period, 1763-1789;" 1985: "Women in the Age of the American Revolution;" 1986: "Arts and Letters: Cultural Life during the American Revolution;" 1987: "James Madison and the Philosophy of the Constitution;" 1988: "The American Revolution as a Social Movement;" 1989: "Ratification and the First Election;" and 1990: "Launching the 'Extended Republic:' The Beginnings of the Federal Government."

The publication program of the Society prints monographs which are derived from the material presented at the symposia. In general, publication can be expected approximately two years following the date of the conference.

The society also publishes a calendar, "We the People," which includes a historical notation for each date of an event that occurred two hundred years earlier. More information about the calendar, or about other aspects of the Society's programs, may be obtained from the Society's Washington office.

Federal Bicentennial Agenda

Independence National Park Prepares for the Bicentennial

As the site of the Constitutional Convention, Independence National Historical Park and the City of Philadelphia will be major focal points for the Bicentennial commemoration. Accordingly, the Park staff and the Friends of Independence National Historical Park are now formulating plans for 1987. A research team has been established to study the Convention, the delegates, and the history of the Constitution, and to provide information to the Park staff, the general public and scholars.

There will be at least three key attractions during the Bicentennial. One will be an exhibit located at the Second Bank of the United States which will feature documents, portraits, and objects that belonged to the delegates or that were associated with the Convention or the ratifying process. This exhibit will be sponsored by the Park, the Friends of Independence National Historical Park, the American Philosophical Society, the Historical Society of Pennsylvania, and the Library Company of Philadelphia. A second exhibit will be on display at the Visitor Center and will use modern technology to allow visitors to engage in simulated decision-making on constitutional questions that faced the Convention delegates, such as separation of powers and representation of states in the national legislature, and to see how their choices coincide with those of the actual delegates. Other parts of the exhibit will explain various sections of the Constitution and its interpretation over two hundred years. Finally, as always, visitors will be able to see the Assembly Room in Independence Hall (the State House of Pennsylvania in 1787), where the Constitutional Convention formulated the document that has survived for more than two hundred years.

The research team will develop several print aids for Bicentennial visitors and for scholars and other interested parties across the nation. Among the most ambitious is the preparation of a computerized bibiliography including thousands of books and articles, court decisions, and manuscript material on the Constitution and the Convention. In addition, the research team will compile a daybook which will include daily entries about the Convention and activities in Philadelphia and the nation. The team will also research and verify the accuracy of information presented in the exhibits and by the interpreters of the exhibits during the Bicentennial.

If you or your organization is conducting research or working on any project dealing with the Constitution or the Constitutional Convention, the Park would like to be informed. For more information about the Bicentennial at the Park, write or phone: Division of History and Historical Architecture, Independence National Historical Park, 313 Walnut Street, Philadelphia, PA 19106; (215) 597-6106 (6107).

Earliest known photograph of the U.S. Capitol, showing the original dome of the Capitol. ***From a daguerreotype by John Plumbe, Jr., 1846. Library of Congress.***

HOUSE OF REPRESENTATIVES APPOINTS BICENTENNIAL STAFF

On October 1, 1983, Dr. Raymond W. Smock, formerly a coeditor of the Booker T. Washington Papers, assumed the position of Historian in the Office for the Bicentennial created in December, 1982, by the United States House of Representatives. He was joined on December 1 by James T. Currie, who is Associate Historian, and Cynthia Pease Miller, Assistant Historian. Dr. Currie came to the Office from the Department of Education, and Ms. Miller from the Office of the Architect of the Capitol.

The Office has already formulated an extensive preliminary program to commemorate the Bicentennial of the House of Representatives. Proposals include: the publication of an anniversary edition of the Biographical Directory of the American Congress (last published in 1971); the preparation of a short, illustrated, history of the House; historical exhibits, located in the Capitol and designed to tour outside it; the compilation of a guide to manuscript collections of former members of the House; the initiation of a oral history interview program; the creation of a newsletter; and the development of a film strip for elementary schools.

The Office is interested in hearing from the public with suggestions for other commemorative activities. Write to: Office for the Bicentennial, U.S. House of Representatives, Washington, D.C. 20515.

Congress Establishes Federal Bicentennial Commission

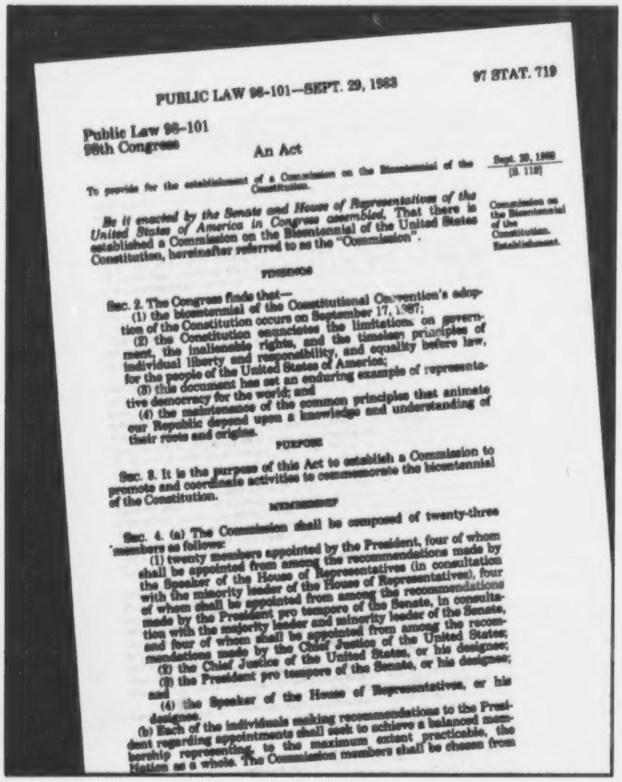
The legislation stipulates that the Commission will undertake the following duties: plan and develop appropriate activities for the federal government to implement; encourage private organizations, and state and local governments to organize events; coordinate activities throughout the states; and serve as a clearinghouse about Bicentennial programs.

In these undertakings, Congress instructed the Commission to give "due consideration" to several aspects of the commemoration, including: the historical setting in which the Constitution was created; the contribution of diverse ethnic and racial groups; the relationship of the three branches of government; citizenship education; the diverse legal and philosophical views regarding the Constitution; the need for reflection and understanding of the document by the public; the need for new educational materials; and the significance of the Constitution to other nations. Congress also directed the Commission to work with both private organizations and government agencies, and to delegate authority to state advisory commissions.

The Commission will submit a comprehensive report by October of 1985, with specific recommendations for the Bicentennial program. It will terminate on December 31, 1989. The Act authorizes an appropriation of $300,000 for 1984, and "such sums as may be necessary" for subsequent years. As of January 15, no commission members had yet been named.

On September 29, 1983, President Reagan signed legislation, P.L. 98–101, to create a Commission on the Bicentennial of the United States Constitution with a mandate "to promote and coordinate activities" for the Constitution's commemoration.

The Commission is to be composed of twenty-three members, including the Speaker of the House of Representatives, the President pro temp of the Senate and the Chief Justice (or their designees). The President will appoint the additional twenty members, twelve from among recommendations by the three statuatory members.The President will designate the chair. According to the legislation, all appointees should have demonstrated "scholarship, a strong sense of public service, and expertise in the learned professions." Members will serve for the life of the Commission.



PUBLIC LAW 98-101—SEPT. 29, 1983 97 STAT. 719

Public Law 98-101
98th Congress

An Act

To provide for the establishment of a Commission on the Bicentennial of the Constitution.

Sept. 29, 1983
[S. 118]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is established a Commission on the Bicentennial of the United States Constitution, hereinafter referred to as the "Commission".

Commission on the Bicentennial of the Constitution. Establishment.

FINDINGS

Sec. 2. The Congress finds that—
(1) the bicentennial of the Constitutional Convention's adop-
tion of the Constitution occurs on September 17, 1987;
(2) the Constitution enunciates the limitations on govern-
ment, the inalienable rights, and the timeless principles of
individual liberty and responsibility, and equality before law,
for the people of the United States of America;
(3) this document has set an enduring example of representa-
tive democracy for the world; and
(4) the maintenance of the common principles that animate
our Republic depend upon a knowledge and understanding of
their roots and origins.

PURPOSE

Sec. 3. It is the purpose of this Act to establish a Commission to
promote and coordinate activities to commemorate the bicentennial
of the Constitution.

MEMBERSHIP

Sec. 4. (a) The Commission shall be composed of twenty-three
members as follows:
(1) twenty members appointed by the President, four of whom
shall be appointed from among the recommendations made by
the Speaker of the House of Representatives (in consultation
with the minority leader of the House of Representatives), four
of whom shall be appointed from among the recommendations
made by the President pro tempore of the Senate, in consulta-
tion with the majority leader and minority leader of the Senate,
and four of whom shall be appointed from among the recom-
mendations made by the Chief Justice of the United States;
(2) the Chief Justice of the United States, or his designee;
(3) the President pro tempore of the Senate, or his designee;
and
(4) the Speaker of the House of Representatives, or his
designee.
(b) Each of the individuals making recommendations to the Presi-
dent regarding appointments shall seek to achieve a balanced mem-
bership representing, to the maximum extent practicable, the
Nation as a whole. The Commission members shall be chosen from

Project '87

Project '87 would like to know about events being planned for the Bicentennial of the United States Constitution, which we will report on in ***this Constitution.*** Please send notices to:

this Constitution
1527 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Photographs and camera-ready art of logos, posters, etc. are welcome and will be returned.

SUBSCRIPTION INFORMATION

THE UNION AND THE CONSTITUTION FOREVER.

The National Endowment for the Humanities is underwriting the publication of ***this Constitution*** as a quarterly magazine so that it may be distributed free to institutions planning Bicentennial programs. Such institutions may write and ask to be placed on the free mailing list. Institutions wishing to receive more than one copy may do so by subscribing for additional copies. Individuals also must subscribe. Subscription rates are listed below. Each issue of the magazine will be available for purchase at bulk rate.

Individuals	$10.00 per year (4 issues)
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In order to subscribe, or to order in quantity, please fill out the form on this page and return it, with your check, to: **Project '87, 1527 New Hampshire Avenue, N.W., Washington, D.C. 20036.** We must request that **all orders be pre-paid.** If you have already received the magazine, please include a photocopy of the mailing label with orders or changes of address.

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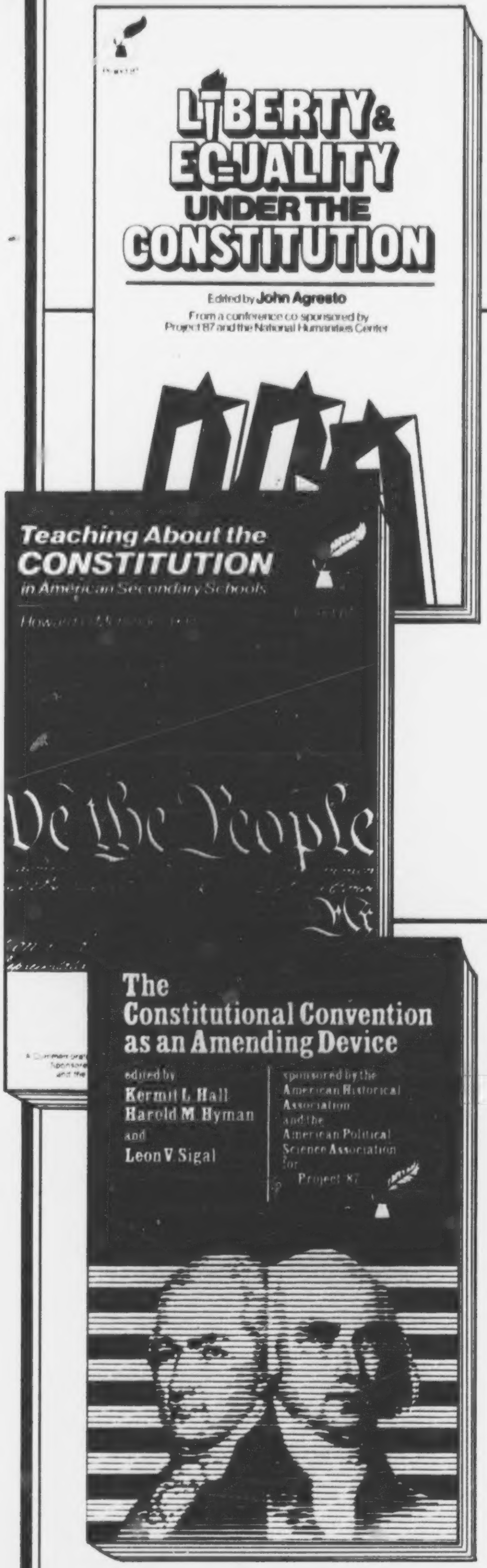
LIBERTY & EQUALITY UNDER THE CONSTITUTION
Edited by John Agresto
From a conference co-sponsored by Project '87 and the National Humanities Center
Teaching About the CONSTITUTION in American Secondary Schools
We the People
The Constitutional Convention as an Amending Device
edited by Kermit L. Hall Harold M. Hyman and Leon V. Sigal
sponsored by the American Historical Association and the American Political Science Association for Project '87

Liberty & Equality Under the Constitution

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$7.50 ea. for paper, $12.95 ea. for hardcover

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Edited by Howard D. Mehlinger
$6.50 ea. for paper, $10.50 ea. for hardcover

The Constitutional Convention as an Amending Device

Edited by Kermit L. Hall, Harold M. Hyman and Leon V. Sigal
$6.50 ea. for paper, $10.50 ea. for hardcover

Order from:

Project '87
1527 New Hampshire Ave. N.W.
Washington, D.C. 20036

A fourth publication, **The American Constitutional System Under Strong and Weak Parties** is available for $19.95 plus shipping and handling and applicable sales tax from Praeger Publishers, 521 Fifth Ave., New York, NY 10017.

The books are based upon presentations and discussions at conferences coordinated by Project '87, a joint undertaking of the American Historical Association and the American Political Science Association. Support for these Project '87 activities came from the Andrew D. Mellon Foundation, the Rockefeller Foundation, the William and Flora Hewlett Foundation, and a matching grant from the National Endowment for the Humanities.

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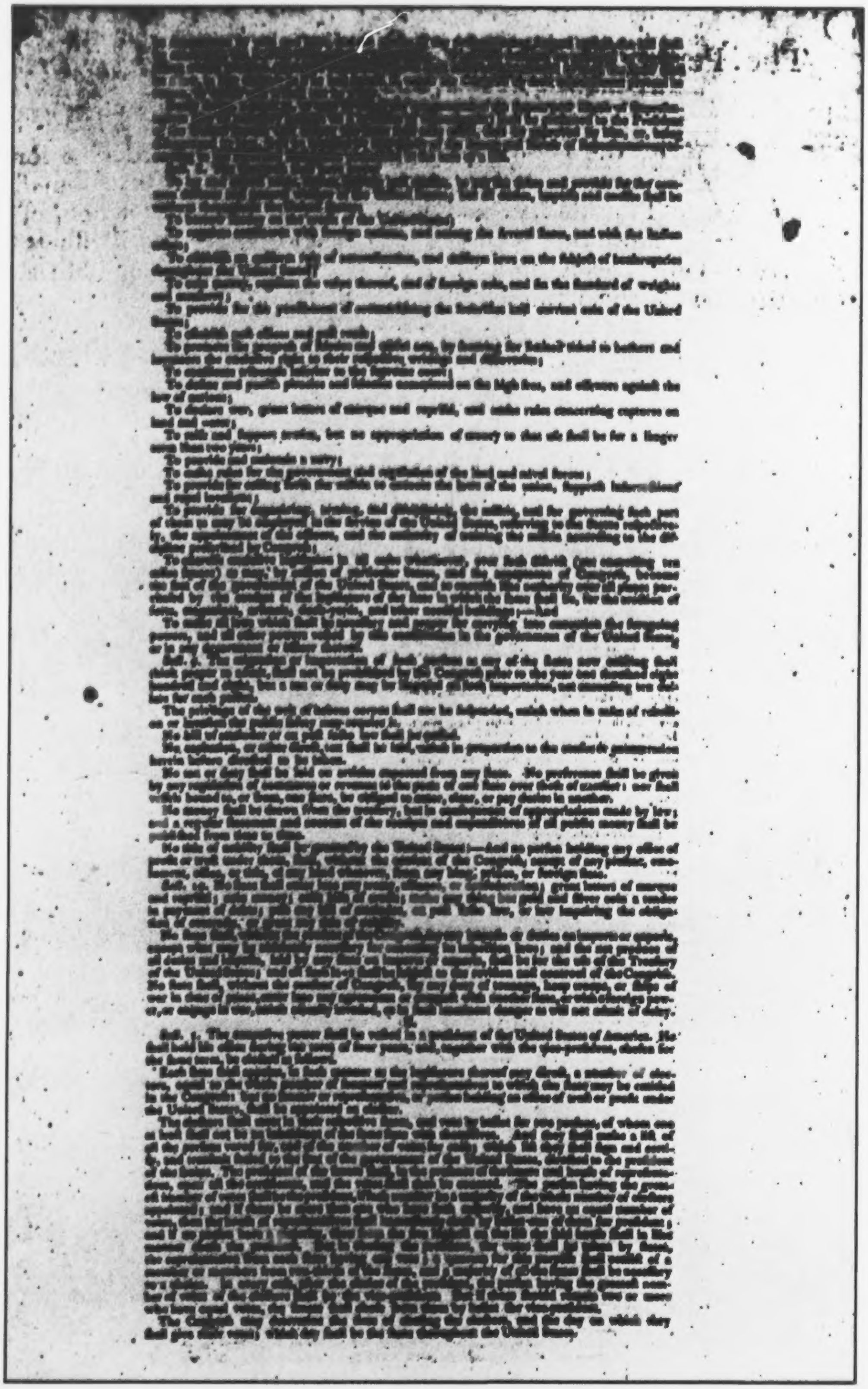

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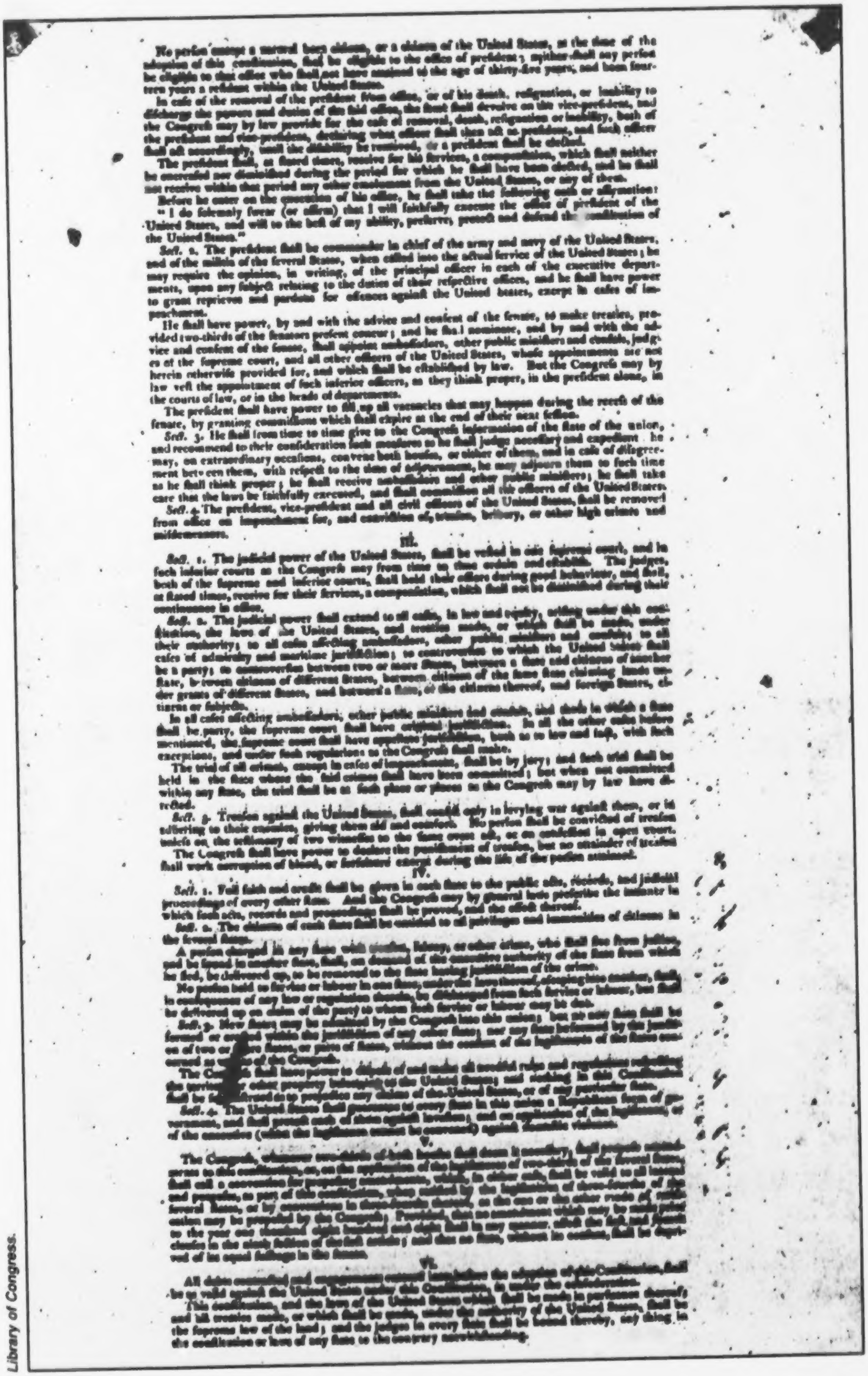

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Project'87

The American Constitutional Bicentennial

Project '87 is a joint undertaking of the American Historical Association and the American Political Science Association. It is dedicated to commemorating the Bicentennial of the United States Constitution by promoting public understanding and appraisal of this unique document.

The Project is directed by a joint committee of historians and political scientists that is chaired by two scholars of international reputation—Professor Richard B. Morris of Columbia University and Professor James MacGregor Burns of Williams College. The Chief Justice of the United States serves as Honorary Chairman of Project '87's Advisory Board.

The implementation of Project '87 has been divided into three distinct but interrelated stages. Stage I, devoted to research and scholarly exchanges on the Constitution, has been underway for the past several years. The Project has awarded fifty-one research grants and fellowships and supported five major scholarly conferences dealing with various aspects of the Constitution. Activities in connection with Stage II—teaching the Constitution in schools and colleges—began in 1980, and Project '87 is now planning Stage III, the development of programs for the public designed to heighten awareness of the Constitution and to provoke informed discussion on constitutional themes.

It is the hope and expectation of the Project's governing committee that, through its activities and those of others, both students and the public alike will come to a greater awareness and comprehension of the American Constitution.

Core support for Project '87 comes from the William and Flora Hewlett Foundation. Additional grants for specific programs have been provided by the National Endowment for the Humanities, which funds the magazine, and by the Lilly Endowment, Inc., of Indianapolis, Indiana, the Rockefeller Foundation, the Ford Foundation and the Mellon Foundation.

For further information, write: Project '87, 1527 New Hampshire Avenue, N.W., Washington, D.C. 20036.

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...do ordain and establish

this Constitution

for the United States of America.

A Bicentennial Chronicle Summer 1984. No. 3

We the People
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Project '87

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Amendments to the United States Constitution

The text of the Constitution as it appeared in 1787 was published in the last issue of ***this Constitution.*** *Since 1787, twenty-six amendments have been proposed by the Congress and ratified by the several states*, pursuant to the fifth Article of the original Constitution.*

ARTICLE I[1]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacably to assemble, and to petition the Government for a redress of grievances.

ARTICLE II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

ARTICLE III

No Soldier shall, in time of peace be quartered in any house without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

ARTICLE VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflected.

ARTICLE IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

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* All the amendments except the Twenty-first Amendment were ratified by State Legislatures. The Twenty-first Amendment, by its terms, was ratified by "conventions in the several States." Only the Thirteenth, Fourteenth, Fifteenth, and Sixteenth Amendments had numbers assigned to them at the time of ratification.

[1] The first 10 amendments (termed articles), together with 2 others that failed of ratification, were proposed to the several States by resolution of Congress on September 25, 1789. The ratifications were transmitted by the Governors to the President and by him communicated to Congress from time to time. The first 10 amendments were ratified by 11 of the 14 States. Virginia completed the required three-fourths by ratification on December 15, 1791, and its action was communicated to Congress by the President on December 30, 1791. The legislatures of Massachusetts, Georgia and Connecticut ratified them on March 2, 1939, March 18, 1939, and April 19, 1939, respectively.

Source: U.S. Congress. House. *The Declaration of Independence and the Constitution of the United States of America.* H. Doc. 96-143, 96th Cong., 1st sess., 1979.

...do ordain and establish

this Constitution

for the United States of America.

A Bicentennial Chronicle

No. 3 **Summer, 1984**

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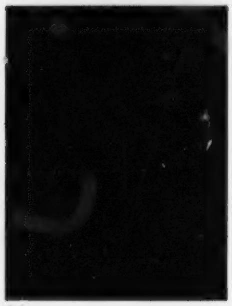

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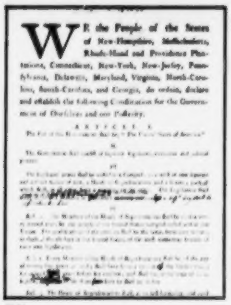

WE the People of the States of New-Hampshire, Maſſachuſetts, Rhode-Iſland and Providence Plantations, Connecticut, New-York, New-Jerſey, Pennſylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, do ordain, declare and eſtabliſh the following Conſtitution for the Government of Ourſelves and our Poſterity.

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this Constitution **is published with the assistance of a grant from the National Endowment for the Humanities as part of its special initiative on the Bicentennial of the United States Constitution. Editorial offices are located at 1527 New Hampshire Avenue, N.W., Washington, D.C. 20036. All material in this publication may be photocopied if attributed as follows: "Reprinted from *this Constitution: A Bicentennial Chronicle,* Summer, 1984, published by Project '87 of the American Historical Association and the American Political Science Association." Project '87 would appreciate notification from those who photocopy material in this issue for use in presentations to other groups.**

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this Constitution

published by Project '87 of the American Historical Association and the American Political Science Association

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From the Editor

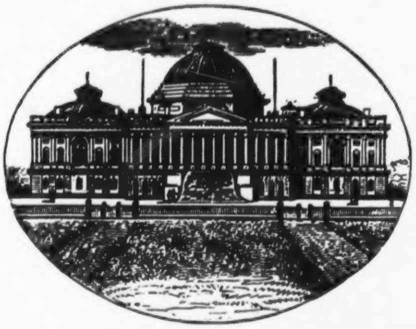
In this, the third number of ***this Constitution***, the Enduring Constitutional Issue that we explore is the balance between government and the individual in protecting civil liberties. Professor Paul L. Murphy of the University of Minnesota discusses the meaning of a free press, and how that concept developed historically as a civil liberty worthy of constitutional protection. A signal case in this evolution, *Near* v. *Minnesota*, is the subject of the lesson included in the section devoted to curriculum materials, "For the Classroom". In issue no. 2, Professor Philip B. Kurland looked at the development of the judiciary. An article by Professor A.E. Dick Howard in this issue touches on two additional significant constitutional themes related to the courts: the process of constitutional change and flexibility through the interpretations of the courts, and the role of the judiciary as shaper of public policy.

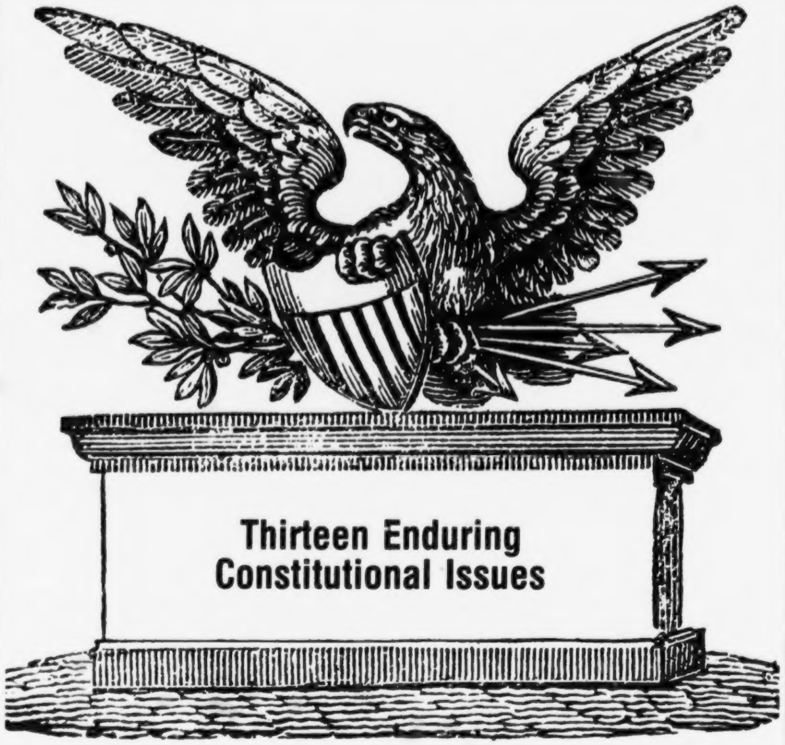
Two other articles offer historical perspectives on the Constitution. Professor Jack N. Rakove of Stanford University describes the political theory of James Madison and the achievement of the framers in constructing a republican form of government suited to a large and diverse nation. Dr. James H. Hutson of the Library of Congress chronicles the writing of the Constitution at the Federal Convention in 1787, and the key role of the Committee of Detail.

The Bicentennial Gazette offers a special focus on the media programs now being planned for the Bicentennial commemoration. We have included descriptions of several projects that are underway; reports on media events will continue in future issues. Once again, please let us know about events you are planning, whether they involve the media or other activities. Also, please send photographs and camera-ready art of logos or posters related to your program for ***this Constitution***.

In the last issue, we featured the text of the Constitution as adopted by the Federal Convention. In this issue, we are publishing the text of the Amendments to the Constitution ratified since 1787. They begin on the inside front cover.

this Constitution encourages your comments on each issue of the magazine. We also look forward to your suggestions for useful features and articles as we work together toward making the Bicentennial of the American Constitution an instructive, entertaining and thoughtful occasion.





Thirteen Enduring Constitutional Issues

- National Power—limits and potential
- Federalism—the balance between nation and state
- The Judiciary—interpreter of the Constitution or shaper of public policy
- **Civil Liberties—the balance between government and the individual**
- Criminal Penalties—rights of the accused and protection of the community
- Equality—its definition as a Constitutional value
- The Rights of Women Under the Constitution
- The Rights of Ethnic and Racial Groups Under the Constitution
- Presidential Power in Wartime and in Foreign Affairs
- The Separation of Powers and the Capacity to Govern
- Avenues of Representation
- Property Rights and Economic Policy
- Constitutional Change and Flexibility

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The Meaning of a Free Press

by PAUL L. MURPHY

On the facade of the *Chicago Tribune* building, chiseled in the marble, is a statement by Chief Justice Charles Evans Hughes. Taken from a 1931 Supreme Court case, *Near* v. *Minnesota*, it reads:

> The administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasize the need of a vigilant and courageous press especially in great cities. The fact that liberty of the press may be abused by miscreant purveyors of scandal does not make any less necessary the immunity of the press from prior restraint in dealing with official misconduct.

The case which produced this vitally important ruling also generated a massive body of argumentation on both sides as to the true meaning of freedom of the press, its history as a concept and instrument in American development, and its role in and relation to the Constitution and constitutional government. The case illustrates both the Constitution's ability to meet new challenges, and its conservative nature: the classical values incorporated in the document proved equal to a modern confrontation. The process of judicial interpretation emphasizes the character of the Constitution as a living document, but one whose modern application comes from its history and the history of the nation. It also illustrates the propensity of modern Justices to translate terms like "freedom of the press" from legal abstraction to operational reality. Further, the case itself raised a specific, crucial constitutional issue with which Americans still wrestle. How much does the public, through the media, have a right to know about the actions of its governing officials, the policies they intend to follow, the methods they plan to use in that pursuit, and the degree to which they indulge their own human venality? It also raises questions as to the proper use of press freedom, and the responsibility of both government officials and media decision-makers to the public and to the general welfare of the nation.

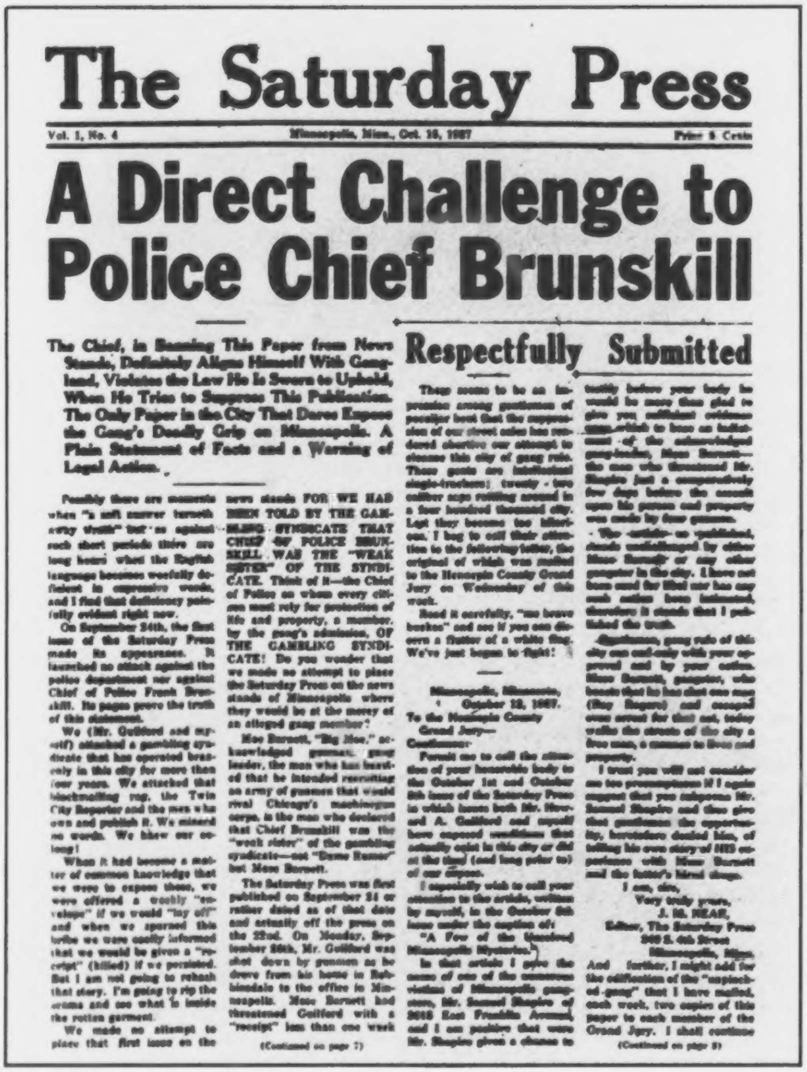
Jay Near. *Minneapolis Tribune, April 19, 1936. Photograph, Minnesota Historical Society.*

The *Near* case involved a Minnesota law enacted in 1925 to shut down an unscrupulous Duluth newspaper which was critical of public authorities for their alleged connections with crime and corruption. The statute was also used against a sleazy Minneapolis publication, the *Saturday Press*, which, too, asserted links between local officials and the underworld. Flamboyant, but still reasonably accurate, its revelations had led to two gangland attacks on one of the publishers, the second of which was fatal. The local County Attorney and future Governor, Floyd B. Olson, asked a judge to close down this "malicious, scandalous, and defamatory publication." The judge quickly obliged and the newspaper was suppressed under a temporary injunction after the Minnesota Supreme Court upheld the constitutionality of the "gag law." The plight of the *Saturday Press* had attracted the attention of both the liberal American Civil Liberties Union, and the conservative Chicago publisher, Robert R. McCormick. His lawyers helped convince the United States Supreme Court that the case was an important test of the First Amendment, and that it should be the occasion for applying the traditional and historic concept of "no prior restraint" to state laws inhibiting the dispersal of information which the public had a right to know.

Charles Evans Hughes, who considered his role in the *Near* case a highpoint of his career, wrote the majority opinion. His now classic statement on prior censorship, which he read from the bench with great feeling, set forth a general principle which still largely defines freedom of the American press, a principle cited frequently in subsequent rulings including the famous Pentagon Papers case in the late years of the Vietnam War. But possibly more importantly, the ruling stiffened the backbones of countless editors and publishers and helped stave off periodic attempts by politicians, judges, and prosecutors to muzzle the journalistic watchdog.

The Bicentennial of the adoption

of the Constitution is an appropriate time to examine the founding fathers' perception of what freedom of the press was supposed to mean. Did they have in mind the establishment of the constitutional right of a newspaper to publish without prior restraint and a conception of the newspaper's role as a herald to expose political corruption and public malfeasance? While conclusive answers are impossible, a look at the history casts some light on the subject.



The Saturday Press

Vol. 1, No. 4 Minneapolis, Minn., Oct. 15, 1927 Price 5 Cents

A Direct Challenge to Police Chief Brunskill

The Chief, in Banning This Paper from News Stands, Definitely Aligns Himself With Gangland, Violates the Law He Is Sworn to Uphold, When He Tries to Suppress This Publication. The Only Paper in the City That Dares Expose the Gang's Deadly Grip on Minneapolis. A Plain Statement of Facts and a Warning of Legal Action.

Respectfully Submitted

The Saturday Press, October 15, 1927. *Minnesota Historical Society.*

Control of a New Medium

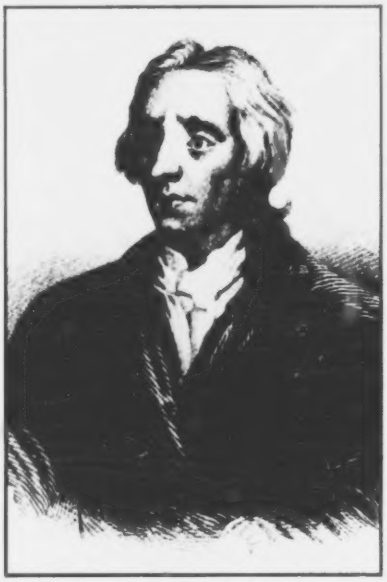
From the invention of the printing press and the ability of a writer to distribute ideas to a general audience, a concern evolved as to the proper use of that process. Prevailing doctrines of spiritual and temporal sovereignty made it inevitable that control over the new medium of expression would be gathered firmly in the hands of the ruling authorities. In England, printing first developed under royal sponsorship and soon became a monopoly granted by the crown. The crown retained, however, the right to restrain in advance the publication of material considered threatening or unwarranted. The government initially used its authority against certain religious works "with divers heresies and erroneous opinions." But once the crown began the process of censorship by curtailing one segment of the press, the whole field became open to official suppression. In 1566, the Star Chamber issued a decree limiting printers to publication of only the most innocuous material, a restriction enforced with increasing severity under the early Stuart rulers of the seventeenth century. To this control, the authorities added over the years further royal proclamations, Star Chamber decrees, and parliamentary enactments, constantly increasing the complexity of the regulations and further shackling the art and business of publication.

Resistance to the crown on this matter arose early. Although opponents of these practices did not question the propriety of punishing seditious libels, they did object to "prior punishment." The licensing power allowed authorities to place a prior restraint on a publication's issuance; anything published without a license was criminal. During the period of the English Civil War, when Parliament assumed control over printing, some Puritan leaders demanded that publication still be subjected to prior restraint. Strong objection ensued. Parliamentary leaders, convinced that there was a "definite, discernable, and discoverable truth in religious doctrine, the presentation of which could not fail to convince the unbeliever," began talking in a vocabulary strikingly similar to the modern view of the importance of the truth being tested in the "marketplace of ideas." As the poet John Milton wrote at the time:

> And though all the winds of doctrin were let loose to play upon the earth, so Truth be in the field, we do injuriously by licencing and prohibiting to misdoubt her strength. Let her and Falshood grapple; who ever knew Truth put to the wors in a free and open encounter?

Milton was also a pragmatist. As he wrote his friend Samuel Hartlib, "the art of Printing will so spread knowledge that the common peo-

"The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous *restraint upon publication, and not in freedom from censure for criminal matter when published."*
—Sir William Blackstone



John Locke, *by Kneller Pinx. Library of Congress.*

ple, knowing their own rights and liberties will not be governed by way of oppression." Thus, the importance of the press's effect on the relationship between the government and the people was recognized early.

In time, Puritans, including Milton, quickly saw that "Truth is not always victorious even where given a free field," and that control of the press to suppress erroneous opinions could be useful. Hence, early attention arose as to what unlicensed words might be found mischievous and libelous and the problem of seeking a balance between freedom and legitimate restraint was sharpened in public argumentation. Generally, cautious restraint won. Toleration for intolerant views had few adherents. "No opinions contrary to human society, or to those moral rules which are necessary to the preservation of civil society, are to be tolerated by the magistrate" wrote the Englishman, John Locke, in his 1689 *Letter Concerning Toleration*. But for Locke, the proper form of punishment was not prior governmental censorship. A system of prior restraint was cumbersome and unpopular, and when the English Licensing Laws expired in 1695 they were not extended.

Thereafter, freedom of the press from licensing came to be recognized in England as a common law or natural right. That law was summarized by the English jurist, Sir William Blackstone, in a now famous passage:

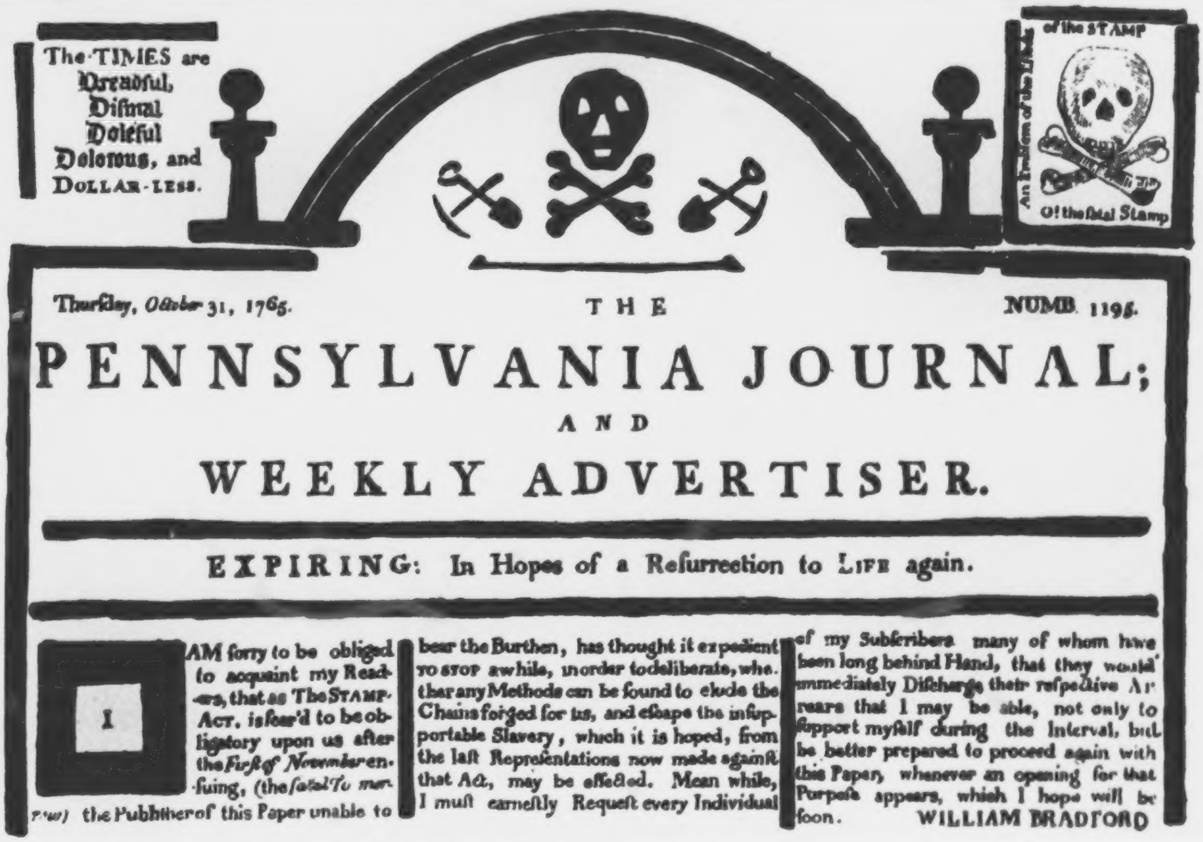
> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraint upon publication, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.

The governmental method for controlling the press in England evolved from the prior censorship of Milton's day to the subsequent punishment of Blackstone's.

Eighteenth century liberals, less secular and more political came to view freedom of the press in far more modern terms. The popular pamphlets known as *Cato's Letters*, published in England, were widely read in the American colonies as an esteemed source of political ideas. The most famous of the *Letters* were those on freedom of speech, and *Reflections upon Libelling*, one of three essays on libel law and freedom of the press. It was "Cato" from whom the founding fathers derived certain of their First Amendment ideas, and it was "Cato" who redefined the proper relationship between government and the press, affording a basis for the evolution of a free press in America.

In "Cato's" view, freedom from illegitimate authority was vital. Freedom of expression constituted a primary value. Governments could rightly limit these freedoms only when their use might directly hurt or abrogate the rights of another. "Cato" argued that free government and free expression would prosper or die together. Moreover, because government officials are agents of the people's interests, they should be subject to popular criticism and should welcome having their activities openly examined. "Only the wicked Governors of Men dread what is said of them," "Cato" contended, and it is only they who fear a free press. While the press should be pressured to correct its errors, the government should not seek in most cases to punish them when they occurred. In Cato's view, libels rarely provoked causeless discontent against the government. Libels were the inevitable result of a free press, an evil arising out of a much greater good that brought advantages to society which far outweighed potential harm. "Cato" was aware, however, of his own need for protection at a time in England when his views were decidedly premature. Thus, he asserted that libels against the government should be punishable, while truthfulness about public people and measures should constitute a legitimate defense against a criminal libel charge.

Cato's Letters were the high water mark of libertarian theory until the close of the eighteenth century. In fact, American libertarian theory, neither original nor independent, was at its best little more than an imitation of "Cato." But as British repression became increasingly



The TIMES are
Dreadful,
Diſmal
Doleful
Dolorous, and
DOLLAR-LESS.

An Emblem of the Effects of the STAMP

O! the fatal Stamp

Thurſday, October 31, 1765. THE NUMB. 1195.

PENNSYLVANIA JOURNAL;

AND

WEEKLY ADVERTISER.

EXPIRING: In Hopes of a Reſurrection to LIFE again.

I AM ſorry to be obliged to acquaint my Readers, that as The STAMP-ACT, is fear'd to be obligatory upon us after the *Firſt of November* enſuing, (the *fatal To-morrow*) the Publiſher of this Paper unable to bear the Burthen, has thought it expedient TO STOP awhile, in order to deliberate, whether any Methods can be found to elude the Chains forged for us, and eſcape the inſupportable Slavery, which it is hoped, from the laſt Repreſentations now made againſt that Act, may be effected. Mean while, I muſt earneſtly Requeſt every Individual of my Subſcribers, many of whom have been long behind Hand, that they would immediately Diſcharge their reſpective Arrears, that I may be able, not only to ſupport myſelf during the Interval, but be better prepared to proceed again with this Paper, whenever an opening for that Purpoſe appears, which I hope will be ſoon. WILLIAM BRADFORD

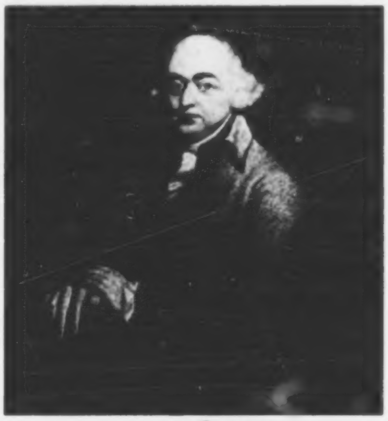
The Pennsylvania Journal and Weekly Advertiser, October 31, 1765. *Library of Congress.*

heavy and objectionable, Americans more and more discussed this vital area and the role of the press.

A 'Sacred' Free Press

In 1765, at a time when the colonists were outraged over the Stamp Act, John Adams wrote a *Dissertation on the Canon and Feudal Law* in which he expressed the view that he knew of no "means of information … more sacred … than … a free press." A free press, he went on to argue, was an instrument by which the mass of the people might take to compensate for some of the disadvantages they labored under in their struggle with the executive. More specifically, Adams maintained, it offered a remedy for the people's most chronic ailment, disunity. Newspapers could play a special part in welding together a united populace by disseminating knowledge of the constitution and of how their ruler's related to it. Without such knowledge, subjects would not know when their rights were invaded, nor have a common principle on which to act. The press could also arouse the people to action. "Inconsideration" no less than ignorance had brought ruin on mankind, and people are not persuaded without the utmost difficulty, to attend to facts and evidence. The position clearly suggests the importance of the press's role as well as the nature of its responsibility.

John Adams, engraving by H. H. Houston. National Portrait Gallery, Smithsonian Institution, Washington, D.C.

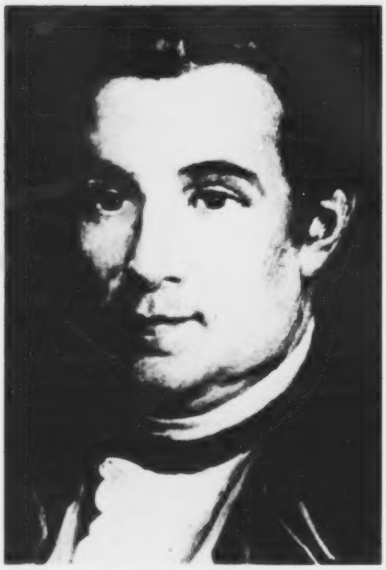


This view set eighteenth century America on a different course from that taken by Britain. The power to control the press through the courts diminished more rapidly in the colonies than in the mother country. Colonial juries had more immediate reason to balk at collaborating with crown officials and convicting printers of seditious libel. Although executive officials would not formally renounce the right to prosecute for libel, they could no longer bend the judicial machinery to their will.

The lower houses of the assemblies, however, did not so readily surrender their power. While championing the liberty of the press against royal officials, the colonial assemblies refused to have such a weapon turned against themselves and suppressed dissent without a qualm. It was these alleged bastions of the people's liberties that persecuted the press, later especially the pro-British loyalist press, and harrassed authors and publishers for breaches of privilege. Further, they usually had considerable popular support for their acts. These facts

"A popular government without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; and a people who mean to be their own governors must arm themselves with the power which knowledge gives."

—James Madison



Eleazer Oswald, painting by Albert Rosenthal. Library of Congress.

suggest that the revolutionary period was a testing ground for the extent to which Americans were committed to a free press in modern terms.

The picture was mixed, but the circumstances were unique since, as Richard Buel has pointed out, a classical power struggle was then going on between the crown and the people, and between authority and liberty. Concessions to English "truth" as opposed to American "truth" were a dangerous luxury to many Americans, at a time when mustering a shaky public opinion behind the revolution was essential to national, and some feared personal, survival.

Once war broke out, the states lost little time in censoring newspapers critical of the patriot cause. Many enacted treason and sedition statutes and took jurisdiction over numerous matters of opinion. A loyalist point of view was not to be expressed, at least not until victory was securely at hand, and even then many had doubts. Congress alone showed restraint in controlling the press during the war. Three times it was asked to act against presses allegedly violating Congress' privileges, and each time it invoked the precedent of freedom of the press to excuse its inaction.

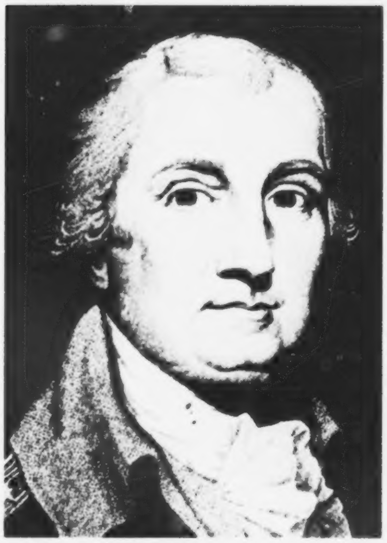
But if the practice was flawed, the broader concept was still ingrained in American values and many American hearts. Section 12 of the Virginia Bill of Rights of 1776, a segment of the new Virginia Constitution which became a model for the other new states and eventually for the federal Bill of Rights, had claimed the freedom of the press as "one of the great bulwarks of liberty (which) can never be restrained but by despotic governments." Four years later, John Adams emphasized that "the liberty of the press is essential to the security of the state. It ought not, therefore, to be restrained in this Commonwealth [of Massachusetts]."

The meaning of "liberty of the press," although vitally important, had no precise boundaries. Neither the Articles of Confederation nor the Constitution defined the proper relationship between government and the press. Given its importance to many citizens, this gap seems inexplicable. The best wisdom suggests that the term meant no prior restraint. But attempts to move beyond Blackstone and spell out more precisely the law and theory of freedom of expression went unfulfilled.

Practical episodes afford a window into the post-revolutionary mind on this subject. When Eleazer Oswald, a Philadelphia printer, was successfully prosecuted for libel, his supporters in the Pennsylvania legislature aided his attempt to impeach justices of the state supreme court who convicted him. Although they were unsuccessful, their actions produced considerable public debate regarding the permissible limits of a free press and the precise meaning of the free press clause in Pennsylvania's Bill of Rights. The Oswald case also made other state courts sensitive to violations of civil rights and led to a number of rulings protecting the press from interference. On the other hand, when Thomas Jefferson proposed a new constitution for Virginia in 1783, he wanted the press exempted from prior restraints but specifically liable for punishment for false publications. This ambivalence implies that once independence was achieved and American leaders occupied positions of power, they saw less value in the press as a safeguard against arbitrary power than they had when British authorities ruled. American statemen resented critics who suggested that they might misuse their offices.

When the Constitutional Convention met in May, 1878, protection of a free press was not high on the agenda. It was not until August 20, near the end of the famous meeting, that Charles Pinckney submitted a proposal for a bill of rights. The press provision was among its thirteen propositions and simply stated: "The liberty of the Press shall be inviolably preserved." This language had little appeal to the other founding fathers. Many did not want a bill of rights because they believed that provisions to safeguard individual liberties, originally created to protect subjects from rulers claiming absolute powers, had no place in a constitution founded on the will of the people. Such attempts to stipulate basic principles of liberty failed to win a majority.

Nevertheless, the framers supported, even assumed, the existence of a free press. They took painstaking efforts in drafting the original body of the Constitution to



Charles Cotesworth Pinckney, engraving by Cornelius Tiebout. National Portrait Gallery, Smithsonian Institution, Washington, D.C.

set up a representative political process. Representation implied citizen participation, which further implied intelligent participation, which meant the ability to communicate freely and take part in the political process. Thus, as James Madison stated: "a popular government without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; and a people who mean to be their own governors must arm themselves with the power which knowledge gives." But such ambiguous reassurance was inadequate, and when the Constitution came before the states for ratification, citizens voiced protests about the absence of a bill of rights.

The Constitution's advocates resisted. Alexander Hamilton argued that there was no way to secure a concept such as freedom of the press by words. Freedom of the press, he said, "must altogether depend on public opinion, and on the general spirit of the people and of the government." James Madison agreed that those rights which were solely dependent upon majority public opinion could be snuffed out whenever that opinion changed. In Virginia, he contended, "I have seen the bill of rights violated in every instance where it has been opposed to a popular current."

Nevertheless, Madison advocated action. Experience quickly reenforced his belief that when it came to the rights and liberties of individual dissenters, a democratic majority could be as repressive as a king, and thus the majority must have its power over certain rights clearly limited. This view was widely shared, and the Virginia representatives when they ratified the Constitution insisted on their position that "liberty of conscience and of the press cannot be cancelled, abridged, restrained, or modified, by any authority of the United States." The implication of the statement was clear—the Constitution should forbid not only Congress, but the executive and the judiciary from limiting the guarantees later placed in the First Amendment.

But Madison wanted more. Possibly anticipating a situation such as the one in *Near* v. *Minnesota*, and clearly responding to the repressive behavior of some of the states during the Confederation period, he advocated an amendment which he considered the most valuable in the whole list. It stated that "no State shall violate the equal right of conscience, [or of the] freedom of the press ... because it is proper that every Government should be disarmed of power which trench upon those particular rights." "I cannot see any reason," he said "against obtaining even a double security on these points.... It must be admitted, on all hands, that the State Governments are as liable to attach these invaluable privileges as the General Government is, and therefore ought to be as cautiously guarded against."

'Congress Shall Make No Law . . .'

Madison's proposal was not adopted. The ultimate language on press in the freedom in the First Amendment read, simply, "Congress shall make no law ... abridging the freedom ... of the press." Such wording begged the definition which would have been desirable, even though the Amendment initially appeared strong enough to support Madison's general view that, in this new American democracy, the power of censorship should be exercised by the people over the government and not the government over the people.

As to whether the drafters had in mind the constitutional right of a newspaper to publish without prior restraint and a conception of a newspaper's role as a herald to expose political corruption and public malfeasance, the record is also tantalizingly incomplete. The prior restraint point seems clearer. As Hughes wrote in *Near*:

> The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraint would violate constitutional right. Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publications of newspapers and periodicals. The gen-

"Congress shall make no law . . . abridging the freedom . . . of the press"
—The First Amendment

> eral principle that the constitutional guarantee of liberty of the press gives immunity from previous restraints has been approved in many decisions under the provision of state constitutions.

Regarding the limits of public criticism and exposure of officials, Hughes quoted Madison. Pointing out that stateman's role as a leading spirit in the preparation of the First Amendment, the Chief Justice stated:

> Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the states that it is better to leave a few of its noxious branches to their luxuriant growth than, by pruning them away, to injure the vigour of those yielding the proper fruits.

Hughes understood Madison in another way as well, and his *Near* opinion finally concretized the Virginian's desired safeguard in protecting press freedom from the states. Following a path which had been begun six years earlier in *Gitlow* v. *New York* (1925), Hughes incorporated freedom of the press from state action in the term "liberty" in the "due process" clause of the Fourteenth Amendment, and held the Minnesota "gag law" to be void. The question, Hughes said, was "whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed." His answer was resoundingly negative.

One vital question remains which even *Near* did not solve. Hughes had made clear, in a frequently overlooked portion of his opinion, that the First Amendment was not absolute. But what, if any, information should be exempted from its protection, particularly under claims of national security, a term which itself is capable of governmental abuse? This area still remains troublingly unresolved. It is especially a concern when definition is in the hands of officials who might seek to use their powers in dubious ways by blacking out public information and crippling the legitimate censorial role which the American public has come to feel is its birthright and obligation as participants in maintaining a free society.

Suggested additional reading:

Bernard Bailyn and John B. Hench, *The Press and the American Revolution* (1980).
Fred Friendly, *Minnesota Rag: The Dramatic Story of the Landmark Supreme Court Case That Gave New Meaning to Freedom of the Press* (1981).
Leonard Levy, *Freedom of the Press from Zenger to Jefferson* (1966).
Richard L. Perry and John C. Cooper, *Sources of Our Liberties* (1952).

Paul L. Murphy is professor of history and American studies at the University of Minnesota, Minneapolis and the author of *The Meaning of Freedom of Speech* (Greenwood Press, 1972), and *The Constitution in Crisis Times* (Harper & Row, 1972).

Charles Evans Hughes. *Supreme Court Historical Society.*

"A Frequent Recurrence to Fundamental Principles": the Courts and Constitutional Change

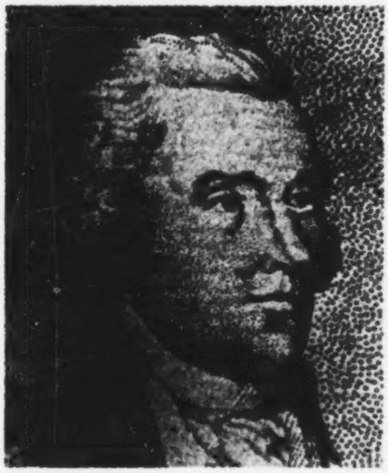
by A. E. DICK HOWARD

Half of the world's nations have constitutions written since 1970. France has had five republics since 1789. Yet Americans still live under the Constitution of 1787. There have been amendments, some of them far-reaching in their implications, but the structure of government, in its basic outlines, is essentially like that laid down by the framers at Philadelphia.

The survival of so much of the text of 1787 makes a striking contrast with the practice of most of the American states. State constitutions are periodically revised, by having either a convention or the legislature rewrite the document preliminary to popular approval. Thomas Jefferson, ever the ardent reformer, proclaimed that "the earth belongs always to the living generation." This theme he explicitly applied to constitutional theory, urging that Virginia's Constitution should provide for revision at stated periodic intervals. For Jefferson, constitutions, like other laws and institutions, "must go hand in hand with the progress of the human mind." Some of the older states have had as many as six constitutions. Thus the states appear to have been more faithful to the Jeffersonian precept of constitutional change than has the nation, at least when one looks at the text of the Constitution itself.

Constitutional Evolution

But do we, in fact, live under the same Constitution as that of 1787? There have, of course, been obvious textual changes, the earliest being the addition of the Bill of Rights in 1791; the adoption of the Reconstruction Amendments after the Civil War embodies the most important changes since that time. Other reshaping of the constitutional order has come about through institutional and political processes, such as the growth of modern government (especially from the time of the New Deal), including the advent of the welfare state and administrative agencies. Still other constitutional evolution has been the product of judicial interpretation and action.



Thomas Jefferson, engraving by unidentified artist. National Portrait Gallery, Smithsonian Institution, Washington, D.C.

We are fond of quoting Charles Evans Hughes' statement that the Constitution "is what the judges say it is." Whatever the accuracy of this remark, the Constitution also reflects what people *ask* judges to say it is. Americans have found ways, by going to court, to give judges ample opportunity to pour the insights of succeeding generations into their basic charter. Americans have thus, in one sense, been faithful to the spirit of Jefferson's admonition that constitutions cannot be stagnant. There is, of course, more than a little irony that, at the national level, the Jeffersonian principle of constitutional change should be given voice by judges, about whose powers Jefferson voiced frequent distrust.

From the earliest days of the republic, courts began to add their gloss to the Constitution. No one is more intimately associated with the assertion of an active judicial role in constitutional interpretation than Chief Justice John Marshall, who in *Marbury* v. *Madison* (1803) declared the Court's power to hold an act of Congress unconstitutional. In *McCulloch* v. *Maryland* (1819), Marshall implied an expansive theory of constitutional interpretation in describing the Constitution as "intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."

In *Marbury*, Marshall wrote, "It is emphatically the province and duty of the judicial department to say what the law is." On the facts of *Marbury* itself, this claim of power was not so sweeping as it might appear. To give effect to the Court's holding in the case—that Congress lacked the power to give the Court original jurisdiction over a question which could arise only in the Court's appellate jurisdiction—Marshall needed only to refuse the writ requested by Marbury; he did not need to address an order to any officer of the legislative or executive branches of the government.

Jefferson, among others, rejected the notion that the Supreme Court had any peculiar prerogatives in interpreting the Constitution. Noth-

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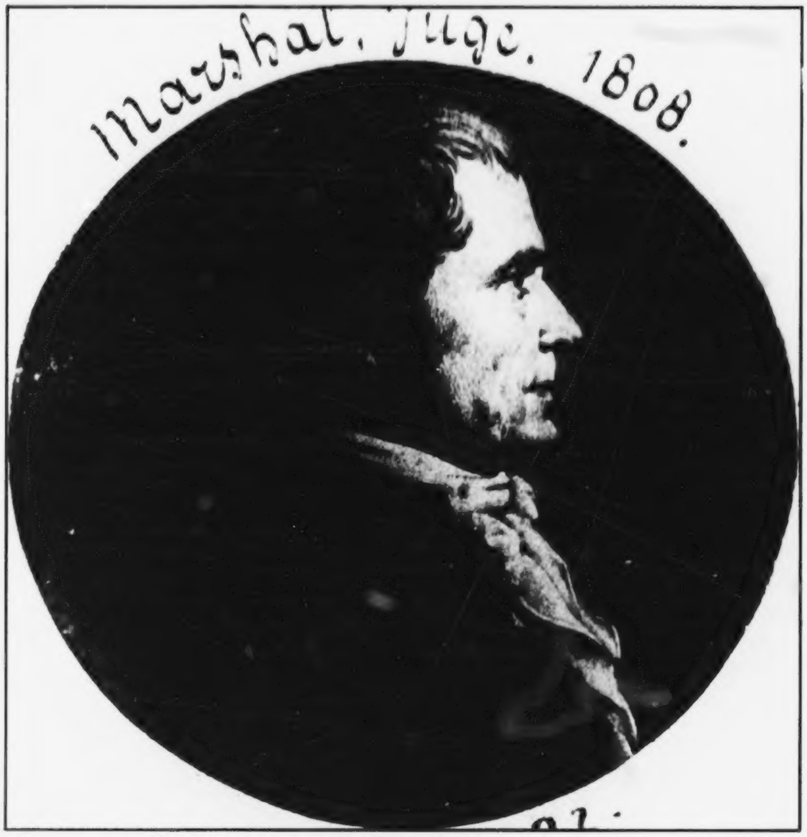

Marshal, Judge. 1808.

John Marshall, *engraving by Saint-Mémin. National Portrait Gallery, Smithsonian Institution, Washington, D.C.*

ing in the Constitution," he said, "has given them [the judges] a right to decide for the Executive, more than that to the Executive to decide for them. Both magistracies are equally independent in the sphere of action assigned to them."

Marshall's dictum about judges' power and duty to "say what the law is" has nevertheless been enormously influential. Most lay persons, one suspects, suppose the Supreme Court to be the ultimate arbiter of the Constitution's meaning. The Court itself, in modern times, has fueled this view by its holding in *Cooper* v. *Aaron* (a 1958 decision arising out of the dispute over school desegregation in Little Rock). Quoting Marshall's *Marbury* language, the *Cooper* Court read that statement as having "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution."

The 'Litigious Society'

Whatever they may think, in the abstract, of judicial power, Americans seem to have little hesitation in turning even garden variety disputes into constitutional questions. This willingness to go to court—a manifestation of the "litigious society"—results in efforts to have judicial resolution of quarrels which a previous generation would have settled in some other forum. The sports fan who takes his complaint about the referee's call to court furnishes a ready example of a "litigious" society.

The evidence of Americans' readiness to take problems to courts for answers takes many forms. Raw statistics reveal the striking increase in the number of lawyers in the United States (we now lead the world in the number of lawyers per capita), the enrollment in law schools (over double the number of twenty years ago), and caseloads in state and federal courts. Every day, judges see new issues brought to their courtrooms.

Many factors are at work in inducing "litigiousness." Government activity, with a few pauses, has grown steadily during the past fifty years. Especially is this true in areas of government regulation of private and public activities, some of the more notable regulatory agencies (such as the Environmental Protection Agency and the Occupational Safety and Health Administration) being of fairly recent origin. The political branches have often been perceived to fail to deal with pressing problems; Congress often seems a branch of inaction, rather than action. Public interest law firms have come into being to litigate questions of public moment. The example was set by the civil rights movement; blacks achieved in court what had been denied them in the political process, and their success was soon imitated by other groups, some of them relatively powerless minorities, some of them not.

In this litigious age, judges have become more willing to articulate new rights and to fashion new remedies. It has been a long time since anyone seriously entertained the notion that judges play a purely passive role in interpreting the Constitution, plucking its meaning, as it were, from the clouds. Indeed, judges often manifest an evident taste for being problem-solvers.

Judicial 'Activism'

Enlarging the sphere of constitutional norms has gone hand in hand with judicial activism. The Warren Court set the modern pace. Willing to be an engine of social reform, the Court in the sixties invoked constitutional responses to a range of issues—racial discrimination, criminal justice, and legislative apportionment among them. Not everyone has viewed these changes as constructive; Philip B. Kurland once remarked that "if the road to hell is paved with good intentions, the Warren Court is one of the greatest roadbuilders of all time."

To President Richard M. Nixon fell the opportunity, not unprece-

Enlarging the sphere of constitutional norms has gone hand in hand with judicial activism.

dented but still rare, to appoint four justices to the Supreme Court within a period of about two-and-a-half years. In naming the new jurists, Nixon made clear his intention to select justices who reflected a conservative philosophy. The Nixon appointments gave rise to widespread expectations that the Court under Chief Justice Burger would pull back from the activist bent of the Warren years.

We now know that many of those predictions about the Burger Court have gone unfulfilled. An assessment of the Court's performance finds most of the landmarks of the Warren era—for example, basing legislative apportionment on population and applying the Bill of Rights to the states—largely in place. Moreover, judicial "activism," rather than abating, has increased since 1969, as the Court treaded upon new terrain, including capital punishment, abortion, sex discrimination, and prisons. If the paradigm of judicial "activism" is a case in which the Court articulates a right not readily based in constitutional language, then Burger Court decisions in cases like *Roe* v. *Wade* (basing the abortion right upon a concept of privacy drawn from Fourteenth Amendment due process) are more activist than such Warren court rulings as *Brown* v. *Board of Education*.

On models provided by the Warren Court, especially in cases with moral overtones (those dealing with racial discrimination, for example, and fairness in criminal procedure), the Burger Court has built yet more constitutional law. The resulting phenomenon may be called the "constitutionalization" of American life—the pervasive use of the Constitution to solve social problems.

The malleability of constitutional norms as interpreted by the courts raises many questions of constitutional theory. One is: What is it that constitutions are *meant* to do? Oliver Wendell Holmes once commented that "a word is not a crystal, transparent and unchanging, but the skin of a living thought." Holmes' thought applies aptly to the uses of constitutions.

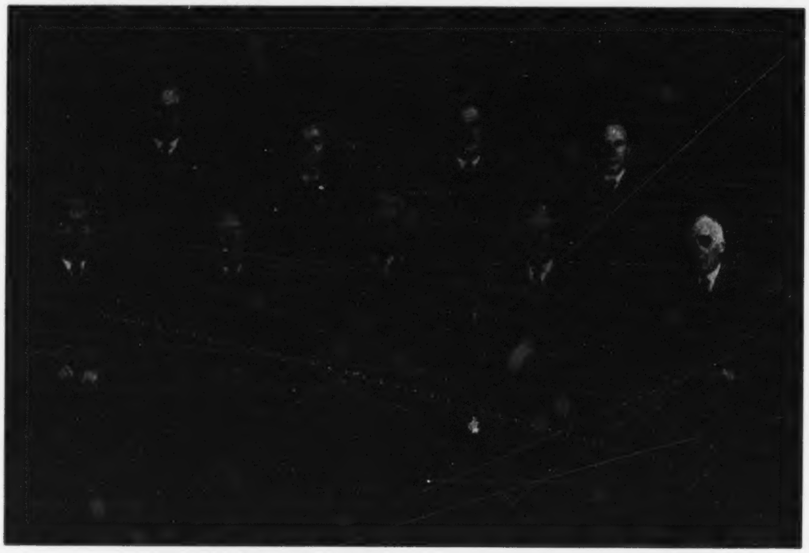
Consider the differences between a constitution drafted in the eighteenth century and one drafted in the twentieth. In the western tradition, an eighteenth-century constitution—the United States Constitution furnishes a good example—would likely be shaped by natural-rights thinking. The emphasis would be on limited or negative government, on individualism, and on inherent rights, such as life, liberty, and property.

Twentieth-century constitutions, by contrast, emphasize the "service state," a positive state. Modern constitutions typically contain not only traditional rights (such as speech or free exercise of religion) but also entitlements—claims against government for education, old age benefits, or other economic rights. There is the obvious question—whether such parchment guaranties become realities; but as symbols of constitutional theory, modern constitutions reveal the trend toward incorporating into countries' charters notions of social welfare and "human right."

In its origins, the Constitution of the United States is based upon concepts of limited government. In light of the more expansive ideologies of most foreign constitutions, one asks whether, two hundred years after its drafting, our Constitution has evolved in the direction of a positive document. In answering this question, one looks not to the Constitution's language but to judicial opinions.

The course of the Supreme Court's school desegregation deci-

The Warren Court, 1965. ***Supreme Court Historical Society.***



As symbols of constitutional theory, modern constitutions reveal the trend toward incorporating into countries' charters notions of social welfare and "human right."

sions is instructive. In *Brown* v. *Board of Education* (1954), the Court ruled that separation of the races in public schools violated the Constitution. A decade later, in litigation arising from Prince Edward county, Virginia, the Court held that the county had acted unconstitutionally in closing the schools. The justices ordered the county to reopen the schools and also to levy taxes and raise revenue for their support. The 1954 decision was essentially a negative order; the 1964 order moved a palpable step toward imposing positive constitutional norms upon government.

Thirty years after *Brown*, institutional litigation has become a commonplace. Class action suits are brought not only in pursuing racial integration but also in seeking the reforms of a range of public institutions—jails, prisons, mental hospitals, and other facilities. Judges appoint special masters who report to the court on the day-to-day operations of the institution.

Through the workings of an activist judiciary, the Constitution has become a vehicle for resolving major social and political issues—criminal justice, abortion, school prayers, busing, etc. Much judicial activity—for example, that aimed at curbing racial discrimination—has resulted in making our society fairer and more just. But one should not suppose that the sweeping use of judicial review—an avowedly anti-majoritarian device—to deal with society's ills is without its cost in terms of its effect on the principle of accountable decision-making in a democratic polity.

The Bicentennial of the Constitution brings with it a fitting occasion to reexamine fundamental principles of free government. Each person may well advance his or her own agenda for marking the Constitution's two hundredth year. That agenda should certainly include sober reflection on the processes of constitutional change.

From the beginning, the American constitutional order has contained within it ambiguities and tensions which must be worked out over time—tensions between liberty and equality, between stability and change, between government's role and private initiative, between law and discretion, between heritage and heresy. Whether change comes through explicit revision of constitutional text, or through judges' interpretations, the process must operate to reconcile the legacy of earlier generations with the insights of our own time and our obligations to generations unborn.

Constitutionalism in America is not a static state of affairs, but a process. The framers of the Constitution worked against the backdrop of centuries of Anglo-American constitutional history. The grand design having been established at Philadelphia, Americans have now had a further two centuries in a seminar in constitutional self-government which, by its nature, is never complete.

Cats may look at queens, and the people, in a free society, may question the stewardship of those they have put in office, including the judges. As the people mull the health of the constitutional order, no better theme for the Constitution's Bicentennial can be found than that laid down in George Mason's Declaration of Rights for Virginia, in 1776: "That no free government, nor the blessings of liberty, can be preserved to any people but by . . . a frequent recurrence to fundamental principles." That is the challenge of the Constitution's Bicentennial.

Reprints of this article may be purchased. For information, see page 47.

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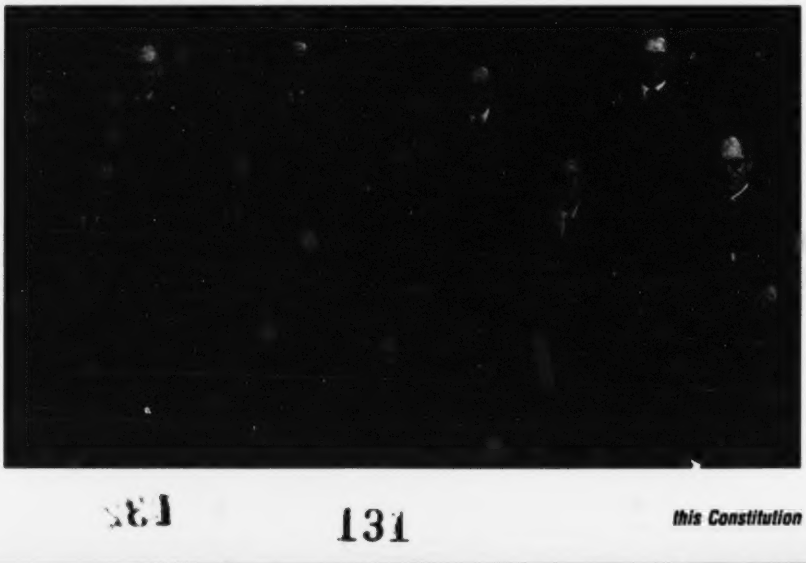
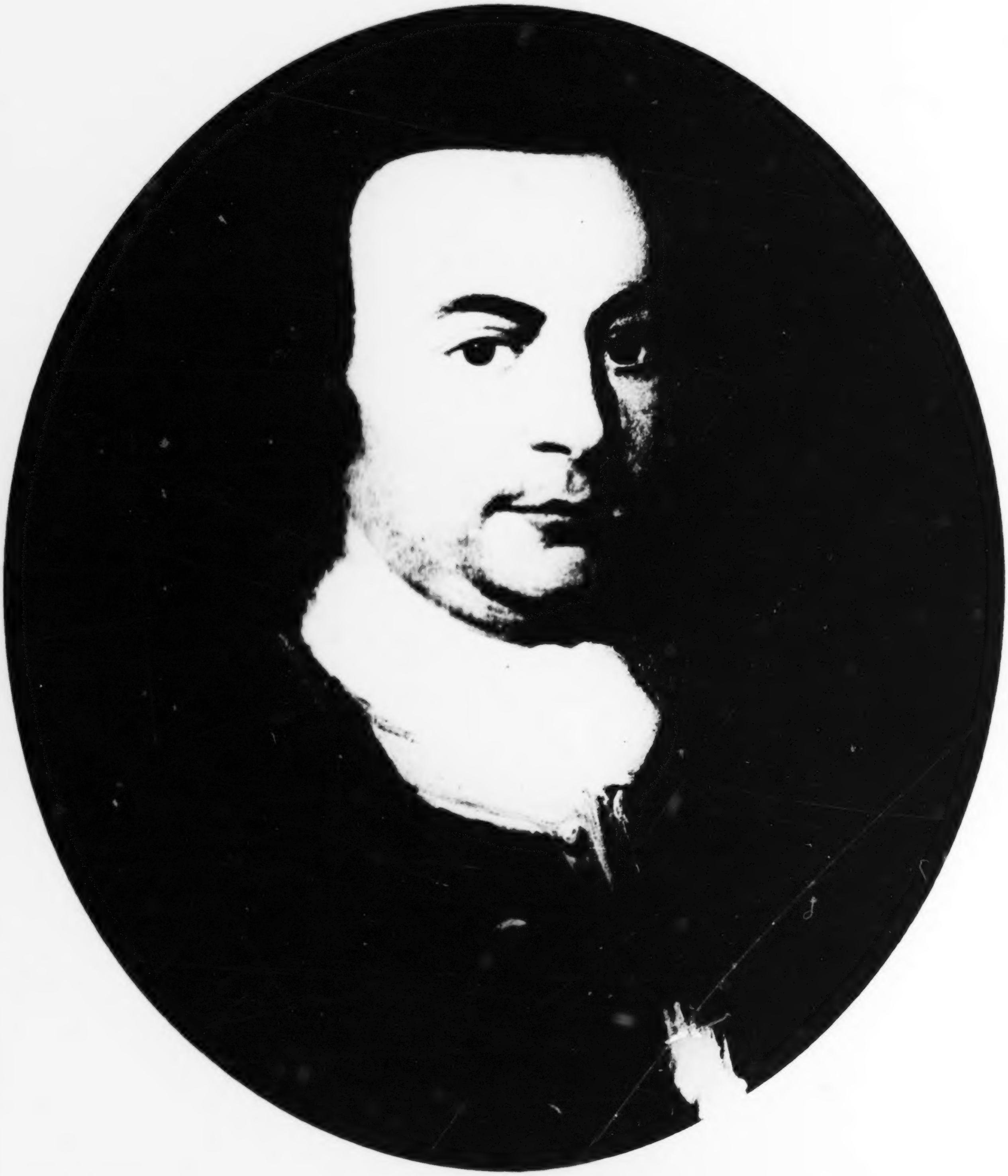
The Burger Court, 1971. ***Supreme Court Historical Society.***





George Mason, *painting by Gilbert Stuart. Library of Congress.*

James Madison and the Extended Republic: Theory and Practice in American Politics

by JACK N. RAKOVE

In March 1789, the duly elected members of the First Federal Congress began to assemble in New York City. Like other eighteenth-century legislators, they were a remarkably unpunctual group. Although the new government under the Constitution was supposed to begin operation on March 4, fully five weeks elapsed before both houses of Congress were able to muster a quorum.

In the wake of the intense political maneuvering that had accompanied the ratification of the Constitution and the first federal elections, this delay in the organization of the new government both embarrassed and alarmed its supporters. Many of them were not entirely sure what they wanted the federal government *to do*, but they knew very well what they wanted it *to be*: a collection of enlightened and responsible men who could be counted upon to discharge the public business with a degree of sobriety and wisdom that both the state assemblies and the Continental Congress had seemed sorely to lack. It was this expectation that made the slow convening of the First Congress so painful to witness. Americans wanted to be ruled by governments of law rather than of men—but the Federalists who had battled for the Constitution also understood that good laws could be framed and executed only if the right men were in office.

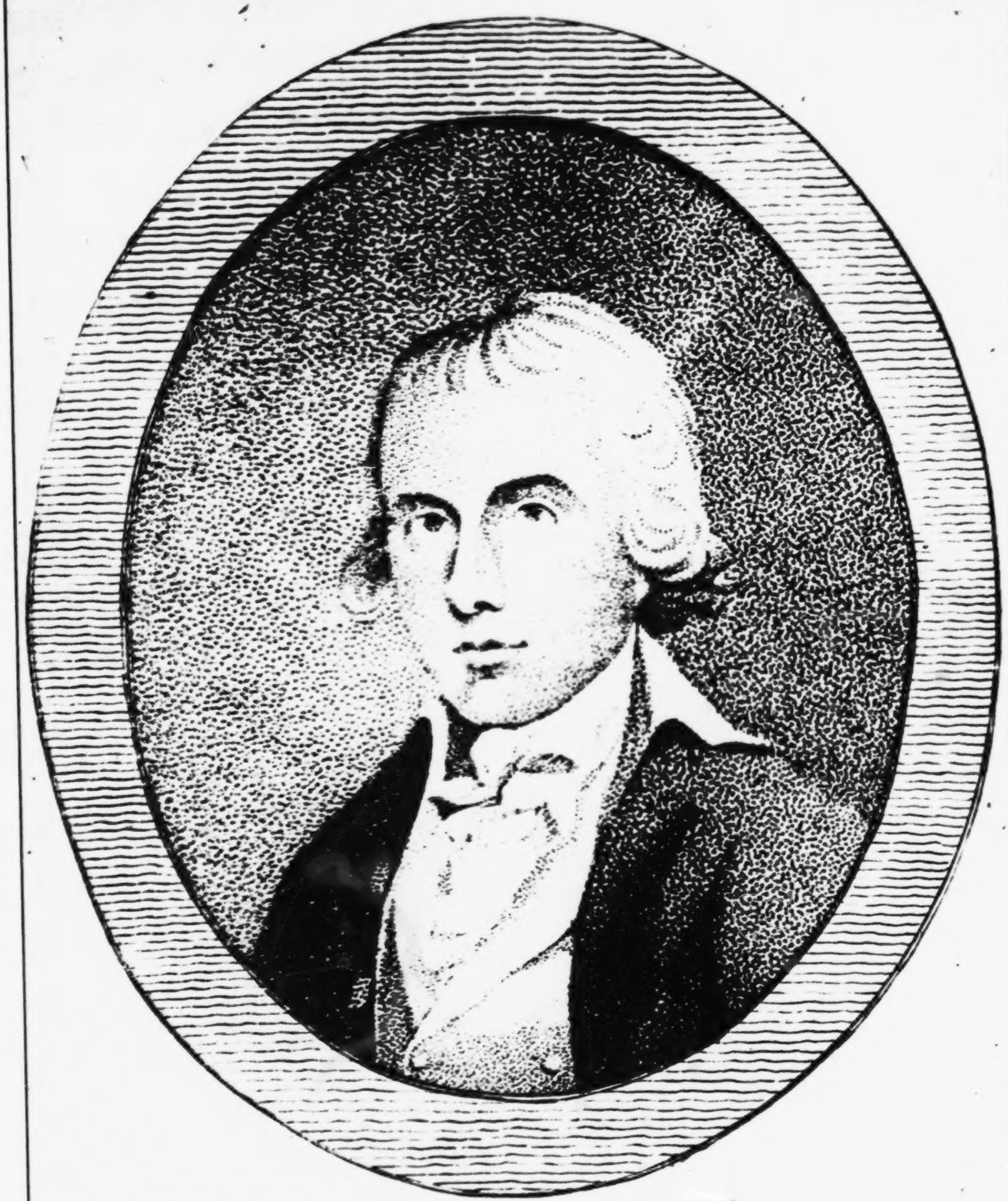
No one had thought more deeply about the problem of how one elected such men to office, and maintained public confidence in their performance, than James Madison, who was about to play as influential a role in the debates of the First Congress as he had at the Constitutional Convention. These issues had been very much on his mind during the months preceding the Convention, which Madison had spent examining both the history and theory of federal government. The results of his research took their first concrete form in a memorandum which he completed only weeks before the Convention met. It was in this working paper, "The Vices of the Political System of the United States," that he first developed the ideas that would receive their classic statement in his Tenth *Federalist*, a document now generally regarded as the cornerstone of American political theory.

'The Mischiefs of Faction'

Madison's concern in both texts was to refute one of the great commonplaces of eighteenth-century political thought: the belief that republican governments could survive only in geographically small, socially homogeneous societies, where a rough equality of condition and similarity of interests would enable the citizens to maintain the virtue upon which all republics rested. Virtue, as contemporaries understood it, meant a willingness to subordinate private interest to public good. In a republic, obedience to law rested on neither the coercive powers of a vigorous monarchy nor the social stability provided by a capable aristocracy. Only the self-restraint of the individual citizen could prevent the descent into anarchy that classical political theory held was the fate of an unruly republic. Since virtue often failed to render men immune to the dangers of passion and self-interest, it seemed wiser to limit the republican form of government to those societies which were relatively simple and homogenous—where, in other words, the absence of clashing, competing interests would help citizens to preserve the virtue they needed.

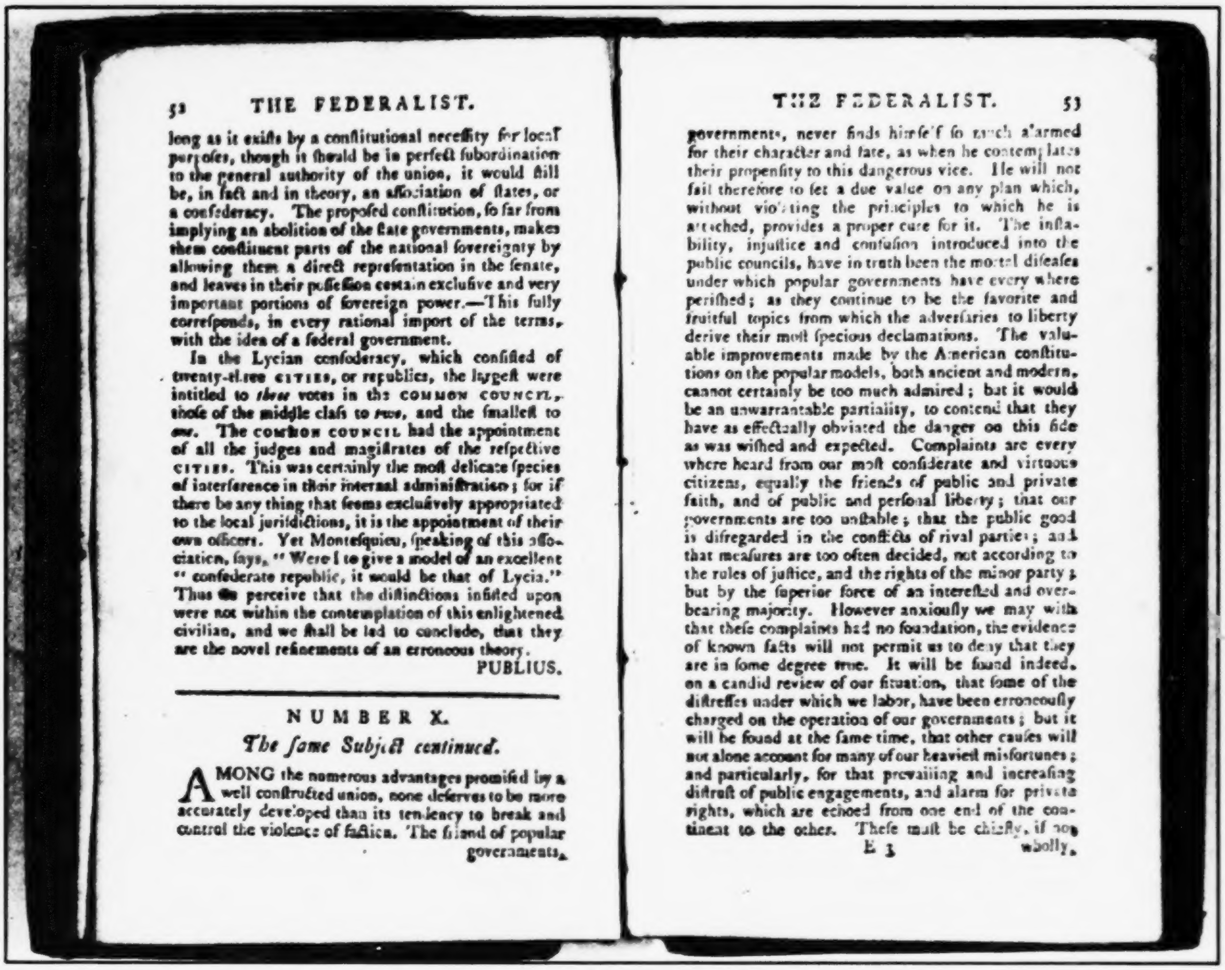
Imbued with such assumptions as these, many Americans in the 1780s doubted whether it would be possible to create a government that would be both faithful to republican principles and capable of managing the affairs of a country so large in extent and diverse in interests as the thirteen newly independent United States. Madison's great contribution was to allay such reservations by turning the received wisdom of his age on its head. Since "the latent causes of faction are sown in the nature of man," he argued, clashing interests were inevitable in any society. The great problem was to explain how these divergent interests could best be adjusted and regulated without violating republican principles. One part of his answer—the more familiar part—argued that an extended republic would "cure the mischiefs of faction" more effectively than a small one. The larger and more diverse a society was, Madison argued, the more difficult it would be to organize durable coalitions intent on pursuing their various private interests at the expense of the larger public good.

In pushing his analysis even this far, Madison had already gone a long way toward adding classical political theory to other European legacies the Americans were eager to discard. He had not only suggested that a republic could rest on vice as easily as on virtue, but he had also substituted a recognizably modern image of a fluid and diverse society for the traditional categories of the few and the many, the aristocracy and the democracy. Yet this was not enough. In arguing that "factious majorities" could not exist in a society as diverse and extensive as America, Madison had only posited what would *not* happen; he



JA^{s}. MADISON.

James Madison, engraving by unidentified artist. National Portrait Gallery, Smithsonian Institution, Washington, D.C.



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long as it exiſts by a conſtitutional neceſſity for local purpoſes, though it ſhould be in perfect ſubordination to the general authority of the union, it would ſtill be, in fact and in theory, an aſſociation of ſtates, or a confederacy. The propoſed conſtitution, ſo far from implying an abolition of the ſtate governments, makes them conſtituent parts of the national ſovereignty by allowing them a direct repreſentation in the ſenate, and leaves in their poſſeſſion certain excluſive and very important portions of ſovereign power.—This fully correſponds, in every rational import of the terms, with the idea of a federal government.

In the Lycian confederacy, which conſiſted of twenty-three CITIES, or republics, the largeſt were intitled to *three* votes in the COMMON COUNCIL, thoſe of the middle claſs to *two*, and the ſmalleſt to *one*. The COMMON COUNCIL had the appointment of all the judges and magiſtrates of the reſpective CITIES. This was certainly the moſt delicate ſpecies of interference in their internal adminiſtration; for if there be any thing that ſeems excluſively appropriated to the local juriſdictions, it is the appointment of their own officers. Yet Monteſquieu, ſpeaking of this aſſociation, ſays, "Were I to give a model of an excellent "confederate republic, it would be that of Lycia." Thus we perceive that the diſtinctions inſiſted upon were not within the contemplation of this enlightened civilian, and we ſhall be led to conclude, that they are the novel refinements of an erroneous theory.

PUBLIUS.

NUMBER X.

The ſame Subject continued.

AMONG the numerous advantages promiſed by a well conſtructed union, none deſerves to be more accurately developed than its tendency to break and control the violence of faction. The friend of popular governments, never finds himſelf ſo much alarmed for their character and fate, as when he contemplates their propenſity to this dangerous vice. He will not fail therefore to ſet a due value on any plan which, without violating the principles to which he is attached, provides a proper cure for it. The inſtability, injuſtice and confuſion introduced into the public councils, have in truth been the mortal diſeaſes under which popular governments have every where periſhed; as they continue to be the favorite and fruitful topics from which the adverſaries to liberty derive their moſt ſpecious declamations. The valuable improvements made by the American conſtitutions on the popular models, both ancient and modern, cannot certainly be too much admired; but it would be an unwarrantable partiality, to contend that they have as effectually obviated the danger on this ſide as was wiſhed and expected. Complaints are every where heard from our moſt conſiderate and virtuous citizens, equally the friends of public and private faith, and of public and perſonal liberty; that our governments are too unſtable; that the public good is diſregarded in the conflicts of rival parties; and that meaſures are too often decided, not according to the rules of juſtice, and the rights of the minor party; but by the ſuperior force of an intereſted and overbearing majority. However anxiouſly we may wiſh that theſe complaints had no foundation, the evidence of known facts will not permit us to deny that they are in ſome degree true. It will be found indeed, on a candid review of our ſituation, that ſome of the diſtreſſes under which we labor, have been erroneouſly charged on the operation of our governments; but it will be found at the ſame time, that other cauſes will not alone account for many of our heavieſt misfortunes; and particularly, for that prevailing and increaſing diſtruſt of public engagements, and alarm for private rights, which are echoed from one end of the continent to the other. Theſe muſt be chiefly, if not

E 3 wholly,

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The Federalist, essay no. 10, ***(New York, 1788). Courtesy of The New-York Historical Society, New York City.***

had not identified the positive principles on which the government would actually operate.

One reading of Madison's theory—usually described as the "pluralist" model—has held that government would somehow constitute an arena within which the various interests of the larger society would be represented, with public policy formed as the outcome of the conflicts and compromises, the push and pull of legislative politics. We now understand that this was not Madison's idea at all. As modern as Madison may have been in understanding the fluidity of society, he still held to an older notion of representation.

'The Filtration of Talent'

In his view, the second great advantage of the extended republic was that it would permit the election to office of more conscientious and capable leaders than the petty politicians and local demagogues who had dominated the state assemblies during the 1780s. Representatives to the new national government would be chosen from constituencies far larger than those which elected state legislators. Within these districts, Madison assumed, politicians of merely local reputation and little talent would cancel each other out; only men possessed of genuine reputation and ability—one suspects Madison was thinking of himself—would be able to command the allegiance of large numbers of voters. Once in office, they would act with a broadmindedness that would elevate the very quality of public life. They would think not in terms of the immediate interests of their constituents, but of the larger public good which was synonymous with the concept of *res publica* itself. The virtue which could no longer be expected to reside in the populace might still be found, he hoped, in its rulers.

It is this aspect of Madison's theory which has, in recent years, commanded the attention of such scholars as the late Douglass Adair, Gordon Wood, and even Garry Wills. Yet with all that has been written about this *idea* of "the filtration of talent," it is striking that we rarely stop to ask whether it bore any correspondence to the reality of early national politics. Madison's theory was, after all, very much a leap of faith, nothing more than a prediction of what he hoped would happen if a vigorous national government replaced the "imbecile" confederation of the 1780s.

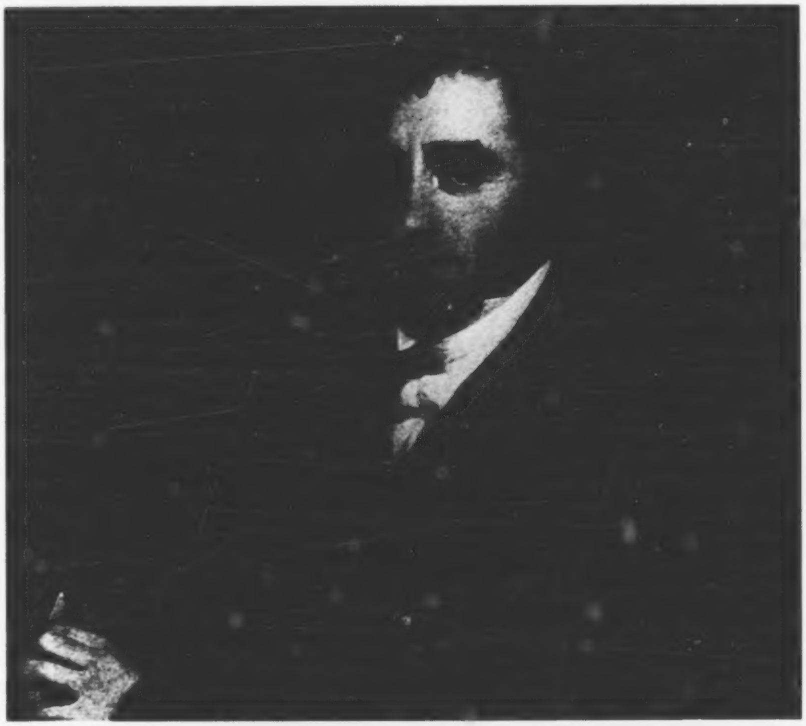
Was Madison more nearly right or wrong in hoping that the framing of the Constitution would release new ambitions and draw better men into public life? Of course, it would be extremely difficult to decide whether those who actually gained office were a "better" group of men—better than whom, and in what respect?—or whether they possessed the traits Madison wanted them to embody. The fact is that for this as for other periods of American history, we know all too little about the range of private motives and public concerns that have worked to bring men (and later women) into public life.

We can, of course, speak confidently about a few prominent individuals who did indeed seem to embody the refined political virtue Madison envisioned. The ninety-odd members of the First Federal Congress included such veteran leaders as Roger Sherman, Richard Henry Lee, Elbridge Gerry, William Paterson, and (perhaps most notably) Madison himself, and it is difficult to deny that a deeply principled commitment to public life was far from being the least important consideration that had led them to seek office under the new regime.

But when one examines the entire roster of membership for this smallest and most celebrated of federal congresses, it also becomes apparent that the process of election was not working only to "extract from the mass of the Society the purest and noblest characters which it contains." Thomas Sumter of South Carolina was elected to the House of Representatives in 1789 not because he had demonstrated any great legislative skills but on the basis of his reputation as a ruthless but daring commander during the vicious warfare that had plagued the Carolina backcountry. Benjamin Contee of Maryland may have hoped that election to Congress would help him stave off the demands of his creditors. If so, he was disappointed: a Philadelphia merchant kept insisting that Contee take a leave from Congress so he could put his affairs in order. Personal considerations of another kind encouraged the young Fisher Ames to accept his friends' urgings to run for the Boston seat in Congress. His father had been a self-educated Yankee almanac-maker whose struggle for prosperity had begun with a bitter legal battle to retain the tavern he had inherited from his first wife. Ames himself knew what it meant to use native intelligence, a Harvard education, and the political connections of a young lawyer to make his way from the status-conscious atmosphere of a small New England town into more elite circles.

Once elected, Ames proved a valuable member of Congress indeed. His success there reminds us that the personal concerns that helped to bring men into public life need not be confused with the sense of responsibility they felt once they were in office. It was entirely possible to pursue election to Congress for reasons of ambition and self-interest, and still act with the kind of political virtue that Madison hoped the Constitution would foster. Yet when one explores the variety of motives that actually worked to bring men to Congress, it is difficult to resist concluding that his vision was naive. Even in a body as small as the First Congress, there was room for a wide range of ambitions to come into play—and not all of these were consistent with the hopes Madison entertained for the operation of the extended republic.

Fisher Ames, oil on panel by Gilbert Stuart. ***National Portrait Gallery, Smithsonian Institution, Washington, D.C.***



> *In accepting the existence of parties even as a temporary and necessary evil, Madison was effectively admitting that legislative politics were being conducted along lines different from those which he and other framers of the Constitution had hoped to lay down.*

Political Parties

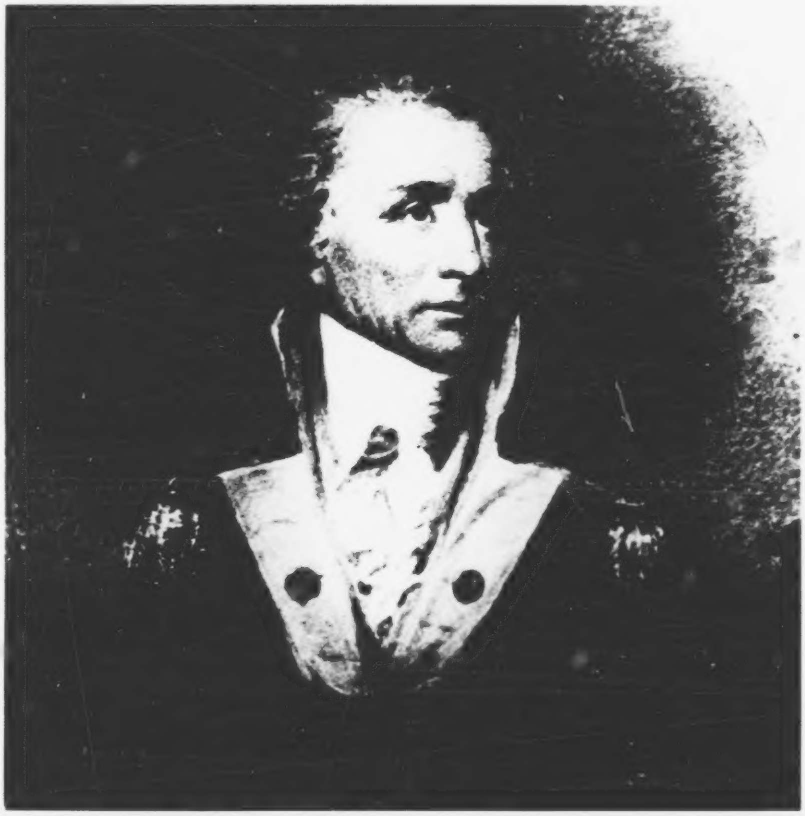
His theory also proved deficient on other grounds. Madison had designed the extended republic to "cure the mischiefs of faction," but by the mid-1790s, no one could claim that when Congress assembled, its members acted in the disinterested and truly patriotic fashion that Madison had envisioned. Sharp disputes arose over both the financial and the foreign policies that Alexander Hamilton had persuaded President Washington to pursue. The divisions within Congress were so severe that Madison himself and Thomas Jefferson undertook the novel task of organizing a genuine political party. In increasing numbers, candidates for both Congress and the state assemblies were running as recognized adherents of Federalist or Republican policies, and, when elected, voting accordingly. The parties became increasingly sectional in character. Madison still resisted the idea that organized parties ought to be a *permanent* part of the American political system; like Jefferson and James Monroe, the two friends who preceded and followed him in the Presidency between 1801 and 1825, he hoped that their Democratic-Republican party could wither away as soon as the Federalist menace was finally eliminated. But in accepting the existence of parties even as a temporary and necessary evil, Madison was effectively admitting that legislative politics were being conducted along lines different from those which he and the other framers of the Constitution had hoped to lay down.

Although partisan politics did seem to be on the road to extinction during the presidency of James Monroe (1817-25), with the election of Andrew Jackson and the controversies which his administration witnessed, active political parties were again organized. They now dominated both electoral and legislative politics with a vigor that the earlier struggles of the Federalists and Democratic-Republicans had not attained.

Had the Democratic and Whig parties of the Jacksonian era not been so vigorous, still the framers' vision would have foundered on another shoal. The emergence of militant abolitionism in the 1830s demonstrated that unless the slavery issue could be either resolved or neutralized, the sectional loyalties of Congressmen would always sharply limit their ability to elevate some broad notion of the national interest over more parochial concerns.

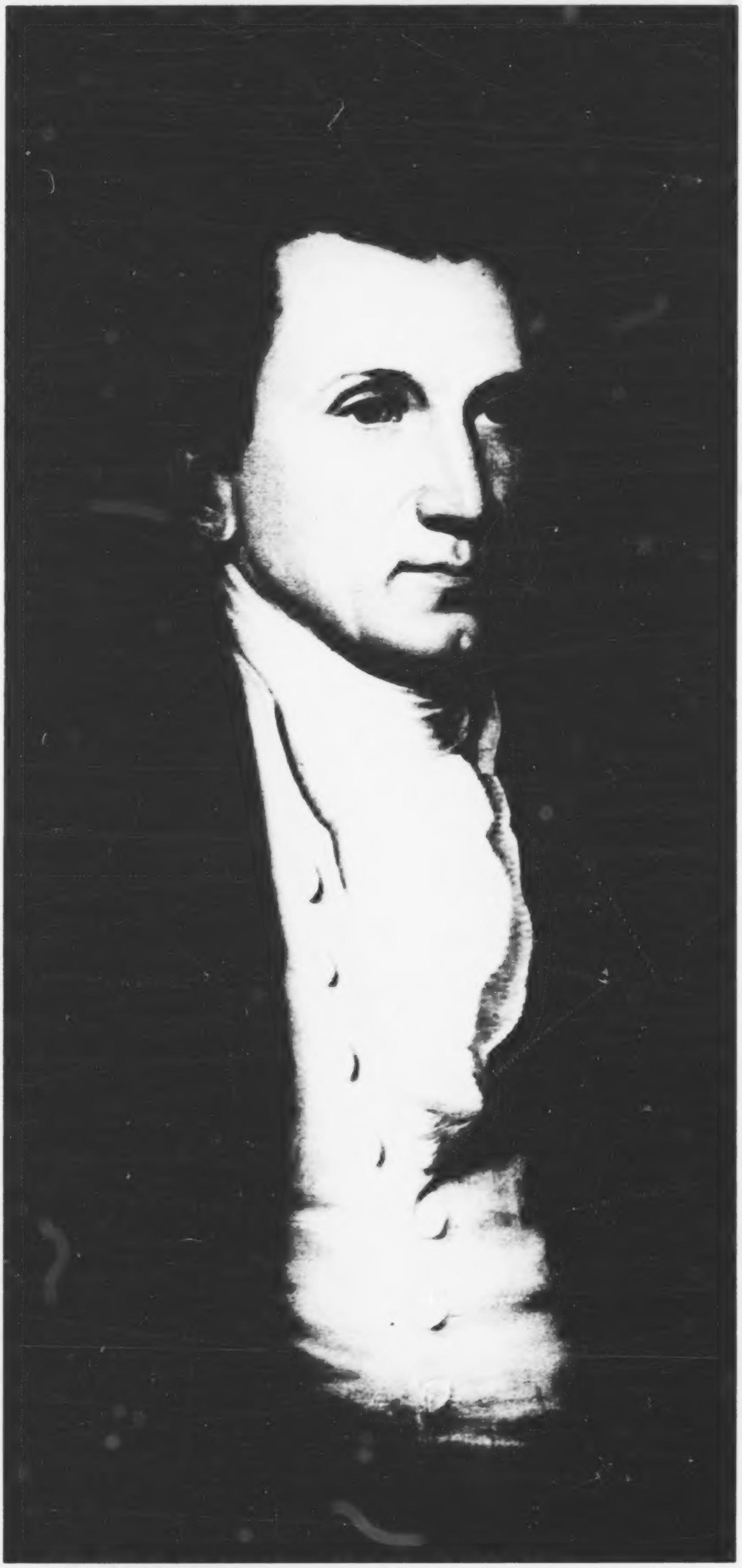
Madison's theory of the extended republic had sought to cure the mischiefs of faction within the states by creating a national political arena in which merely local interests could never hold permanent sway. What his theory did not anticipate—or could not avert—was the possibility that "factious majorities" might form within each

Thomas Sumter, *sepia on artist board by Armstrong. National Portrait Gallery, Smithsonian Institution, Washington, D.C.*



of the new republic's major regions, each one dedicated to pursuing a vision of the national good that the other could only interpret as deeply threatening to its own vital interests. By the 1850s, Southern spokesmen were convinced that if the authority of the national government were not used to protect the expansion of slavery into the western territories, the "peculiar institution" which was the basis of their civilization would be doomed. Northern Republicans believed with equal fervor that if the national government did not act to halt the extension of slavery, the free institutions and free labor of their own region would be gravely endangered. Two "factious majorities" had coalesced at the regional level within America, and their definitions of the national good were no longer compatible with the preservation of the union. The fact that a greater sense of political virtue and justice lay with the supporters of antislavery does not prevent our recognizing that James Madison's brilliant contribution to American political theory ultimately failed to surmount the central contradiction in American history: the persistence of slavery in a society otherwise committed to liberal ideals.

Yet if the Civil War must always be regarded as the greatest and most tragic failure of the framers' work, the rending of the union in 1861 has not led later generations to reject the Madisonian argument. In fact it has only been in the twentieth century—and not the nineteenth—that the richness and originality of his theory have come to be appreciated. Modern critics of the Constitution may fault Madison and his colleagues for creating a regime with too many checks and balances, a government divided (like Lincoln's union) against itself. But



James Monroe, oil painting attributed to James Herring. National Portrait Gallery, Smithsonian Institution, Washington, D.C.

Madison understood that republican government could, indeed had to be, reconciled with a realistic theory of human nature.

Madison's theory of the extended republic remains central to the American science of politics, for at lest two reasons. He was convinced, in the first place, that a vigorous national government could protect individual liberty, a belief which the history of the struggle for civil rights in our own time amply supports. Second, and perhaps more important, Madison understood that republican government could, indeed had to be, reconciled with a realistic theory of human nature. Rather than conclude that evidence of enduring human frailty justified a resort to less popular forms of government, he and his colleagues struggled to create a government by consent that would work even if electors and the elected proved less virtuous than one might hope. From the perspective of the twentieth century, the novelty of their achievement may be difficult to perceive. But in the founders' time, it was a revolution indeed.

Suggested Reading:

Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (1969).

Richard Hofstadter, *The Idea of a Party System* (1970).

Daniel P. Jordan, *Political Leadership in Jefferson's Virginia* (1983).

Jack N. Rakove is associate professor of history at Stanford University and the author of *The Beginnings of National Politics: An Interpretive History of the Continental Congress* (Alfred A. Knopf, 1979).

Federal Hall, New York City, meeting place of the first federal congress. *National Park Service, U.S. Department of the Interior.*

DOCUMENTS

Writing the Constitution: the Report of the Committee of Detail, August 6, 1787

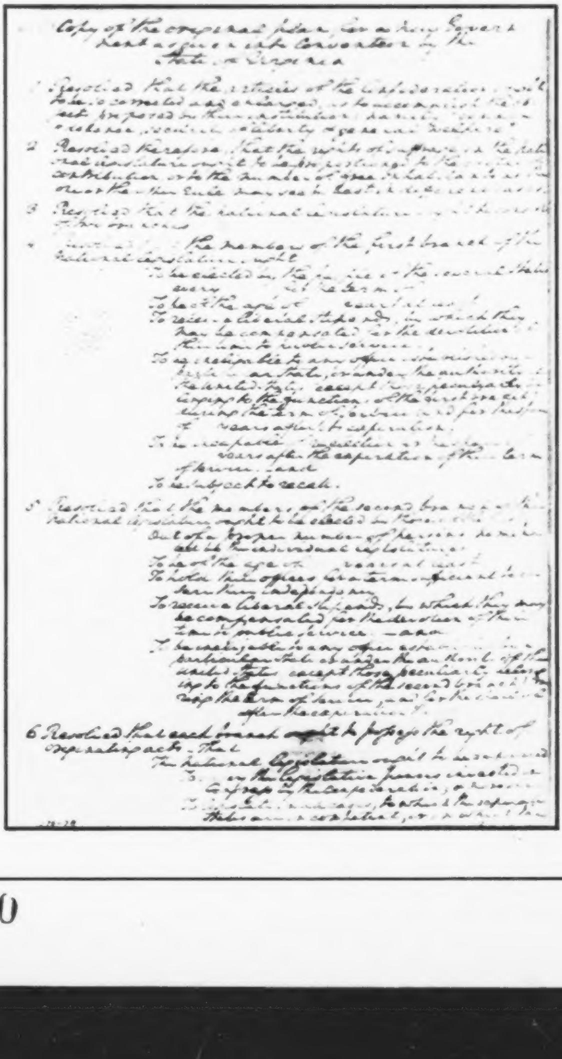
by JAMES H. HUTSON

Of nothing were the founders of this nation prouder than that the Constitution of the United States was formed by the peaceful process of deliberation and debate rather than by "accident and force" to which they believed other nations owed their political systems. The first arena for the debate was the Constitutional Convention which convened at Philadelphia on May 25, 1787, and continued without interruption for two months. During this time, the delegates confronted the crucial issue of whether the existing "constitution" of the nation, the Articles of Confederation, should be retained and revised or whether an entirely new instrument of government should be created. Although the delegates chose to craft a new plan, they included both old and new elements, and made the government "partly national, partly federal." On July 26, after two months of sketching out the new structure of government, the Convention adjourned to permit a committee of five of its ablest members to summarize—to codify—in its words, to "detail"—what it had accomplished. The Report of this Committee of Detail, presented to the Convention on August 6, 1787, is the subject of this paper.

The initial attempt at the Convention to describe a constitution, the first in a series of documents leading to the Committee of Detail Report, was the "Virginia Plan," presented by the Virginia delegation on May 29, 1787. Virginia's delegates believed, James Madison recalled later, that "from the early and prominent part taken by that state in bringing about the Convention some initiative step might be expected from them." Accordingly, they worked up a series of fifteen resolutions—many no more than suggestions—which Governor Edmund Randolph introduced as soon as the convention officially convened.

Resolving itself into a Committee of the Whole, the Convention debated the Virginia Plan for two weeks and produced the next important document in the progression toward the Constitution: the Committee of the Whole House Report of June 13. Containing nineteen resolutions, the Committee Report was more specific than its predecessor—a characteristic of each successive document in the stream leading to the Constitution. Where the Virginia Plan, for example, had left blank the terms of service in the first and second branches of the national legislature, the Committee Report specified the duration—three and seven years respectively. More importantly, the Committee Report refined the Virginia Plan's proposal that representation in the legislature be based on numbers or wealth by specifying that it be "in proportion to the whole number of white and other free citizens and inhabitants" and three-fifths of the slave population in both houses.

The small states at the convention considered the Committee of the Whole Report a betrayal, for it deprived them of the power—an equal vote with the large states—which the Articles of Confederation conferred upon them. They responded on June 15 by presenting the New Jersey Plan, so-called because it was introduced on their behalf by William Patterson of New Jersey, which substantially strengthened the national government, but retained the principle of one equal vote in the federal legislature for each state. For the next month the Convention wrangled over the issue of repre-

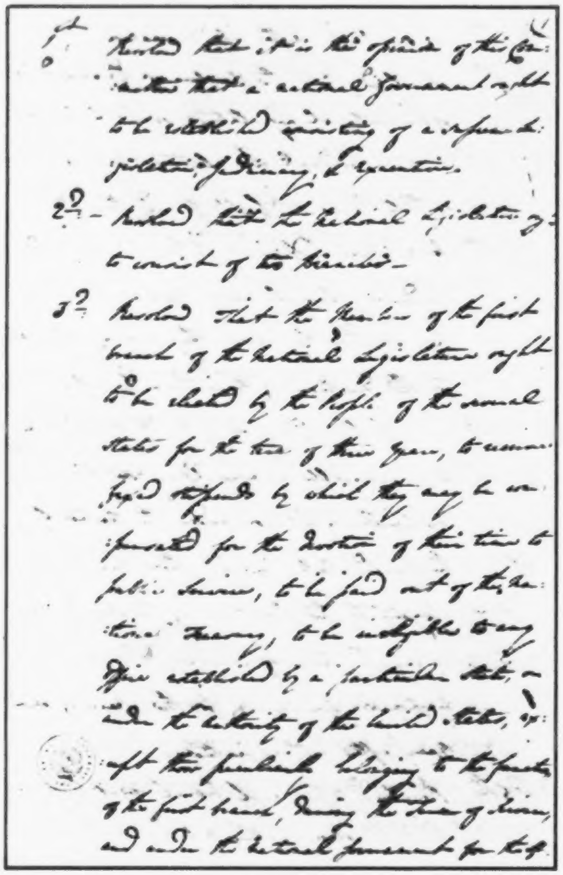


1. The Virginia Plan, in George Washington's hand. *George Washington Papers, Library of Congress.*

sentation in the new government, the large states insisting on representation proportioned to the population, the small on equality of representation. The issue became so acrimonious that it threatened to break up the Convention. It was finally resolved by the famous "Great Compromise" of July 16, 1787, which gave the large states proportional representation in the first branch of the legislature and the small states equal representation in the second branch. For the next ten days, the Convention debated and in some case revised the resolutions of the Committee of the Whole Report of June 13, which it had been doing, at time permitted, in the intervals between the battle over representation. On July 26 it adjourned until August 6, so that a Committee of Detail, elected on July 24, could "report a Constitution conformable to the resolutions passed by the Convention."

This Committee of Detail was composed of five of the Convention's ablest men, representing all geographical regions—John Rutledge of South Carolina, Edmund Randolph of Virginia, James Wilson of Pennsylvania, Oliver Ellsworth of Connecticut, and Nathaniel Gorham of Massachusetts. Several working documents left by the Committee survive, principally in James Wilson's papers, which show that Edmund Randolph wrote a preliminary draft of the Committee's report which Rutledge corrected. Wilson then appears to have assumed the major responsibility for composition and to have written the draft adopted as the final report. When printed, it ran to seven pages and contained twenty-three separate articles.

The Committee's approach, in preparing the Report, was to "treat of the legislative, judiciary and executive in their order, and afterwards, of the miscellaneous subjects, as they occur, bringing together all the resolutions, belonging to the same point, howsoever they may be scattered about." But the Committee was not simply a group of copy editors, arranging the Convention's proceedings in proper order and polishing its language to resonate with the proper sonority. Convention records do not indicate it, but the Committee must have been informally charged to use its imagination, to go beyond the bare list of resolutions approved by the Convention and, on its own initiative, add provisions proper for the constitution of a great nation. This it did and, as a result, the Committee report contains three components: resolutions of the Convention, incorporated more or less as adopted on the floor; amplifications, by the addition of details, of Convention actions; and innovations.



2. Committee of the Whole House Report, June 13, 1787, in Charles Cotesworth Pinckney's hand. *Pinckney Papers, Library of Congress.*

Among the first group of provisions were those, adopted from the Virginia Plan and Committee of the Whole Report, which gave the national government its structure: legislative, executive, and judicial powers separated from each other, a bicameral legislature whose acts were subject to a qualified executive veto, and a government with powers to act directly on the country's citizens rather than through the medium of sovereign states, as under the Articles of Confederation.

It was the second group of clauses which demonstrated why the term "detail" was used to describe the Committee and its work, for here the Committee defined and specified the extent and meaning of the resolutions adopted by the Convention. In detailing the powers of the new government, the Committee tried to read the Convention's mind by inferring what it intended. Judging by the general satisfaction with its report, it did so quite successfully.

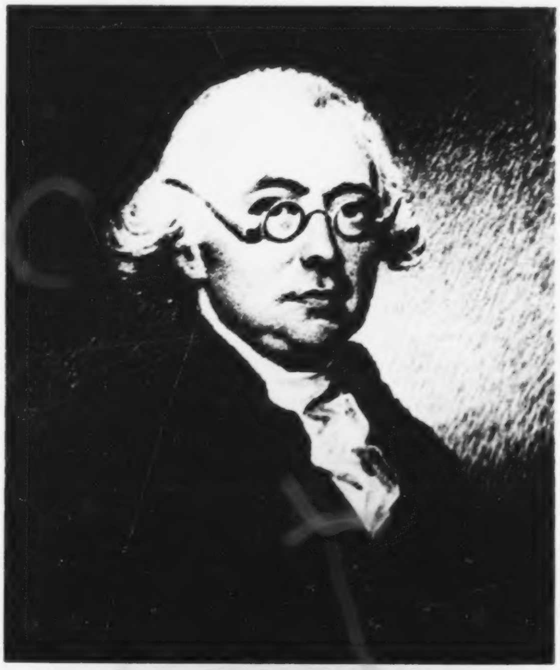
One example of the way in which the Committee defined the powers of the new government by adding details to general resolutions of the Convention is the clause relating to the jurisdiction of the Supreme Court. As received from the Convention, the Court clause read:

> *That the jurisdiction of the national Judiciary shall extend to Cases arising under the Laws passed by the general Legislature, and to such other Questions as involve the national Peace and Harmony.*

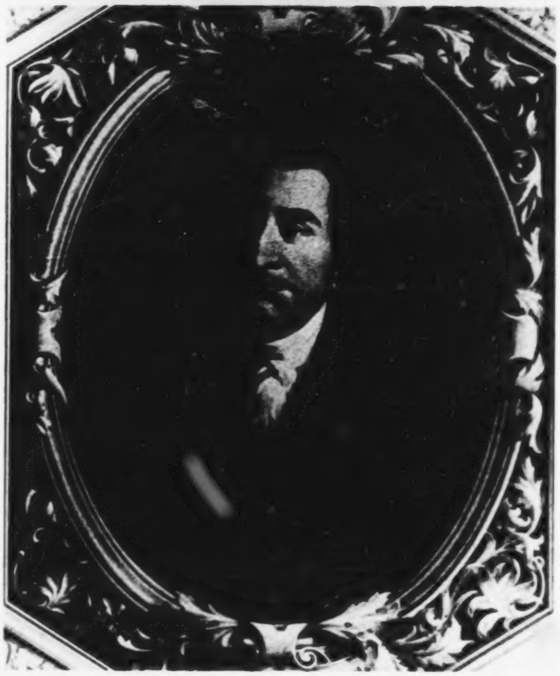
It left the hands of the Committee reading:

> *The Jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States; to all cases affecting Ambassadors, other Public Ministers, and Consuls; to the trial of impeachments of Officers of the United States; to all cases of Admiralty and maritime jurisdiction; to controversies between two or more States (except such as shall regard Territory or Jurisdiction), between a State and citizens of another State, between Citizens of different States, and between a State or the citizens thereof and foreign states, citizens, or subjects. In cases of impeachment, cases affecting Ambassadors, other Public Ministers, and Consuls, and those in which a State shall be a party, this jurisdiction shall be original. In all the other cases before mentioned, it shall be appellate, with such exceptions and under such regulations as the Legislature shall make. The Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) in the manner and under the limitations which it shall think proper, to such inferior Courts as it shall constitute from time to time.*

Another instance concerns the power of the legislature. The Convention gave the Committee the following ill-defined directive:



James Wilson, *sepia on artist board by Longacre. National Portrait Gallery, Smithsonian Institution, Washington, D.C.*

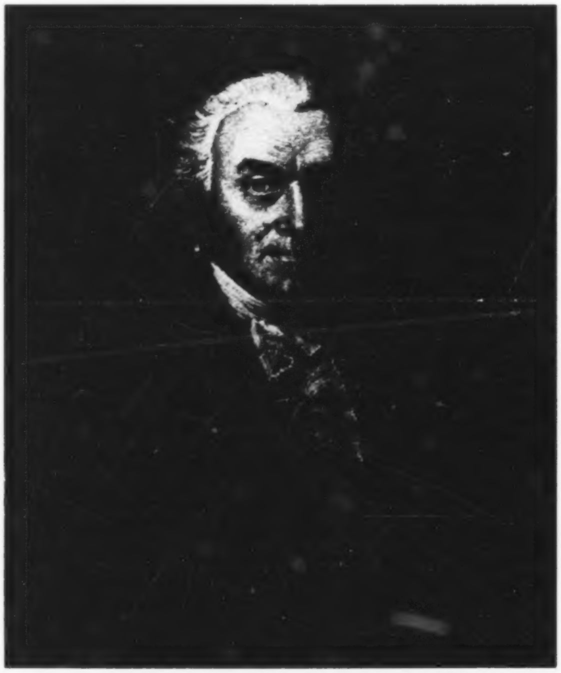


Edmund Randolph, *fresco by Constantine Brumidi. Library of Congress.*

> *That the national legislature ought to possess the legislative rights vested in Congress by the Confederation; and, moreover, to legislate in all cases for the general interests of the Union, and also in those to which the states are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.*

The Committee distilled these vague phrases into the following specific list of powers, concluding with what contemporaries called "the sweeping clause," the famous necessary and proper clause:

> *The Legislature of the United States shall have the power to lay and collect taxes, duties, imposts, and excises;*
> *To regulate commerce with foreign nations, and among the several States;*
> *To establish a uniform rule of naturalization throughout the United States;*
> *To coin money;*
> *To regulate the value of foreign coin;*
> *To fix the standard of weights and measures;*
> *To establish Post-offices;*
> *To borrow money, and emit bills on the credit of the United States;*
> *To appoint a Treasurer by ballot;*
> *To constitute tribunals inferior to the Supreme Court;*
> *To make rules concerning captures on land and water;*
> *To declare the law and punishment of piracies and felonies committed on the high seas, and the punishment of counterfeiting the coin of the United States, and of offences against the law of nations;*
> *To subdue a rebellion in any State, on the application of its legislature;*
> *To make war;*
> *To raise armies;*
> *To build and equip fleets;*
> *To call forth the aid of the militia, in order to execute the laws of the Union; enforce treaties, suppress insurrections, and repel invasions;*
> *And to make all laws that shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested, by this constitution, in the government of the United States, or in any department or officer thereof.*

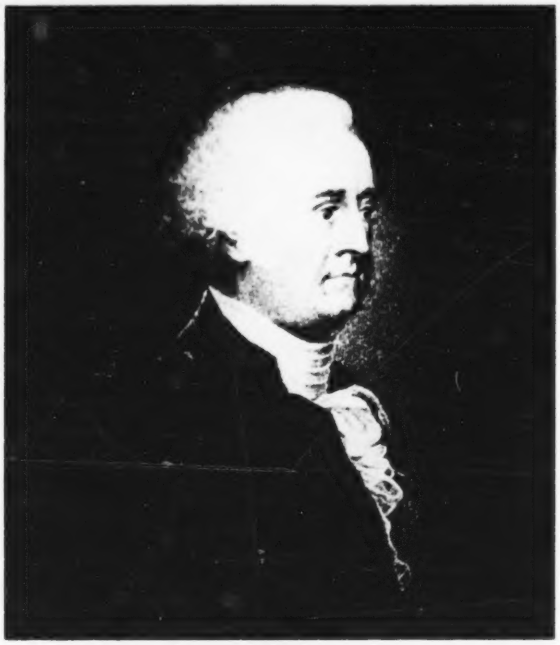


Oliver Ellsworth, engraving by G. MacKenzie. Library of Congress.

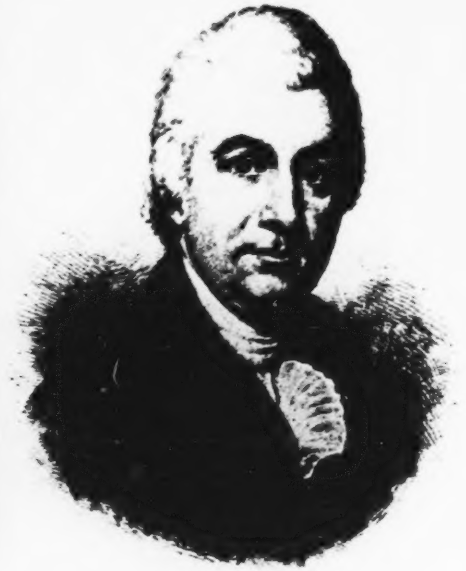
Among the Committee's innovations were the series of prohibitions on state activities; the states were forbidden to coin money, emit bills of credit, lay imposts, keep military forces in peacetime and to do numerous other things. The Convention had never itemized activities which it would forbid the states, although it is conceivable that the Committee was inspired in drawing this section by Madison's futile efforts to control state legislatures by granting a veto over their acts to the national legislature. Also innovative were the prohibitions laid on activities of the national legislature, including the prevention of its interfering with the importation of slaves; here the Committee was responding to the lobbying of Charles Cotesworth Pinckney, who had warned in the Convention that the support of the Deep South depended on an unimpeded supply of slaves.

Other innovations were the Committee's attempt to define treason and its punishment and its labored efforts to deal with land disputes between different states. Close examination of Article IX, Sections 2 and 3, of the Committee Report, which addressed the problem of land controversies, demonstrates how the Committee of Detail borrowed from the Articles of Confederation.

Committee of Detail	*Articles of Confederation*
Sect. 2. In all disputes and controversies now subsisting, or that may hereafter subsist, between two or more states, respecting jurisdiction or territory, the Senate shall possess the following powers:—Whenever the legislature, or the executive authority, or lawful agent of any state, in controversy with another, shall, by memorial to the Senate, state the matter in question, and apply for a hearing, notice of such memorial and application shall be given, by order of the Senate, to the legislature, or the executive authority, of the other state in controversy. The Senate shall also assign a day for the appearance of the parties, by their agents, before that House. The agents shall be directd to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question. But if the agents cannot agree, the Senate shall name three persons out of each of the several states; and from the list of such persons, each party shall alternately strike out one, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine, names, as the Senate shall direct, shall, in their presence, be drawn out by lot; and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges to hear and finally determine the controversy; provided a majority of the judges who shall hear the cause agree in the determination. If either party shall neglect to attend at the day assigned, without showing sufficient reasons for not attending, or being present shall refuse to strike, the Senate shall proceed to nominate three persons out of each state, and the Clerk of the Senate shall strike in behalf of the party absent or refusing. If any of the parties shall refuse to submit to the authority of such court, or shall not appear to prosecute or defend their claim or cause, the court shall nevertheless proceed to pronounce judgment. The judgment shall be final and conclusive. The proceedings shall be transmitted to the President of the Senate,	*The united states in congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more states concerning boundary, jurisdiction or any other clause whatever; which authority shall always be exercised in the manner following. Whenever the legislative or executive authority or lawful agent of any state in controversy with another shall present a petition to congress, stating the matter in question and praying for a hearing, notice thereof shall be given by order of congress to the legislative or executive authority of the other state in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question: but if they cannot agree, congress shall name three persons out of each of the united states, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names as congress shall direct, shall in the presence of congress by drawn out by lot, and the persons whose names shall be so drawn or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination: and if either party shall neglect to attend at the day appointed, without shewing reasons, which congress shall judge sufficient, or being present shall refuse to strike, the congress shall proceed to nominate three persons out of each state, and the secretary of congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court,*



John Rutledge, engraving after the painting by John Trumbull. Library of Congress.



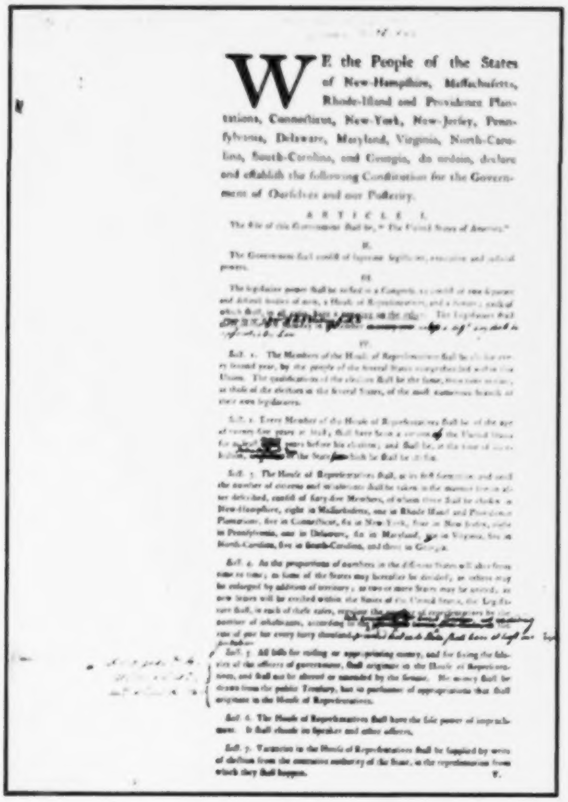
Nathaniel Gorham, etching by unidentified artist. Library of Congress.

and shall be lodged among the public records, for the security of the parties concerned. Every commissioner shall, before he sit in judgment, take an oath, to be administered by one of the judges of the supreme or superior court of the state where the cause shall be tried, 'well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection, or hope of reward.'

Section. 3. All controversies concerning lands claimed under different grants of two or more states, whose jurisdictions, as they respect such lands, shall have been decided or adjusted subsequently to such grants, or any of them, shall, on application to the Senate, be finally determined, as near as may be, in the same manner as is before prescribed for deciding controversies between different states.

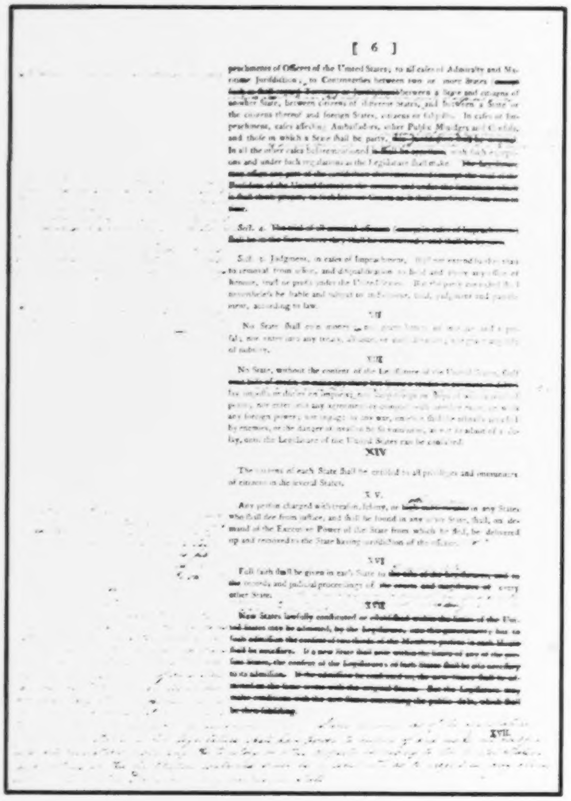
or to appear to defend their claim, or cause, the court shall pronounce sentence, or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceedings being in either case transmitted to congress, and lodged among the acts of congress for the security of the parties concerned: provided that every commissioner, before he sits in judgment, shall take an oath to be administered by one of the judges of the supreme or superior court of the state, where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favour, affection or hope of reward:" provided also that no state shall be deprived of territory for the benefit of the united states.

All controversies concerning the private right of soil claimed under different grants of two or more states, whose jurisdictions as they may respect such lands, and the states which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall on the petition of either party to the congress of the united states, be finally determined as near as may be in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different states.



WE the People of the States of New-Hampſhire, Maſſachuſetts, Rhode-Iſland and Providence Plantations, Connecticut, New-York, New-Jerſey, Pennſylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, do ordain, declare and eſtabliſh the following Conſtitution for the Government of Ourſelves and our Poſterity.

3. Committee of Detail Report, August 6, 1787, with William Samuel Johnson's annotations. *Peter Force Papers, Library of Congress.*



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4. Committee of Detail Report, August 6, 1787, with William Jackson's annotations. *William Samuel Johnson Papers, Library of Congress.*

The extent of the Committee's borrowing from the Articles is also demonstrated by comparing articles XV and XVI of its Report with the conclusion of article IV in the Articles:

Committee of Detail

Art. XV. Any person charged with treason, felony, or high misdemeanor in any state, who shall flee from justice, and shall be found in any other state, shall, on demand of the executive power of the state from which he fled, be delivered up and removed to the state having jurisdiction of the offence.

Art. XVI. Full faith shall be given in each state to the acts of the legislatures, and to the records and judicial proceedings of the courts and magistrates of every other state.

Articles of Confederation

If any Person guilty of, or charged with treason, felony, or other high misdemeanor in any state, shall flee from Justice, and be found in any of the united states, he shall upon demand of the Governor or executive power, of the state from which he fled, be delivered up and removed to the state having jurisdiction of his offence.

Full faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state.

Another section of Article IV in the Articles of Confederation—the stipulation that citizens of each state "shall be entitled to all privileges and

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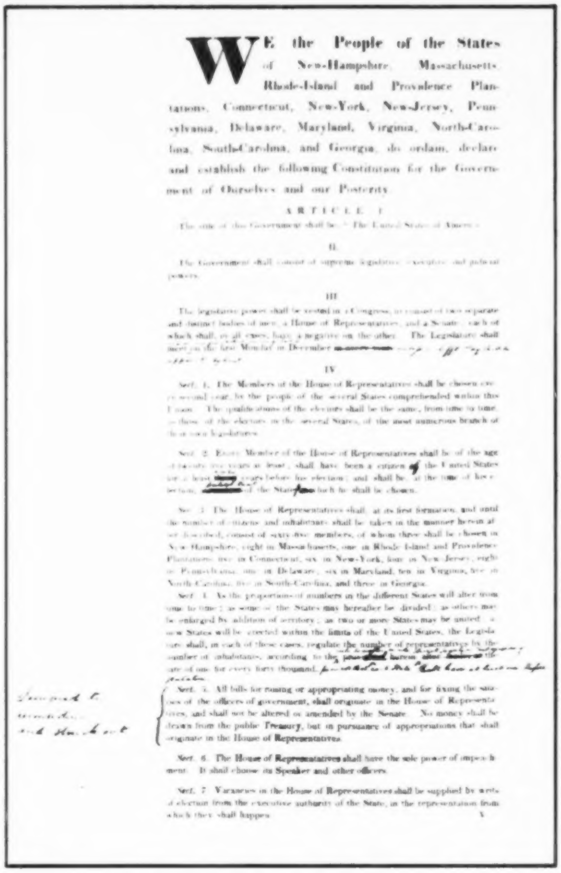
The Convention must have expected the Committee of Detail to submit a well-crafted document because it ordered the Philadelphia firm of Dunlap and Claypoole to print sixty copies of the Committee Report which were distributed to the members on August 6. This procedure was a departure from the previous methods of disseminating documents, for all earlier documents were submitted by their sponsors in longhand to the Convention Secretary to whom members repaired and made their own longhand copies (see illustrations one and two). Apparently upon orders from the Convention, Dunlap and Claypoole crowded the text of the report to the right margin of the paper, leaving a large space on the left side of the document. This enabled some delegates to use their copy of the report as a legislative diary, entering additions and corrections daily as the Convention debated the document through August and into September (see illustration four). Other delegates, John Dickinson, for example, used their margins for reflections on the Convention proceedings, which are, in some cases, as revealing as notes on the debates. The marginalia on the Committee of Detail Report, and on some other constitutional documents as well, has never been adequately studied and presents a challenge to scholarly ingenuity.



WE the People of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, do ordain, declare and establish the following Constitution for the Government of Ourselves and our Posterity.

ARTICLE I

5. Nineteenth century reprinting of the Committee of Detail Report. *Peter Force Papers, Library of Congress.*

immunities" of citizens in the other states—was incorporated into the Committee Report and Article I of the Articles—"The Stile of this confederacy shall be the 'United States of America' "—was brought over into the Report with the change of one significant word, confederacy to government.

By using the language of the Articles of Confederation, the Committee of Detail tried to convey an impression of continuity between the Constitution it was writing and the Articles which would demonstrate that the Convention had not violated its mandate to do no more than revise the Articles. The Committee, of course, had poured so much new wine in the Old Confederation bottle that the notion that the Constitution which it was preparing was a mere revision of the Articles was recognized by everyone as a fiction. The fiction became more transparent as the Convention in August deleted the Committee's clauses about state land controversies and modified or omitted other language which connected the Constitution to the Articles. Nevertheless, certain phrases from the Articles—the term "articles" itself, the "full faith" clause, "privileges and immunities"—survive in the final draft of the Constitution. Further, if the form of the two documents is compared—each having a preamble, a series of articles, itemization of legislative powers and prohibitions—the debt of the new document to its predecessor is clear, a debt which should not be forgotten as we celebrate the Bicentennial of the Constitution.

The Committee of Detail presented its report to the Convention on August 6. The members debated the report until September 10 when they adjourned to await the work of the Committee of Style, which had been appointed to prepare a new version of the Constitution. Between August 6 and September 10 the Convention made several significant changes in the Report, the most important being the alteration of the method of electing the president from selection by the national legislature to choice by electors. Aside from this change and a few other important alterations such as removing from the Senate the power to make treaties and appoint Supreme Court justices, the constitution which emerged from the Committee of Style and which was adopted on September 17 did not differ widely from the Committee of Detail Report. The titles which the Committee of Detail gave to officers and institutions of the new goverment—President, Speaker, Congress, Senate, House of Representatives, Supreme Court—many of its arresting phrases—"We the People," "necessary and proper," "State of the Union"—the structure of government, its powers and limitations, all appear, with modifications, in the Constitution as it exists today. The Committee of Detail Report did not, therefore, represent a middling, half-finished version of the Convention's proceedings; rather, it pointed the way to the completed Constitution.

An interesting footnote to the history of the Committee of Detail Report is that Peter Force, for reasons not clearly understood, reprinted the document in the 1820s or 1830s (see illustration five). The Force printing is easily distinguished from the original document by observing the different type used (compare illustrations five and three). Force's paper also differs appreciably. Force or someone in his pay annotated copies of his printing to enhance their appearance of authenticity. Libraries have been deceived by these annotations into believing that the Force printing was an original document. Students and prospective purchasers should be on their guard for these reprintings and for other purportedly original documents which may surface during the celebration of the Bicentennial of the Constitution.

James H. Hutson is chief of the manuscripts division of the Library of Congress. He is preparing a supplement to Max Farrand's *The Records of the Federal Convention of 1787* which will be published by Yale University Press in 1987.

PATHWAY TO JUDGMENT: *NEAR* V. *MINNESOTA* (1931)

The lesson which follows has been designed for use in the high school classroom, in courses which teach American history and government. It is one of more than sixty lessons developed by Project '87 with a grant from the National Endowment for the Humanities. This lesson may be photocopied for classroom application with the attribution noted on page 1.

The complete book of ***Lessons on the United States Constitution*** will be published and distributed to high schools throughout the nation for use in conjunction with standard high school textbooks. The lessons were designed and developed by John J. Patrick of the Social Studies Development Center, Indiana University, and Richard Remy of the Citizenship Development Program, Ohio State University. Paul Finkelman of the University of Texas served as consulting historical editor.

Project '87 would like to hear of other curriculum materials on the Constitution developed for all grade levels, but especially pre-collegiate. We will consider publishing samples in this section of the magazine. Please contact ***this Constitution,*** 1527 New Hampshire Avenue, N.W., Washington, D.C. 20036. Attention: Educational materials.

This lesson has been edited for inclusion in ***this Constitution.***

The Supreme Court is a busy place. The Court receives nearly 5,000 requests a year to review the decisions of lower courts. Each year the Court accepts about 450 of the requests. However, less than 200 of these cases receive a full hearing and a written opinion from the high court. Only a small number of cases receiving full review involve the most basic constitutional questions, whose outcome may shape the course of American life for generations.

Where do these major cases come from? How does a dispute that can shape the meaning of the Constitution get to the Supreme Court? What is the pathway to judgment?

This lesson describes how one major case reached the Supreme Court. The case, *Near* v. *Minnesota*, involved a small newspaper widely recognized as a scandal sheet, a future governor of Minnesota, two publishers—one a millionaire and the other a pauper—and the First Amendment to the Constitution.

The lesson illustrates common characteristics of many major cases heard by the Supreme Court.

1. Major cases involve a basic constitutional question affecting the whole nation.
2. Major cases often involve a real conflict between two parties over a specific issue or problem.
3. Major cases may take several years to resolve from the time the conflict first arises to the time the Supreme Court issues a decision.
4. Major cases, with rare exception, are appealed from a lower court.
5. Major cases involve various types of people. Some are model citizens acting from a sense of civic duty; others are less reputable characters. As Justice Felix Frankfurter put it, some of our most treasured safeguards in the Bill of Rights have been "forged in controversies involving not very nice people."

Background: A "Gag Law" Is Passed

The Minnesota legislature passed the Public Nuisance Law of 1925 for one purpose: to close down John Morrison's *Rip-Saw*, a newspaper notorious for its vicious attacks on public officials. The law permitted a single judge acting without a jury to stop a newspaper or magazine from publication, if it was found to be "obscene, lewd, and lascivious...or malicious, scandalous and defamatory." Although this law was vague, and gave judges great power over the press, many major newspapers in the state supported the law because they thought the suppression of scandalous papers like the *Rip-Saw* would protect the rights of reasonable publishers.

The Public Nuisance Law was known as a "gag law." Legally, the law authorized a form of censorship called *prior restraint*. Prior restraint allows government officials to prohibit a newspaper from publishing materials of which they disapprove.

The *Near* Case Begins

In the 1920's, Minneapolis became a crossroads in the illegal Canadian liquor trade. Ordinary people went about their business leaving law enforcement and the running of the city to corrupt politicians and gangsters. Besides gambling and illegal booze, there were numerous gang killings. Respectable newspapers refused to investigate the association between the law-breakers and law enforcement officials.

In 1927, Jay Near and Howard Guilford established the ***Saturday Press*** in Minneapolis. Near was an experienced journalist, but was known for his bigotry against Catholics, Blacks, Jews and organized labor. His specialty was reporting scandals in a sensational manner.

From its first issue, the *Saturday Press* hammered away at supposed ties between gangsters and police with a series of sensational stories. The paper especially was tough on city and county government officials.

Among these officials was the county prosecutor, Floyd Olson. Olson was later to become a three-term Minnesota governor. The *Saturday Press* called him "Jew lover" Olson. It claimed he was dragging his feet in the investigation of gangland pursuits. Olson was enraged. On November 21, 1927, he filed a complaint under the Public Nuisance Law of 1925 with the county district judge. Olson charged that the *Saturday Press* had defamed various politicians, the county grand jury, and the entire Jewish community.

The county judge issued a temporary restraining order against the *Saturday Press*. This order prohibited publication of the paper under the Public Nuisance Law of 1925. Near and Guilford obeyed the order but claimed it was unconstitutional. The county judge rejected their claim but did certify they could appeal the restraining order. Under Minnesota law the case went directly to the Minnesota supreme court.

The Case Moves Through the Minnesota Courts

Near and Guilford had little money to pursue their legal battle. The temporary restraining order would keep their paper off the streets until their appeal was settled. The publishers finally did get some legal help from a local attorney who believed in freedom of the press, even though he personally disliked Near and his newspaper.

The Minnesota Supreme Court. On April 28, 1928—more than three months after the temporary restraining order was issued—the Minnesota supreme court heard the appeal.

The publishers argued that the Public Nuisance Law violated the entire concept of freedom of the press as guaranteed by the First Amendment. That Amendment says: "Congress shall make no law ... abridging the freedom ... of the press." They also argued that it violated the right of a free press guaranteed by the Minnesota Constitution.

The Minnesota supreme court ruled that the Public Nuisance Law did not violate the Minnesota Constitution. The court compared the *Saturday Press* to "houses of prostitution or noxious weeds." It asserted that the legislature had the power to do away with such nuisances. In Minnesota, the court argued, no one can stifle the truthful voice of the press, but the constitution was never intended to protect "malice, scandal and defamation." The case would return to the county court, which would decide if the temporary restraining order should be made permanent.

An Important Ally. While these legal maneuverings were going on, two things happened. First, Howard Guilford, Near's partner, withdrew from the legal battle. Guilford, impatient with the slow pace of the legal system, sold his interest in the paper to Near.

More importantly, Near recruited a rich and powerful ally in his fight. Robert McCormick, the publisher of the *Chicago Tribune*, sympathized with Near for a number of reasons. Like Near, McCormick was also a bigot who disliked Blacks, Jews, and other minorities. McCormick had also fought numerous legal battles over articles published in his paper. This had taught McCormick the importance of defending the First Amendment. He certainly did not want the Minnesota "gag law" copied by the Illinois legislature. Thus, the interests of the rich publisher in Chicago and the poor scandal monger in Minnesota coincided. Near wanted his little paper back in business; McCormick wanted a free press.

McCormick committed the *Tribune*'s resources to the case. His lawyers would represent Near in future proceedings.

Back to the County Court. On October 10, 1928, the county judge held hearings on whether the temporary restraining order should be made permanent. The hearings were merely a formality. Near's attorney used the same arguments as before. This time, however, he was joined by two lawyers from the *Chicago Tribune*. Prosecutor Olson simply offered as evidence nine copies of the *Saturday Press*. The judge accepted the state supreme court's conclusion that the Public Nuisance Law was constitutional, and in January the restraining order became permanent. It had taken a little more than a year, and three legal proceedings, but the *Saturday Press* was finally closed down for good under the Minnesota "gag law."

Final Steps in Minnesota. McCormick's lawyers did not expect to win in the county court. They were aiming

for the U.S. Supreme Court. But the U.S. Supreme Court would only take a case from a state's highest court. So once again, Near and his attorneys appealed to the Minnesota supreme court. This time they appealed the issuing of the permanent injunction. They had little doubt that the Minnesota supreme court would uphold the injunction, since it had already upheld the "gag law."

As expected, the Minnesota supreme court reasserted that the *Saturday Press* was a public nuisance. The justices did say the defendants could publish a newspaper "in harmony with the public welfare...." But such a paper would hardly be the *Saturday Press.*

One Additional Ally. Before going to the Supreme Court, McCormick sought to strengthen Near's case by having the formal support of the American Newspaper Publishers Association (ANPA). ANPA members represented more than 250 newspapers across the country. On April 24, 1930, ANPA came out in support of Near. The Association made a public statement declaring the Minnesota law "one of the gravest assaults upon the liberties of the people that has been attempted since the adoption of the Constitution."

The ANPA statement stimulated editorials in many leading newspapers attacking the Minnesota law. *The New York Times*, for example, called the statute "a vicious law."

So the stage finally was set for Near, with McCormick's help, to bring his case to the U.S. Supreme Court. There was little question the Supreme Court would take the case. Under federal law, the Court was required to consider rulings that upheld state laws while denying constitutional rights, such as freedom of the press.

On April 26, 1930, twenty-six months after the first restraining order against Near, the U.S. Supreme Court notified the Minnesota supreme court that it would hear the case of *Near* v. *Minnesota.*

The Supreme Court Decides

For the first time in its history, the Supreme Court would rule on the constitutionality of prior restraint. Arguments in the case were scheduled for January 30, 1931. Neither Jay Near nor "Colonel" McCormick would be present, but McCormick's attorney was ready, as were attorneys for the state of Minnesota.

Arguments. Near's attorney claimed that the Minnesota Public Nuisance Law allowed prior restraint and thus violated the First and Fourteenth Amendments. Freedom of the press, he argued, was a fundamental right guaranteed by the Constitution. No state could take the right away through prior restraint.

Near's attorney admitted that the *Saturday Press* article was "defamatory" (highly critical of government officials). But, he added, "So long as men do evil, so long will newspapers publish defamation." The attorney argued that "every person does have a constitutional right to publish malicious, scandalous and defamatory matter, though untrue and with bad motives, and for unjustifiable ends." Such a person could be punished afterwards. The remedy, then, was not censorship of an offending newspaper by prior restraint. Rather, the state should bring specific criminal charges against such a newspaper after the material was published.

Minnesota argued that the Public Nuisance Law was constitutional and that the injunction against the *Saturday Press* had attacked the reputations of public officials. Thus, it was punishment for an offense already committed. The Constitution was designed to protect individual freedoms, not to serve the purposes of wrong-doers, such as Near and his scandalous *Saturday Press.*

The Decision. On June 1, 1931, the Supreme Court ruled in favor of Near by a vote of 5 to 4. The Court held that the Minnesota law was a prior restraint on the press and violated the First Amendment and the "due process" clause of the 14th Amendment.

Chief Justice Charles Evans Hughes, in the majority opinion, declared the Minnesota law was "the essence of censorship." He said that libel laws, not closing down newspapers, were the answer to false charges and character assassinations. He emphasized that the right to criticize government officials was one of the foundations of the American nation.

Jay Near had lost four times in the Minnesota courts. But he had won his final battle before the U.S. Supreme Court.

Aftermath

Jay Near was triumphant when he learned of the Court's verdict. In October 1932, Near began to publish the *Saturday Press* again. The paper, however, did not survive, and in April 1936, Near died in obscurity at the age of 62.

EXTRA!
BIG SENSATION
SOCIETY SHOCKED

Colonel McCormick was also pleased with the Court's ruling. He wrote Chief Justice Hughes: "I think your decision in the Gag Law case will forever remain one of the buttresses of free government."

As a result of *Near* v. *Minnesota*, the United States has retained a tradition against prior restraints unlike nearly any other in the world. This tradition has helped keep the press free from censorship by government officials despite publication of negative articles about political figures.

In 1971, the Supreme Court relied on the "Near" precedent in the "Pentagon Papers" case (*New York Times* v. *United States*). In that case the federal government attempted to stop publication by *The New York Times* of secret documents describing the history of the involvement of the United States in the Vietnam War. The documents showed that the government had frequently misled the American people about the war. The government did not want this embarrassing information to be published. The Court ruled against the government and permitted publication of the documents.

Reviewing Facts and Ideas

1. Match the items in Column *B* with the names in Column *A*.

___1. John Morrison	A. Publisher whose newspaper was suppressed by Minnesota law
___2. Jay M. Near	B. Jay Near's partner
___3. Floyd Olson	C. Chief Justice of the U.S. Supreme Court
___4. Howard Guilford	D. Publisher of the *Rip-Saw*
___5. Robert McCormick	E. Publisher of the *Chicago Tribune*
___6. Charles Evans Hughes	F. County prosecutor who filed complaint against the *Saturday Press*

2. *True or False*? (Be prepared to explain your choices.)
   a. Prior restraint is protected by the First Amendment.
   TRUE FALSE
   b. The Minnesota Public Nuisance Law authorized judges to engage in prior restraint.
   TRUE FALSE
   c. Jay Near claimed the Minnesota Law violated the 5th Amendment.
   TRUE FALSE
   d. The Minnesota supreme court ruled the Public Nuisance Law violated the U.S. Constitution.
   TRUE FALSE
   e. A county judge issued the temporary restraining order against the *Saturday Press*.
   TRUE FALSE
   f. The U.S. Supreme Court upheld the Minnesota Law as constitutional.
   TRUE FALSE
3. What led county prosecutor Olson to file a complaint against the *Saturday Press*?
4. What action did the county district judge take in response to Olson's complaint? What reason did the judge give for his action?
5. Why was Robert McCormick interested in the case?
6. What were the arguments of the two sides before the U.S. Supreme Court?
7. What did the Court decide?
8. What reasons did the majority give for their decision?
9. What has been the significance of *Near* v. *Minnesota*?

LESSON PLAN AND NOTES FOR TEACHERS

Preview of Main Points

In the case of *Near* v. *Minnesota*, the U.S. Supreme Court for the first time ruled that states must not abridge the First Amendment's guarantee of freedom of the press. The case is used here to illustrate to students the path a case may follow to the Supreme Court. It begins at the county court level, goes to the Minnesota supreme court, back to

the county court, and then back once more to the state's highest court. From there it goes to the U.S. Supreme Court. The lesson provides a detailed look not available in textbooks about how major cases reach the Supreme Court.

Connection to Textbooks

This lesson could be used to supplement government textbook material on the judicial process and the Supreme Court and with material on civil liberties. In addition, the lesson illustrates the federal nature of our system in two ways: (1) the U.S. Supreme Court ruled a state law unconstitutional and (2) the *Near* case progressed through a state court system before being finally settled in a national court.

The lesson could supplement American history textbook discussions about social and political issues of the period between World Wars I and II.

Objectives

Students are expected to:

1. explain the circumstances leading up to *Near* v. *Minnesota;*
2. identify the main participants and constitutional issue in *Near* v. *Minnesota*;
3. identify the steps that the case followed through the two court systems;
4. explain the interests of third parties in the case;
5. explain the relationship of the federal and state court systems as revealed in the case;
6. explain the significance of the Supreme Court's decision with regard to freedom of the press;
7. develop a greater understanding of the process through which major cases reach the Supreme Court.

Suggestions For Teaching The Lesson

This is a case study designed to provide students with a detailed look at the process through which major cases reach the U.S. Supreme Court. Use questions at the end of the lesson to help students comprehend and analyze the facts and ideas of the case.

Opening The Lesson

- Explain to students how this lesson is connected to their textbook materials and inform them about the main points of the lesson.
- Tell students that the purpose of the lesson is to show how major cases reach the U.S. Supreme Court.

Developing The Lesson

- Have students read the case study.
- Ask them to answer the questions about reviewing facts and ideas. You might wish to check student comprehension of the case by conducting a discussion of these questions.

Concluding The Lesson

- Tell students that one popular saying is "Justice delayed is justice denied." Ask how that saying might apply to the *Near* case. Ask students if they believe it is a good idea to provide for more than one appeal in our judicial system. Finally, ask students to help formulate a list of attributes associated with taking a case all the way to the Supreme Court (e.g. a real conflict between parties, time and money, a determination to win, expert legal help, etc.).

Suggested Reading

Friendly, Fred W. *Minnesota Rag* (New York: Random House, 1981).

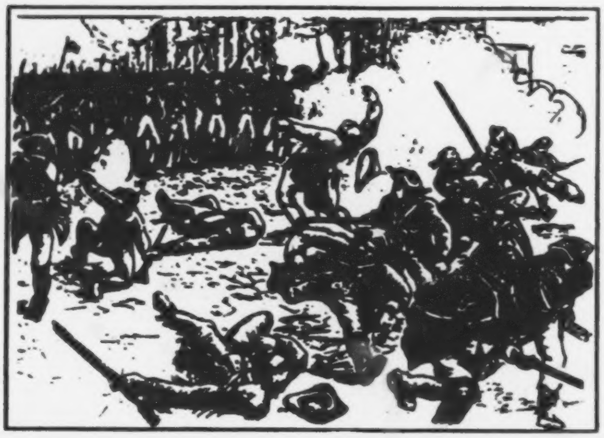
This book is a case study of *Near* v. *Minnesota.* It gives the behind-the-scenes story of Minnesota's attempts to enforce a "gag rule" in closing down a "yellow sheet," the *Saturday Press.* The book follows the case step-by-step through the Minnesota courts and on to the U.S. Supreme Court. It discusses the significance of the case as a precedent for future Supreme Court decisions that built a tradition of "no prior restraint" of the American press.

Murphy, Paul L. "*Near* v. *Minnesota* in the Context of Historical Developments" (*Minnesota Law Review* Vol. 66, No. 1, November, 1981), pp. 95–160.

This article, which appeared in the *Minnesota Law Review*, gives the historical importance of *Near* v. *Minnesota.* It would be useful for teachers.

Bicentennial Gazette

MEDIA PROGRAMS



THE SHAYS' REBELLION PROJECT

Calliope Film Resources, Inc.
35 Granite St.,
Cambridge, MA 02139
Randall Conrad, Project Director

Shays' Rebellion of 1786–87 will be the subject of a 90-minute film for public television being developed by Calliope Film Resources of Cambridge, Massachusetts. Shay's Rebellion was the New England uprising that climaxed a decade of social turmoil; the outbreak of violence unified the movement for a strong national government and, thereby, ushered in the constitutional era. "Shays' Rebellion had a great influence on public opinion," as Samuel Eliot Morison has reminded modern readers; it became "the final argument to sway many Americans in favor of a strong federal government." "Let us have a government in which our lives, liberty and property will be served, or let us known the worst at once," declared George Washington in response to Shays' Rebellion, which he gave as the reason for his own attendance at the Philadelphia Convention in 1787.

It is expected that this television film will offer an authentic portrayal of the lives of "ordinary" eighteenth-century Americans in relation to the great events of their time by dramatizing the interplay of the everyday concerns of average citizens with historic events of national importance.

Randall Conrad and Christine Dall are producers and cowriters of the Shays' Rebellion film. Among the scholars associated with the project are: James A. Henretta (Boston University), Sidney Kaplan (University of Massachusetts, Emiterus), David Szatmary (author of *Shays' Rebellion: The Making of an Agrarian Insurrection*), and Steven A. Channing (UNC Center for Public Television). The project has received funding from the National Endowment for the Humanities.

PROJECT '87 MEDIA REVIEW POLICY

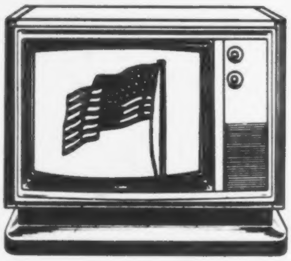
In response to inquiries from television producers to review and/or endorse programs, Project '87 has established these services to provide producers with assistance and, possibly, with reviews:

1. At the request of a producer, Project '87 will provide the names of scholars who might serve as consultants for programs. Producers may say that Project '87 offered its assistance in identifying consultants. This service does not connote endorsement by Project '87 or permission to use its name as a co-sponsor or developer of the program.

2. At the request of a producer, Project '87 will convene panel of reviewers for the programs. Upon the recommendation of the panel, the program will be permitted to carry this statement:

"This program has been reviewed and recommended by a panel of scholars convened by Project '87, the joint effort of the American Historical Association and the American Political Science Association to commemorate the Bicentennial of the United States Constitution."

Except in the case of educational institutions that produce television programming, all expenses associated with convening the review panel will be born by the producer of the program.



WGBH-TV (BOSTON) U.S. CONSTITUTION PROJECT

Peter McGhee, Project Director
125 Western Ave.
Boston, MA. 02134

WGBH-TV (Boston) has received a planning grant from the National Endowment for the Humanities to enable it to design a television project on the evolution of the U.S. Constitution. The programming, for use by the Public Broadcasting Service, will evalaute the U.S. Constitution's fulfillment of its mission to date and its prospects for continued usefulness and vitality. The programs are expected to focus upon areas where technological and economic change pose substantial challenges to traditional constitutional interpretations, and upon the evolution of the relationship among the federal branches, and between the federal government and the states.

The project proposed by WGBH-TV is being planned in conjunction with the Institute of Politics at the John F. Kennedy School of Government at Harvard University. Personnel of the Institute associated with this project include: Samuel Beer, Philip Heymann, Don Price, Ernest May, Francis Bator and Richard Neustadt.

A MORE PERFECT UNION

Yale University Media Design Studio
396 Orange Street
New Haven, Ct. 06511
Burke Marshall, Project Director

Yale University Films, a non-profit, educational unit of Yale University, has received a script-writing grant from the National Endowment for the Humanities for a three-hour, primetime film for television on the making of the Constitution and the Bill of Rights. The script, written by William Peters, Director of Yale Films, in consultation with Gordon Wood, Professor of History, Brown University and Paul Freund, Professor Emeritus, Harvard Law School, will be submitted to the NEH in July for production support. Production is scheduled to begin by April, 1985, with broadcast planned for early 1986.

A More Perfect Union will use an actor-narrator and supporting cast to recount the pertinent events of 1787–1791 in a dramatic documentary form, characterized by historical accuracy of both fact and feeling. Shot where the events described took place, the film will cover the Philadelphia Convention, the state ratifying conventions, and the creation and adoption of the first ten amendments. Actors will represent the people involved in those events and will use their actual words. Through the use of dramatic "flashesforward" in the course of the narrative, the production will also illustrate the growth and change of the Constitution through amendment and Supreme Court interpretations. The deliberate blending of the past—both the years of the making of the Constitution and those that followed it—with the present—a modern-dress narrator sometimes in contemporary backgrounds—will help underscore the living nature of the Constitution and its relevance today while also bringing to life for a prime-time adult television audience the drama, tension, and suspense experienced by Americans of two hundred years ago as they struggled to create what has been called "the first new nation."

A hard-cover book by Mr. Peters, paralleling the script, will be published by *American Heritage* Publishing Company to coincide with the broadcast. *American Heritage Magazine* plans to use excerpts from the book in the months prior to publication and broadcast. A trade paperback edition will be published in the Fall of 1986.

In addition to this evening-length special, Yale Films is planning to convert the materials into two series to be used for educational purposes. The first of the two proposed series will consist of three one-hour films and video cassettes suitable for closed circuit broadcast and telecourse use. The second will consist of six films and video cassettes of approximately thirty-minutes-length appropriate for high school and college classroom utilization.

WITNESSES AT THE CREATION

Witnesses at the Creation by Richard B. Morris is the title of a forthcoming book from the press of Holt, Rinehart, and Winston, which is to provide the basis for a television series, jointly sponsored by Capital Cities Communications and Lou Reda Productions. As a contribution to the Bicentennial of the Federal Constitution, the book and TV series stress the writing of *The Federalist*, and present that great classic in political science through the eyes of its authors, Alexander Hamilton, John Jay, and James Madison. The triple biography traces their early careers and sets them against the background of the historic events of the time, including the crises of the Confederation, the federal Convention, the ratification of the Constitution, and the adoption of the Bill of Rights. Publication of the book is scheduled for 1985.

Richard B. Morris is the author of numerous works in American history, including *The Peacemakers: The Great Powers and American Independence* (current edition, Northeastern University Press), the *Encyclopedia of American History*, now in its sixth edition, and *Government and Labor in Early America*. He also serves as co-chair of Project '87, has been past president of the American Historical Association, and is currently president of the Society of American Historians.

Historical consultants in the series include Henry Steele Commager of Amherst College, co-editor with Morris of the New American Nation Series and author of numerous works in American history, and Jacob E. Cooke, former associate editor of the Hamilton Papers and an editor of an authoritative edition of *The Federalist*.

Torch of the Statue of Liberty, *Philadelphia Exposition of 1876. Division of Political History, Smithsonian Institution, Washington, D.C.*

Seminar session on national security and freedom of the press moderated by Columbia law professor Benno C. Schmidt., Jr. *Photograph by Lynn Cates.*

THE CONSTITUTION: THAT DELICATE BALANCE

Produced by Media and Society Seminars
Columbia University Graduate School of Journalism
In association with WTTW, Chicago, and WNET/13, New York
Fred W. Friendly, Senior Program Advisor

The Constitution: That Delicate Balance is a telecourse funded by the Annenberg/CPB Project and produced by Media and Society, WNET/New York and WTTG/Chicago. At the heart of the course is a thirteen-part television series which will be nationally broadcast on PBS this fall.

The television specials bring together over 200 representatives of government, law, journalism, education and medicine in a series of historic seminars. The first four broadcasts were videotaped during a three-day Media and Society conference held in April 1983 entitled "National Seminar on the Bill of Rights: Freedom and Restraints in the 80's." The session was held in the House of Representatives' Chamber in Congress Hall—adjacent to Independence Hall, the site of the original debates and framing of the Constitution—at Independence National Historic Park, Philadelphia.

The format of the television programs has the panelists responding to hypothetical dilemmas which echo today's headlines and editorials. (Behind each hypothetical situation is a specific constitutional clause and a search for its proper contemporary meaning.) Retired Supreme Court Justice Potter Stewart offers background analysis on the constitutional issues under review. Moderators from leading law schools question the panel in a Socratic fashion. Beliefs and biases are revealed; in Professor Friendly's words, the panelists are placed "in situations so agonizing that they can escape only by thinking."

The first four programs in the series were aired in January and February of 1984. They were entitled: "National Security and Freedom of the Press"; "Criminal Justice and a Defendant's Right to a Fair Trial"; "School Prayer, Gun Control, and the Right to Assemble"; and "Affirmative Action and Reverse Discrimination". The press reviews of these initial shows were very favorable; comments from the academic community were equally enthusiastic.

The topics to be explored in forthcoming programs include: "Executive Privilege and the Presidency: The President Versus the Congress;" "War Powers: The President and the Congress"; "Presidential Elections, Presidential Succession"; "Crime and the Insanity Defense"; "Punishment and the Death Penalty"; "The Electoral Process: Money and the Media"; "The Right to Live, The Right to Die"; "Immigration and Illegal Aliens"; and "Federalism: The National Government Versus the States".

Two books accompany and supplement the television programs. The first, written by Professor Friendly and Martha J. H. Elliott, is an introduction to the human dramas behind landmark cases in constitutional law. Justice Felix Frankfurter observed that "the safeguards of liberty have frequently been forged in controversies involving not very nice people." In a series of sixteen essays, the authors combine history, journalism and legal interpretation to bring what Frankfurter called these "petty cases" to life. The second, a short textbook by George McKenna, has thirteen chapters that correspond to the thirteen television programs. Each chapter begins with the historical and legal background of the issue covered, the principles and controvery at the heart of the seminar, the course of Supreme Court thinking on the issue and the fate that these Court decisions have met with before the public. McKenna also reviews the televised seminars themselves to show how major points are developed in the programs, what assumptions underlie them, and when answers go astray or come too easily. Both volumes are published by Randon House.

For information about off-air taping licenses or acquisition of tape cassettes, call 1-800-532-7637 or write The Annenberg/CPB Collection, 1213 Wilmette Avenue, Wilmette, Illinois 60091.

TO FORM A MORE PERFECT UNION

Epilog/WITF
P.O. Box 18938
Philadelphia, PA 19119
Marc Epstein, Coordinator

This public television series will examine the shape and the character of the American Constitution as it was written in 1787 and its growth and change in the following decades. The programs will include discussion of the Constitutional Convention and its participants, the ratification debates, the adoption of the Bill of Rights, the creation of political parties and the resolution of the slavery question. The programs will describe the evolution of the Constitution out of individual and geographic self-interest, political ideals and a spirit of compromise.

The editorial development of the series will be guided by Marc Epstein (Epilog), Howard A. Ohline (Temple University), Stanley N. Katz (Princeton University) and Richard R. Beeman (University of Pennsylvania).

WE, THE PEOPLE. . . .

KQED, Inc. (San Francisco)
500 Eighth Street
San Francisco, California 94103
Beverly Ornstein, Project Director

A series of seven half-hour television documentaries is being planned by WQED (San Francisco) to examine the origin, development and contemporary meaning of some of the provisions of the U.S. Constitution. Tenatively titled *We, the People . . .*, the series will use a current affairs approach to demonstrate the impact on daily lives of the Constitution. Among the issues that are likely to be considered are: judicial review, the First Amendment guarantees, the treatment of minority groups under the Constitution and problems of federalism.

A planning grant has been awarded to this project by the National Endowment for the Humanities. Among the planning consultants ae: Gerald Gunther (Stanford Law School), James Kettner (UC Berkeley), James MacGregor Burns, (Williams College), Seymour Martin Lipset (Hoover Institute, Stanford University), Thomas Grey (Stanford Law School), and Anthony Lewis (New York Times).

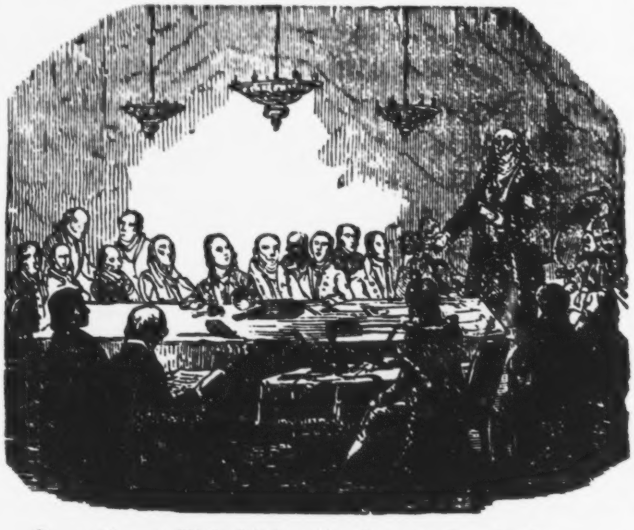
VISIONS OF THE CONSTITUTION

Metropolitan Pittsburgh Public Broadcasting, Inc.—WQED 4802 Fifth Avenue
Pittsburgh, PA 15213
Danforth Fales, Project Director

Visions of the Constitution, a projected series of eight to twelve half-hour documentary profiles, will focus on the life stories of modern-day scholars and interpreters of the Constitution. Their ideas, actions, thoughts and life work will be examined through the extensive use of related archival footage, stills, and interviews: a structured colloquy.

The proposed subjects for this television series include Archibald Cox, Charles Black, and Hannah Arendt among others. In order to present a balanced program, the thoughts, opinions, and contributions of each program's subject will be analyzed by his or her peers who may agree or disagree with the subject's particular point of view.

The films are designed to be used by public broadcasting and in the classroom. The project has been created by Professor Tom Gerety and WQED (Pittsburgh). The National Advisory Committee includes: Derrick Bell, Jr. (University of Oregon), Joel Feinberg (University of Arizona), Harold Hyman (Rice University), Barbara Black (Yale University), Gerald Gunther (Stanford University), and Benno C. Schmidt, Jr. (Columbia University). The project received an NEH program grant.



Convention at Philadelphia forming the Constitution.

THE WORK OF PEACE

The National Committee for the Bicentennial of the Treaty of Paris
3117 Hawthorne St., N.W.
Washington, D.C. 20008

A film about the negotiations behind the Treaty of Paris is being produced by the Smithsonian Institution's Office of Telecommunications. Titled *The Work of Peace* from Benjamin Franklin's phrase in a letter to David Hartley—"we were long fellow labourers in the best of all works, the work of peace"—the half-hour documentary is scheduled for completion this winter. It is expected to be shown on public television and will also be available for distribution to schools, universities, libraries and community groups, as well as overseas audiences.

Much of the footage will be shot on location in London and Paris. Paintings, portraits and period costumes will set the scene and recreate the texture of life as it was experienced by the American negotiators. To ensure historical accuracy, scholars of the Treaty and the period such as Claude-Anne Lopez, Jonathan Dull, Marc Pachter and Joan Challinor are serving as consultants.

"There is an enormous challenge in making a film about a lengthy diplomatic negotiation," says Paul Johnson, the film's producer. Thus the film will emphasize the human element, even the personality clashes among the extraordinary men who hammered out the Treaty. Since these negotiators left full records of their thoughts and feelings, it will be possible in many cases to use their actual language, thereby enhancing the accuracy of the presentation.

Standing Bear, Ponca Chief. National Anthropological Archives, Smithsonian Institution, Washington, D.C.

THE TRIAL OF STANDING BEAR

Nebraska ETV Network
P.O. Box 83111
Lincoln, NE 68501
Eugene H. Bunge, Project Director

On May 2, 1879, the U.S. District Court in Omaha, Nebraska handed down a landmark decision in the case of Ponca chief, Standing Bear. The decision estalished for the first time that Native Americans were protected by the Constitution. The case concerned important human rights issues for Native Americans at a time when few sympathized with their cause.

The Nebraska ETV Network will produce a two-hour dramatization of the events leading to the trial and the trial itself, taped partly on location in the Great Plans area of Nebraska. The script for the program was written by Native American scholar, teacher and writer Vine Deloria, Jr., and screenwriter Angela Rackley, under a grant from the National Endowment for the Humanities. The program will be offered for broadcast to the Public Broadcasting System.

THE LIVING CONSTITUTION

National Video Communications, Inc.
2807 Eagle St.
San Diego, CA 92103
George A. Colburn, President

National Video Communications, Inc. is developing a four-part television series on the U.S. Constitution. Each of the four projected programs will focus on a theme that was of major concern to the Founders and is still a source of tension in the political system today.

As it is now envisioned, three programs will open with documentary footage of a contemporary controversy, such as school prayer, environmental regulation or sex discrimination, that illustrates the basic tensions in the constitutional issue under consideration. Historical recreation will then portray the debates at the time of the Constitutional Convention. This technique will be supplemented by the use of archival materials, narration, and interviews to highlight major historical developments and their relationship to the specific constitutional issues between 1787 and the present. The fourth program will use documentary techniques to illustrate current and future problems confronting the Constitution.

The key personnel in the planning of this project are: George A. Colburn, president of NVC, project director; David Kennard, producer; and Paul Murphy, University of Minnesota, chief academic consultant.

THE U.S. CONSTITUTION AND CHILDREN'S TELEVISION

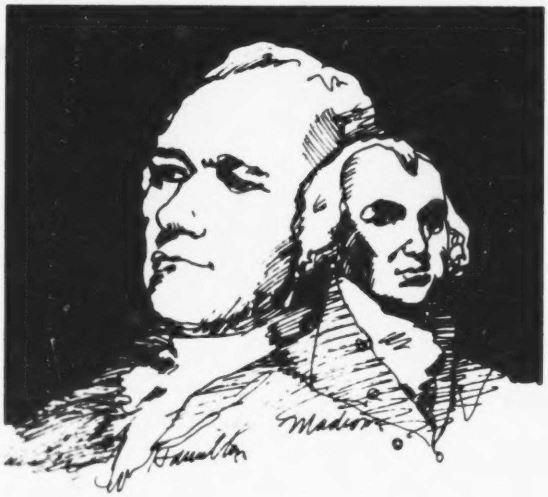
Action for Children's Television (ACT)
46 Austin Street
Newtonville, MA 02160
Peggy Charren, President

The National Endowment for the Humanities has awarded a grant to the Action for Children's Television, Inc. (ACT) for a project linking the U. S. Constitution to children's television broadcasting. ACT is organizing a symposium that will bring scholars and educators in American history, political philosophy and constitutional law together with producers in the broadcast and cable television industry. The purpose of the symposium will be to plan appropriate themes and treatments for programming for young people to be shown during the 1987 Bicentennial.

Although ACT hopes to promote a wide variety of program types and formats, it is proposing a general theme: to communicate to young people the balance of opposites that holds the Constitution and our government together and gives it strength.

Following the symposium, ACT will publish and distribute a handbook in order to disseminate the planners' ideas and suggestions to producers and scholars nationwide and to encourage further collaboration on children's programming.

THE NATIONAL ENDOWMENT FOR THE HUMANITIES SPECIAL INITIATIVE FOR THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION



A RECURRENCE TO FIRST PRINCIPLES: THE NEW BICENTENNIAL OF THE UNITED STATES CONSTITUTION

by Edward J. Erler
Director, Office of the Bicentennial

As the readers of ***this Constitution*** undoubtedly know, the National Endowment for the Humanities, through the Chairman's Special Initiative on the Bicentennial of the United States Constitution, is continuing its funding of projects which have the Constitution as their central focus. This Endowment-wide initiative has as its long term goal to provide the groundwork for a renewal of scholarship and public debate concerning the fundamental and enduring principles that inform the Constitution.

Someone might well ask whether this is an appropriate subject for the humanities? While it may be difficult to define the humanities, it certainly could be argued that the fundamental question of the humanities is the question of what it means to be human. From this point of view, all of the specific disciplines within the humanities are attempts to answer this question. For the Founders, this basic question resolved itself into the question of what constituted human nature. James Madison, perhaps the most philosophic of the framers, writing in *The Federalist*, queried "What is government itself but the greatest of all reflections on human nature?" Madison thus implied that the elemental questions confronting the human condition culminate in politics understood in the most comprehensive sense—how a people chooses to govern itself. The founding of a political order thus presents the human things in their most dramatic and revealing light. Such was clearly the situation of the American Founding. The Founders asserted not only the right but the capacity of the people freely to choose their form of government.

While this capacity is always a potential of the human condition, the necessary conditions for its actualization are rarely found. But the Founders believed that such conditions were present at the time the Constitution was drafted. As Hamilton wrote in *The Federalist*:

> "It has been frequently remarked, that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions, on accident and force. If there be any truth in the remark, the crisis, at which we are arrived, may with propriety be regarded as the era in which that decision is to be made; and a wrong election of the part we shall act, may, in this view, deserve to be considered as the general misfortune of mankind."

The *ancien régime* was dominated by the politics of class and caste. But the Framers believed that caste and class could not provide the foundations for the rule of law. As Jefferson was later to remark, "the mass of mankind has not been born with saddles on their backs, nor a favored few booted and spurred, ready to ride them legitimately, by the grace of god." The Founders of the American regime wanted, more than anything else, to establish a political order in which the rule of law would replace the arbitrary system that dominated feudal society. The American regime was thus intended by the framers to be a regime of principle and not one of fiat.

The drafters of the American Constitution self-consciously relied on the Declaration of Independence as the statement of the animating principles of the regime. Madison, writing in *The Federalist*, noted that the Constitution sprang from the "laws of Nature and nature's God" and embodied the "fundamental principles of the revolution." The great principle of the Declaration is embodied in the statement that "all men are created equal" and that as a necessary consequence of this equality all legitimate government must be derived from "the consent of the governed." In this respect America is unique in being a regime of principle. Whereas tradition was the prescriptive element of the feudal regime, the ratiocination of the unaided human intellect was to provide the foundation of a constitutional regime in America. Tom Paine, America's foremost polemicist, wrote of America's uniqueness in his *Rights of Man*:

> "The independence of America, considered merely as a separation from England, would have been a matter but of little importance, had it not been accompanied by a revolution in the principles and practise of government . . . The revolutions which formerly took place in the world had nothing in them that interested the bulk of mankind. They extended only to a change of persons and measures, but not of principles, and rose or fell among the common transactions of the moment."

The principle of equality was thought by the Founders to supply the ground of non-arbitrary rule. It would thus serve as the animus of the American polity, the authoritative source of its most authoritative opinions; or as Abraham Lincoln termed it, "our ancient faith."

But the Constitution, insofar as it allowed the continued existence of slavery, was only a partial expression of the Declaration's principle that all legitimate rule must proceed from the "consent of the governed." The incompleteness of the Constitution was thought by the Founders to have been dictated by political necessity. A more radical position on the question of slavery in 1787 would, they thought, have spelled the defeat of the Constitution. Under the pressing circumstances the best that could be accomplished was to create an instrument of government which, although tolerating slavery, nevertheless put slavery on what Lincoln termed "the road to ultimate extinction" because it stood in stark contrast to the principles that served as the "sheet anchor" of the Constitution. But it was not until the adoption of the Reconstruction Amendments that the Constitution was brought formally into harmony with the principles of the Declaration. Indeed, those who debated the Amendments frequently referred to the Declaration as the "organic law" of the regime. Thus it is not entirely untoward, as some scholars have suggested, to regard the Civil War as a necessary completion of the Revolution.

This statement from the Massachusetts Bill of Rights of 1780 might well be taken as the motto for the Special Initiative on the Bicentennial of the Constitution: "A frequent recurrence to the fundamental principles of the constitution ... [is] absolutely necessary to preserve the advantages of liberty and to maintain a free government." If it is true that America is uniquely a regime of principle as the Founders believed, then it is necessary for the people of America to rethink periodically not only those principles by which they constituted themselves as a people, but also the application of those principles in current law and policy. The two hundredth anniversary of the drafting and ratification of the Constitution provides the natural occasion for this activity.

REQUEST FOR PROPOSALS FROM THE NATIONAL ENDOWMENT FOR THE HUMANITIES CONFERENCES ON THE BICENTENNIAL OF THE U.S. CONSTITUTION

The National Endowment for the Humanities is requesting proposals from colleges and universities to design and conduct two- to three-day conferences on the Bicentennial of the U.S. Constitution. The purpose of the conferences is to encourage renewed interest and public reflection on the history, principles, and foundations of constitutional government in the United States. Conferences should be designed around a theme central to constitutionalism and should bring together scholars from a variety of humanities fields with high school teachers, state and local officials, and interested general audiences.

The deadline for receipt of proposals is September 1, 1984. Work on the project should begin by December 1, 1984 and is expected to require approximately six months for completion.

Copies of the application form can be obtained until August 1, 1984 by writing to: Office of the Bicentennial of the U.S. Constitution, National Endowment for the Humanities, 1100 Pennsylvania Avenue, N.W., Washington, D.C. 20506. For information, write or call (202) 786-0438.

STATE HUMANITIES COUNCILS UPDATE

VIRGINIA FOUNDATION FOR THE HUMANITIES AND PUBLIC POLICY

1-B West Range
University of Virginia
Charlottesville, VA 22903
(804) 924-3296

The Virginia Foundation for the Humanities has laid out a course of action for the next five years, organized around major projects on selected topics. In 1986, the Foundation will focus on the Virginia Statute for Religious Freedom, written by Thomas Jefferson and passed by the House of Burgesses on January 16, 1786. In honor of the Bicentennial of the adoption of the statute, the VFH will arrange a major scholarly symposium for October 1985, a publication, and a range of public programs throughout the state in 1986 on the role of Virginia in shaping America's attitudes toward church and state and on current issues of religious freedom.

In 1987, the Bicentennial of the Constitution, the VFH will mount a major project which explores Virginia's contributions to the framing of this document. While emphasis will fall, as in the case of the Statute for Religious Freedom, on new scholarly syntheses, the VFH will also conduct a wide variety of public programs to insure public dialogue. The foundation has recently awarded a planning grant to the UVA Institute of Government to establish a statewide coordinating committee for commemoration of the bicentennial of the Constitution.

NEH Program Development Grants Awarded in February, 1984

American Bar Association
Chicago, Illinois
Robert Peck
$14,506

A planning grant to support the creation of a weekly newspaper series dealing with constitutional issues and a complementary series of public meetings in several cities.

Carleton College
Northfield, Minnesota
Michael Zuckert
$49,234

An implementation award to support a dramatization of the intellectual and political rivalry between Thomas Jefferson and John Adams.

University of California, Los Angeles
Lois Smith-Bupp
$164,923

To support a two-year project which will stage 24 public debates or dialogues with scholars who will reproduce the opposing viewpoints on issues which divided Americans at the time of the Constitutional Convention of 1787.

ORGANIZATIONS and INSTITUTIONS

INTERNATIONAL CONFERENCE ON TEACHING ABOUT THE UNITED STATES CONSTITUTION

In July, 1983, Project '87 and the United States Information Agency (USIA) combined efforts to improve instruction about the Constitution on an international level by sponsoring a conference in Hamburg, Germany. Entitled "Teaching About the U. S. Constitution," the meeting took place at Amerika Haus, adjacent to Hamburg University. American studies teachers and professors from five European nations—Austria, France, the Federal Republic of Germany, Great Britain and the Netherlands—participated. Howard Mehlinger, Chairman of Project '87's Task Force on Education, directed the eight-day workshop with an American staff that provided information about the Constitution, its history and its impact on the political process, as well as ways of teaching about the Constitution and American government.

USIA selected the nineteen European educators who participated in the conference, focusing primarily on those who develop curricula for courses that include United States history and government. The majority of the participants were teachers of English language courses who taught about American culture as part of language instruction.

The program consisted of scholarly lectures, discussions, and independent study and group work on the development of teaching materials. The conference staff drew heavily upon American projects and experience to illustrate their points. A resource book for secondary school students containing lessons on the Constitution developed by Project '87 was examined for application in European schools, along with educational materials provided by the CloseUp Foundation. As the program drew to a close, participants requested a special panel on the "American Mind" that enabled the seminar staff to answer questions about prevailing American ideas.

The lectures were recorded on audio tape. They included:

A. E. Dick Howard, School of Law, University of Virginia, on "Constitutionalism and the American Mind"

John J. Patrick, Social Studies Development Center, Indiana University, on "Teaching About the Constitution in American Schools" and on Project '87's book of lessons

Mary K. B. Tachau, Department of History, University of Louisville, on "The U. S. Constitution: Main Features and Interpretation"

Linda K. Kerber, Department of History, University of Iowa, on "Gender and the Constitution"

Frank Sorauf, Department of Political Science, University of Minnesota, on "The Politics of the U. S. Supreme Court"

Margery Kraus, Vice-President, CloseUp Foundation, on "CloseUp Foundation: A Program in Citizen Education for Youth."

Also, Professors Tachau and Kerber presented a brief report on the high school teacher conferences sponsored by the American Historical Association.

Several recommendations resulted from the conference. Proposals included small workshops, involving people from one nation, to aid in developing teaching modules or syllabi for use in their own countries; and multi-national conferences to exchange ideas and disseminate information from different countries about new research and curriculum development on the U. S. Constitution.

Both participants and seminar directors felt the meeting was very successful and strongly recommended that similar conferences be arranged in the future to help strengthen American studies in European schools.

THE ORGANIZATION OF AMERICAN HISTORIANS
THE NATIONAL COUNCIL OF PUBLIC HISTORY

The Organization of American Historians and the National Council of Public History have joined in a collaborative effort to develop programs to commemorate the Bicentennial of the Constitution. The OAH/NCPH Bicentennial Committee has adopted the "culture of constitutionalism" as its major theme. The Committee believes that the Framers constructed more than a constitution; they generated, as well, a set of expectations about the proper relationship of government to citizen, of state and national governments to one another, and of popular will to fundamental law. At the core of those expectations was a commitment to the idea of constitutionalism—that is, government according to and in adherence with constitutional principles. The Committee proposes to encourage understanding of constitutionalism by developing programs that give attention not only to the institutions of government, but also to the way in which constitutional values have structured the day-to-day lives of individuals.

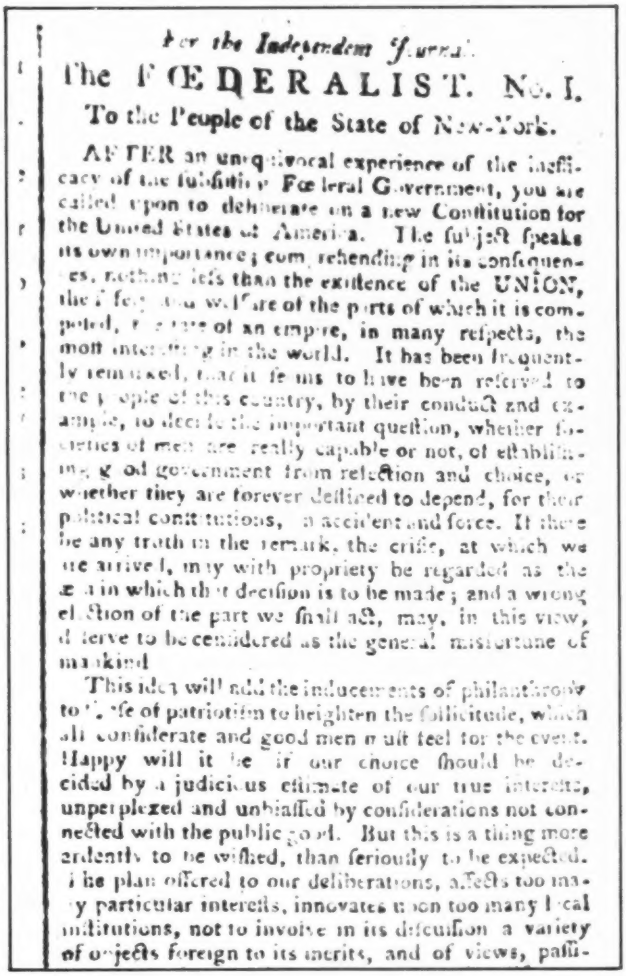
The Committee has developed two major programs. The first involves the establishment, in conjunction with the National Park Service, of a "scholars in residence" program in selected National parks. Historians will be responsible for developing programs in the parks that will highlight aspects of the culture of constitutionalism unique to those parks. Historians will work cooperatively with park staff to fashion a variety of public programs. The second project involves the collaboration of constitutional historians from across the country with school districts. University history departments will "adopt" a particular school district and implement a program of year-long workshops concentrating on teaching about constitutionalism and the rule of law in secondary schools. The program promises not only to enhance teaching about the Constitution but to improve the professional relationship between secondary school teachers and university history faculty.

For more information, contact Professor Kermit L. Hall, College of Law, University of Florida, Gainesville, Florida 32611, (904) 392-2211.

UNIVERSITY OF OKLAHOMA DEPARTMENT OF POLITICAL SCIENCES
519 Mathematical Sciences
Stillwater, OK 74078
Contact: Danny M. Adkinson

The Department of Political Sciences of the University of Oklahoma at Stillwater has begun issuing *The Federalist Newsletter*, a publication containing articles on *The Federalist* and related topics. A bibliography of recent papers delivered on *Federalist* subjects will also appear in each issue. *The Federalist Newsletter* should be of special interest to constitutional scholars as the Bicentennial approaches. The first issue of the newsletter, which was published in January, contained an article comparing *The Federalist* papers of Madison and Hamilton with John C. Calhoun's *A Disquisition on Government*.

The next issue of *The Federalist Newsletter* is scheduled to appear this summer. Subscriptions are $6. Those interested in contributing or subscribing should contact Danny Adkinson at the above address.



For the Independent Journal.

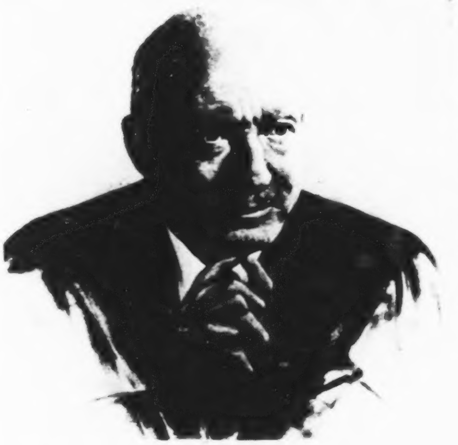
The FŒDERALIST. No. I.

To the People of the State of New-York.

AFTER an unequivocal experience of the inefficacy of the ſubſiſting Fœderal Government, you are called upon to deliberate on a new Conſtitution for the United States of America. The ſubject ſpeaks its own importance; comprehending in its conſequences, nothing leſs than the exiſtence of the UNION, the ſafety and welfare of the parts of which it is compoſed, the fate of an empire, in many reſpects, the moſt intereſting in the world. It has been frequently remarked, that it ſeems to have been reſerved to the people of this country, by their conduct and example, to decide the important queſtion, whether ſocieties of men are really capable or not, of eſtabliſhing good government from reflection and choice, or whether they are forever deſtined to depend, for their political conſtitutions, on accident and force. If there be any truth in the remark, the criſis, at which we are arrived, may with propriety be regarded as the æra in which that deciſion is to be made; and a wrong election of the part we ſhall act, may, in this view, deſerve to be conſidered as the general misfortune of mankind.

This idea will add the inducements of philanthropy to thoſe of patriotiſm to heighten the ſollicitude, which all conſiderate and good men muſt feel for the event. Happy will it be if our choice ſhould be decided by a judicious eſtimate of our true intereſts, unperplexed and unbiaſſed by conſiderations not connected with the public good. But this is a thing more ardently to be wiſhed, than ſeriouſly to be expected. The plan offered to our deliberations, affects too many particular intereſts, innovates upon too many local inſtitutions, not to involve in its diſcuſſion a variety of objects foreign to its merits, and of views, paſſi-

The Federalist, No. 1, *Independent Journal, October 27, 1787. Courtesy of The New-York Historical Society, New York City.*



Hugo Black. *Supreme Court Historical Society.*

HUGO BLACK CENTENNIAL

UNIVERSITY OF ALABAMA SCHOOL OF LAW
University, Alabama 34586
Contact: Tony Freyer

As the Bicentennial of the Constitution approaches, it is appropriate that one of its foremost interpreters in modern times should be honored as well. The University of Alabama will commemorate the hundredth anniversary of the birth of Hugo L. Black with activities beginning this spring and culminating in a major conference in 1986.

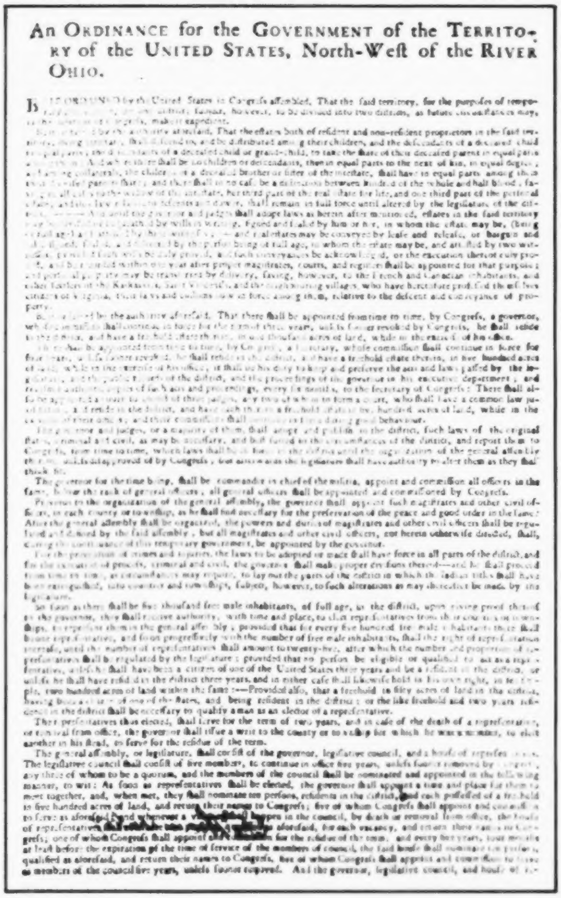
Black, who was appointed to the Supreme Court by Franklin Delano Roosevelt in 1932 and served until his death in 1971, was a champion of individual liberties and civil rights. He also helped to shape thinking about the relationship of government to business and labor and was important in defining the limits of free enterprise.

The celebration will begin with an exhibit of memorabilia to be unveiled as part of the University of Alabama's annual Law Week, April 1–7. The collection will feature Black's private library from his Supreme Court years. The volumes are particularly valuable because they contain the Justice's annotations.

In 1985, the University will host a one-day conference focusing on Black's life in Alabama. (A native of Clay County, Black graduated from the University of Alabama in 1906.) A two-day conference in 1986 will cover Black's contribution as a Supreme Court Justice. An array of people who knew Black in his professional and personal life will participate in the meetings. Some of the scheduled speakers are Anthony Lewis of the *New York Times*; Max Lerner of the *New York Post*; and Guido Calabresi, Sterling Professor of Law, Yale University. The two conferences and the resulting published papers will be the most complete treatment of Black's contribution to date.

The festivities this spring will include the presentation of the University of Alabama's Hugo Black Award by university president Joab Thomas. This year's recipient will be Florida Congressman Claude Pepper.

The activities are funded by the Hugo Black Centennial Fund, established in 1980 by several of Black's former law clerks, the University of Alabama's School of Law Foundation, the Committee for the Humanities in Alabama, the National Endowment for the Humanities, and the American Bar Foundation. The Alabama Professional Chapter of the Society of Professional Journalists/Sigma Delta Chi, and the Alabama State Bar are cosponsors.



An ORDINANCE for the GOVERNMENT of the TERRITORY of the UNITED STATES, North-Weſt of the RIVER OHIO.

Northwest Ordinance. *National Archives.*

NORTHWEST ORDINANCE BICENTENNIAL

In the summer of 1787, while the Constitution was then being fashioned in Philadelphia, the Congress of the old Confederacy was accomplishing perhaps its most memorable work. On July 13 it adopted the Northwest Ordinance, providing for the government of the nation's common domain beyond the Ohio River as far as the Mississippi, and establishing an enduring territorial policy. Efforts have now begun to mark the Bicentennial of the Ordinance of 1787.

"Should We Remember the Northwest Ordinance? Why? How?", was the topic of a public conference held on December 10, 1983, in Marietta, Ohio, the first settlement under the Ordinance. It was sponsored by Marietta College, with the financial support of the Ohio Humanities Council and the Fenton Foundation. More than sixty participants gathered at the Campus Martius Museum of the Ohio Historical Society. They heard addresses by Philip R. Shriver, President Emeritus and Professor of History at Miami University, and Harry V. Jaffa, Henry R. Salvatori Research Professor of Political Philosophy at Claremont McKenna College, which stressed the significance of the Northwest Ordinance as an historical landmark and as a source of instruction in the fundamental principles of liberty. The conferees then turned to planning for the commemoration of the Ordinance throughout the next five years, including proposals for scholarship, for festivity, and for civic education. A committee to carry on the work has been organized.

To mark the two-hundredth anniversary of Jefferson's plan for the government of the western territory, the forerunner of the Northwest Ordinance, Merrill D. Peterson, Jefferson Professor of History at the University of Virginia, spoke and received an honorary degree at Founders-Scholars Day at Marietta College on February 13, 1984. He addressed the subject of Thomas Jefferson and the foundations of free government in the Northwest.

Further activities are being developed, to be carried out in the years through 1988, the Bicentennial of the beginning of government under the Ordinance. Individuals and organizations interested in broadening and deepening the people's understanding of the Northwest Ordinance are encouraged to participate and to cooperate. They may contact R.S. Hill, Department of Political Science, Marietta College, Marietta, Ohio 45750, (614) 374-4801.

METROCENTER YMCA
909 Fourth Ave.
Seattle, Washington 98104
Contact: Robin Anderson

The upcoming Bicentennial of the Constitution has provided the impetus for a retooling of educational approaches to constitutional history and issues. The Metrocenter YWCA in Seattle, Washington, has developed a major educational project which involves youths and adults in examining the beliefs upon which America was founded and exploring their application today.

"Today's Constitution and You" incorporates a core content based on four themes: the function of a written constitution, the role of federalism, the balance of power among the branches of government, and the nature of the individual citizen's relationship to the Constitution. Various types of presentations have been tested, including public debates, media programming, a curriculum for high school students, and an adult education retreat.

The high school curriculum takes a fresh approach to the subject with an eye to using contemporary examples to involve students in exploring constitutional implications. For example, the Fourth Amendment's ban on unreasonable searches and seizures is taught through a case study of the Washington Supreme Court's decision that pat-down searches of rock concert-goers are unreasonable. About three-quarters of the course deals with the foundations of limited government as set forth in the original Constitution, and the balance is devoted to the first ten amendments. In addition to case histories, teaching techniques include group work, opinion polls, hypotheticals, role plays, and brain storming.

The project is cosponsored by the Washington State Bar Association, Continuing Education at the University of Washington, the Seattle Public Library, the Seattle-King County Bar Association, and the YMCA Youth and Government Program.

For more information, contact Robin Anderson at the above address.

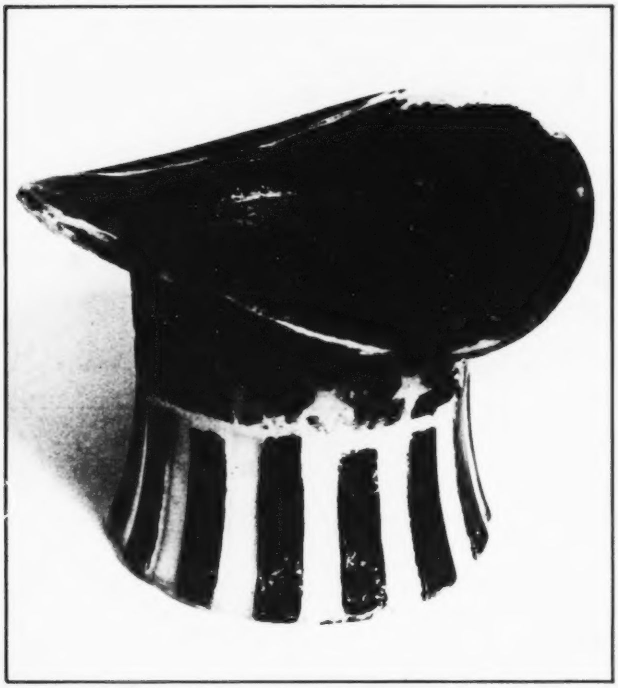
Federal Bicentennial Agenda

NATIONAL ARCHIVES TO PRODUCE LEARNING MATERIALS ON CONSTITUTION

As part of its Bicentennial activities, the National Archives and Records Service will publish a thirty-document learning package, aimed at secondary school history and government classes, tentatively titled *The Constitution: Evolution of a Government*. The package includes a teacher's guide with suggested questions and activities, a time line and bibliography, as well as general and specific teaching objectives. The package will be available in October 1984.

Documents in the package will include reproductions of such major items as the Articles of Association, the printed and corrected draft of the Articles of Confederation, the Northwest Ordinance, the vote on the Great Compromise, and the Senate's draft of 17 amendments for the Bill of Rights. Ten documents will deal with the social history of the period, and an additional ten or more will trace at least one major constitutional issue as it has evolved since adoption of the Constitution. All of the documents reproduced in the package are found in the holdings of the National Archives and Records Service.

The package is the seventh in a series developed since 1976 by the Education Division, Office of Public Programs and Exhibits, National Archives and Records Service. Published by Social Issues Resources Series, Inc., the packages presently retail for $30 each and include from thirty to sixty documents. Widely used in secondary schools, community colleges and some four-year colleges, the titles include: *The Civil War: Soldiers and Civilians*; *The Progressive Years*; *World War I: The Home Front*; *The 1920's*; *The Great Depression and the New Deal*; and *World War II: The Home Front*. Information on ordering the material and on other activities of the Education Division can be found by calling (202) 523-3347 or writing Education Division (NE), National Archives and Records Service, Washington, D.C. 20408.



Uncle Sam's hat. ***Becker collection. Division of Political History, Smithsonian Institution, Washington, D.C.***

NEW JERSEY PROPOSES BICENTENNIAL COMMISSION

Eleven New Jersey assembly members have cosponsored legislation to establish a state commission for the Bicentennial of New Jersey's ratification of the United States Constitution. The bill is now in committee.

Project '87

Project '87 would like to know about events being planned for the Bicentennial of the United States Constitution, which we will report on in ***this Constitution.*** Please send notices to:

this Constitution
1527 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Photographs and camera-ready art of logos, posters, etc. are welcome and will be returned.

SUBSCRIPTION INFORMATION

THE UNION AND THE CONSTITUTION FOREVER.

The National Endowment for the Humanities is underwriting the publication of ***this Constitution*** as a quarterly magazine so that it may be distributed free to institutions planning Bicentennial programs. Such institutions may write and ask to be placed on the free mailing list. Institutions wishing to receive more than one copy may do so by subscribing for additional copies. Individuals also must subscribe. Subscription rates are listed below. Each issue of the magazine will be available for purchase at bulk rate.

Individuals	$10.00 per year (4 issues)
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continued from inside front cover

ARTICLE X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI[2]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

ARTICLE XII[3]

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. [And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.][4] The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

ARTICLE XIII[5]

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV[6]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction there-

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[2] The Eleventh Amendment was proposed by resolution of Congress on March 4, 1794. It was declared by the President, in a message to Congress dated January 8, 1798, to have been ratified by three-fourths of the several States. Records of the National Archives show that the 11th Amendment was ratified by 13 of the 15 States. It was not ratified by New Jersey or Pennsylvania.

[3] The Twelfth Amendment was proposed in lieu of the original third paragraph of section 1 of article II, by resolution of Congress on December 9, 1803. It was declared in a proclamation of the Secretary of State, dated September 25, 1804, to have been ratified by three-fourths of the States. Records of the National Archives show that it was ratified by 14 of 17 States and rejected by Connecticut, Delaware, and Massachusetts.

[4] The part enclosed by brackets has been superseded by section 3 of Amendment XX.

[5] The Thirteenth Amendment was proposed by resolution of Congress on January 31, 1865. It was declared in a proclamation of the Secretary of State, dated December 18, 1865, to have been ratified by 27 States. Subsequent records of the National Archives show that the 13th Amendment was ratified by 8 additional States. It was rejected by Mississippi.

[6] The Fourteenth Amendment was proposed by resolution of Congress on June 13, 1866. By a concurrent resolution of Con-

of, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV[7]

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XVI[8]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

ARTICLE XVII[9]

The Senate of the United States shall be composed of two Senators from each State, elected by the people therof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors

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gress adopted July 21, 1868, it was declared to have been ratified by "three-fourths and more of the several States of the Union", and the Secretary of State was required duly to promulgate the amendment as a part of the Constitution. He accordingly issued a proclamation, dated July 28, 1868, declaring the amendment to have been ratified by 28 States, "being more than three-fourths." Records of the National Archives show that the 14th Amendment was subsequently ratified by 9 additional States.

[7] The Fifteenth Amendment was proposed by resolution of Congress on February 26, 1869. It was declared in a proclamation of the Secretary of State, dated March 30, 1870, to have been ratified by 29 States, which "constitute three-fourths." Records of the National Archives show that the 15th Amendment was subsequently ratified by 6 more of the States. It was rejected by Tennessee.

[8] The Sixteenth Amendment was proposed by resolution of Congress on July 12, 1909. It was declared in a proclamation of the Secretary of State, dated February 25, 1913, to have been ratified by 36 States, which "constitute three-fourths." Subsequent records of the National Archives show that the 16th Amendment was ratified by 2 additional States. It was rejected by Connecticut, Rhode Island, and Utah.

[9] The Seventeenth Amendment was proposed by resolution of

of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

ARTICLE XVIII[10]

[Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

[Sec. 2. The Congress and the Several States shall have concurrent power to enforce this article by appropriate legislation.

[Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.]

ARTICLE XIX[11]

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XX[12]

Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Sec. 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Sec. 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Sec. 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a

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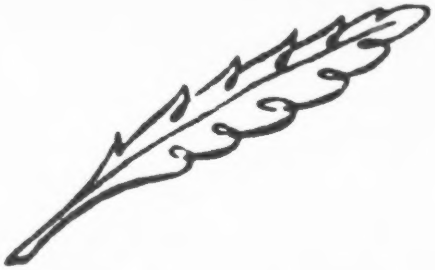
Congress on May 13, 1912. It was declared in a proclamation of the Secretary of State, dated May 31, 1913, to have been ratified by 36 States, which "constitute three-fourths." Records of the National Archives show that the 17th Amendment was subsequently ratified by 1 additional State. It was rejected by Utah.

[10] The Eighteenth Amendment was proposed by resolution of Congress on December 18, 1917. It was declared in a proclamation of the Acting Secretary of State, dated January 29, 1919, to have been ratified by 36 States, which "constitute three-fourths." Subsequent records of the National Archives show that the 18th Amendment was ratified by 9 additional States. It was rejected by Rhode Island. By its own terms the 18th Amendment became effective one year after its ratification, which was consummated on January 16, 1919, and therefore went into effect on January 16, 1920.

Repeal of the 18th Amendment on December 5, 1933, was proclaimed by the President in his proclamation of that date, when the ratification of the 21st Amendment was certified by the Acting Secretary of State.

[11] The Nineteenth Amendment was proposed by resolution of Congress on June 4, 1919. It was declared in a proclamation of the Secretary of State, dated August 26, 1920, to have been ratified by 36 States, which "constitute three-fourths." Subsequent records of the National Archives show that the 19th Amendment was ratified by 10 additional States. It was rejected by Mississippi and Delaware.

[12] The Twentieth Amendment was proposed by resolution of Congress on March 2, 1932. It was declared in a proclamation of the Secretary of State, dated February 6, 1933, to have been ratified by 39 States, which "constitute more than the requisite



President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Sec. 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Sec. 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the data of its submission.

ARTICLE XXI[13]

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Sec. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

ARTICLE XXII[14]

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Sec. 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

ARTICLE XXIII[15]

Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

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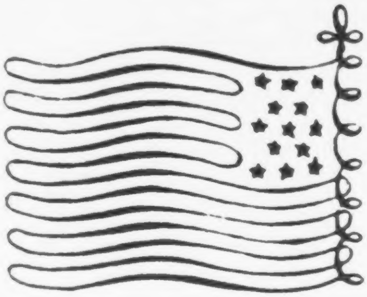
three-fourths." Subsequent records of the National Archives show that the 20th Amendment was ratified by all 48 States before sections 1 and 2 became effective on October 15, 1933. The other sections of the amendment became effective on January 23, 1933, when its ratification was consummated by three-fourths of the States.

[13] The Twenty-first Amendment was proposed by resolution of Congress on February 20, 1933. It was certified in a proclamation of the Acting Secretary of State dated December 5, 1933, to have been ratified by conventions of 36 States, which "constitute the requisite three-fourths of the whole number of States." Subsequent records of the National Archives show that the 21st Amendment was ratified by 2 additional States. It was rejected by the convention of South Carolina. North Carolina voted against holding a convention.

[14] The Twenty-second Amendment was proposed by resolution of Congress on March 21, 1947. Ratification was completed on February 27, 1951, when the thirty-sixth State (Minnesota) approved the amendment. On March 1, 1951, the Administrator of General Services certified that "the States whose Legislatures have so ratified the said proposed Amendment constitute the requisite three-fourths of the whole number of States in the United States". Records of the National Archives show that the 22nd Amendment was subsequently ratified by 5 additional States. It was rejected by Oklahoma and Massachusetts.

[15] The Twenty-third Amendment was proposed by resolution of Congress on June 17, 1960. The Administrator of General Services certified the ratification and adoption of the amendment by three-fourths of the States on April 3, 1961. It was rejected by Arkansas.



ARTICLE XXIV[16]

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XXV[17]

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Sec. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Sec. 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Sec. 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

ARTICLE XXVI[18]

Sec. 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Sec. 2. The Congress shall have power to enforce this article by appropriate legislation.

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[16] The Twenty-fourth Amendment was proposed by resolution of Congress on August 27, 1962. It was declared in a Proclamation of the Administrator of General Services dated February 4, 1964, to have been ratified by three-fourths of the States. It was rejected by the legislature of Mississippi on December 20, 1962.

[17] The Twenty-fifth Amendment to the Constitution was proposed by the Congress on July 6, 1965. It was declared in a certificate of the Administrator of General Services, dated February 23, 1967, to have been ratified by the legislatures of 38 of the 50 States.

Ratification was completed on February 10, 1967.

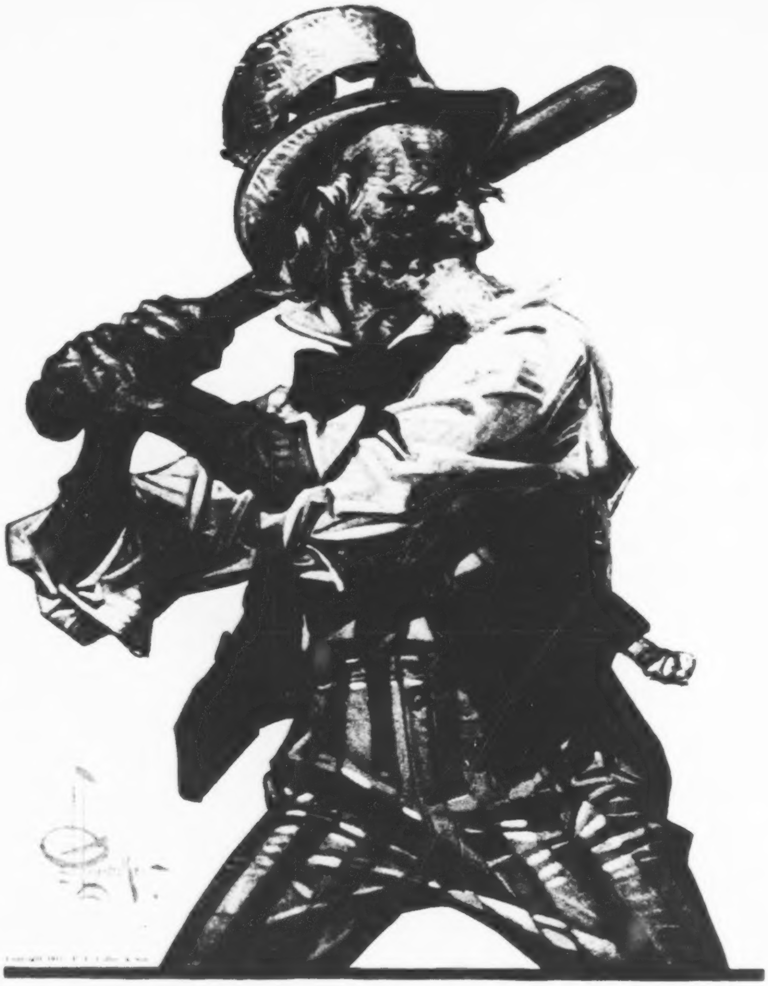
The amendment was subsequently ratified by Connecticut, Montana, South Dakota, Ohio, Alabama, North Carolina, Illinois, Texas, and Florida.

[18] The Twenty-sixth Amendment was proposed by resolution of Congress on March 23, 1971. It was declared in a certificate of the Administrator of General Services, dated July 5, 1971, to have been ratified by the legislatures of 39 of the 50 States.

Ratification was completed on July 1, 1971.

The amendment was subsequently ratified by Virginia, Wyoming, and Georgia.

1917 poster. *Division of Political History, Smithsonian Institution, Washington, D.C.*


Get in the Game
With Uncle Sam

Project'87

The American Constitutional Bicentennial

Project '87 is a joint undertaking of the American Historical Association and the American Political Science Association. It is dedicated to commemorating the Bicentennial of the United States Constitution by promoting public understanding and appraisal of this unique document.

The Project is directed by a joint committee of historians and political scientists that is chaired by two scholars of international reputation—Professor Richard B. Morris of Columbia University and Professor James MacGregor Burns of Williams College. The Chief Justice of the United States serves as Honorary Chairman of Project '87's Advisory Board.

The implementation of Project '87 has been divided into three distinct but interrelated stages. Stage I, devoted to research and scholarly exchanges on the Constitution, has been underway for the past several years. The Project has awarded fifty-one research grants and fellowships and supported five major scholarly conferences dealing with various aspects of the Constitution. Activities in connection with Stage II—teaching the Constitution in schools and colleges—began in 1980, and Project '87 is now planning Stage III, the development of programs for the public designed to heighten awareness of the Constitution and to provoke informed discussion on constitutional themes.

It is the hope and expectation of the Project's governing committee that, through its activities and those of others, both students and the public alike will come to a greater awareness and comprehension of the American Constitution.

Core support for Project '87 comes from the William and Flora Hewlett Foundation. Additional grants for specific programs have been provided by the National Endowment for the Humanities, which funds the magazine, and by the Lilly Endowment, Inc., of Indianapolis, Indiana, the Rockefeller Foundation, the Ford Foundation and the Mellon Foundation.

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this Constitution

for the United States of America.

A Bicentennial Chronicle

Fall 1984, No.4

1787
PEOPLE
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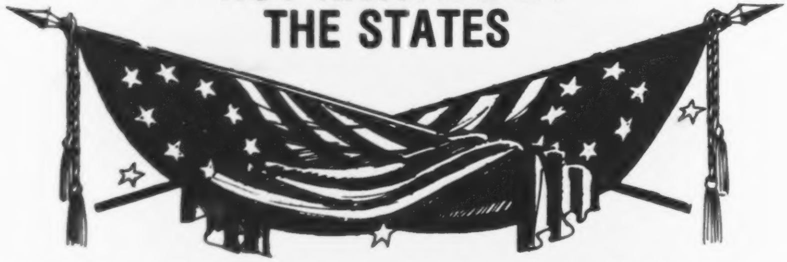
Project '87

PROPOSED AMENDMENTS TO THE CONSTITUTION NOT RATIFIED BY THE STATES



Since 1789, in addition to the 26 amendments which have been ratified by the required three-fourths of the States, six other amendments have been submitted to the States but have not been ratified by them. The text of these amendments follows.

In 1789, at the time of the submission of the Bill of Rights, 12 proposed amendments were submitted to the States. Of these, articles III–XII were ratified and became the first 10 amendments to the Constitution. Proposed articles I and II were not ratified.

> *Article I. After the first enumeration required by the first article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred; after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.*
>
> *Article II. No law varying the compensation for the services of the Senators and Representatives shall take effect, until an election of Representatives shall have intervened.*

Thereafter, in the 2d session of the 11th Congress, the Congress proposed the following amendment to the Constitution relating to acceptance by citizens of the United States of titles of nobility from any foreign government.

> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of both Houses concurring), *That the following section be submitted to the legislatures of the several states, which, when ratified by the legislatures of three fourths of the states, shall be valid and binding, as a part of the constitution of the United States.*
>
> *If any citizen of the United States shall accept, claim, receive or retain any title of nobility or honour, or shall, without the consent of Congress, accept and retain any present, pension, office or emolument of any kind whatever, from any emperor, king, prince or foreign power, such person shall cease to be a citizen of the United States, and shall be incapable of holding any office of trust or profit under them, or either of them.*

During the second session of the 36th Congress on March 2, 1861, the following proposed amendment to the Constitution protecting slavery was signed by President Buchanan. It is interesting to note in this connection that this is the only proposed amendment to the Constitution ever signed by the President. The President's signature is considered unnecessary because of the constitutional provision that upon the concurrence of two-thirds of both Houses of Congress the proposal shall be submitted to the States and shall be ratified by three-fourths of the States.

> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, *That the following article be proposed to the Legislatures of the several States as an amendment to the Constitution of the United States, which, when ratified by three-fourths of said Legislatures, shall be valid, to all intents and purposes, as part of the said Consititution, viz:*

continued on page 52

Source: U.S. Congress. House. *The Declaration of Independence and the Constitution of the United States of America.* H. Doc. 96-143, 96th Cong., 1st sess., 1979.

...do ordain and establish

this Constitution

for the United States of America.

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Cover: Poster for the Sesquicentennial of the Constitution by Howard Chandler Christy. *National Archives.*

this Constitution **is published with the assistance of a grant from the National Endowment for the Humanities as part of its special initiative on the Bicentennial of the United States Constitution. Editorial offices are located at 1527 New Hampshire Avenue, N.W., Washington, D.C. 20036. All material in this publication may be photocopied if attributed as follows: "Reprinted from *this Constitution: A Bicentennial Chronicle,* Fall, 1984, published by Project '87 of the American Historical Association and the American Political Science Association." Project '87 would appreciate notification from those who photocopy material in this issue for use in presentations to other groups.** **© Copyright 1984 by the American Historical Association and the American Political Science Association**

this Constitution

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From the Editor

Three articles dealing with the issue of constitutional change and flexibility are featured in the fourth issue of ***this Constitution***. The first, by Professor Frank J. Sorauf, discusses the way in which interest groups bring pivotal cases before the courts in pursuit of their goals of constitutional reinterpretation. Howard N. Meyer, an attorney, looks at the Fourteenth Amendment as a case of constitutional change. He discusses the goals of its framers and how the application of that amendment changed from the nineteenth to the twentieth centuries. In the "Public Forum" section of the magazine, we offer a debate on a current idea for changing the Constitution: a constitutional convention to propose an amendment requiring a balanced budget. Beginning on the inside front cover, readers can find the texts of the amendments to the Constitution that have been proposed by Congress but that have not been ratified by the states.

Returning to the history of the Constitution, Professor Robert A. Rutland tells the story of James Madison's central role in the crafting and the introduction of the Virginia Plan, the first proposal for a new constitution, at the Federal Convention in 1787. An essay and bibliography on "Race and Slavery in the American Constitutional System, 1787-1865" by Professor Don E. Fehrenbacher appears in the "For the Classroom" section.

The Bicentennial Gazette features Project '87's Network of Scholars. These constitutional specialists, who have agreed to serve as consultants and speakers for Bicentennial programs, are listed by state. We trust that this roster, as well as the rest of the issue, proves useful to our readers.

Additions and Corrections:

In the last issue, the date of the opening of the Constitutional Convention on page 8 should have been May, 1787.

On Page 50, footnote 11 stated that neither Delaware nor Mississippi had ratified the 19th Amendment. Mississippi ratified the amendment this year, on March 22. Delaware had ratified the amendment in 1923, but the federal government had no official record of the ratification (possibly because the original letter notifying the federal government of the ratification was lost). When Mississippi ratified in 1984, press accounts reflecting official government records listed Delaware as not having ratified. In response, Delaware forwarded official notification to the Office of the Federal Register at the National Archives so that the federal government records were corrected—61 years after the fact. Delaware's legislature approved ratification on March 6, 1923. The governor added his signature on March 12, but, from a constitutional point of view, his action was superfluous.

Thirteen Enduring Constitutional Issues

- National Power—limits and potential
- Federalism—the balance between nation and state
- The Judiciary—interpreter of the Constitution or shaper of public policy
- Civil Liberties—the balance between government and the individual
- Criminal Penalties—rights of the accused and protection of the community
- Equality—its definition as a Constitutional value
- The Rights of Women Under the Constitution
- The Rights of Ethnic and Racial Groups Under the Constitution
- Presidential Power in Wartime and in Foreign Affairs
- The Separation of Powers and the Capacity to Govern
- Avenues of Representation
- Property Rights and Economic Policy
- **Constitutional Change and Flexibility**

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Winning in the Courts: Interest Groups and Constitutional Change

by FRANK J. SORAUF

In 1924 the Congress proposed and sent to the states a constitutional amendment that would have authorized it to regulate, even outlaw, goods in interstate commerce made by child labor. By 1930 only five states had ratified it. Even with the impetus of the depression and Franklin Roosevelt's victories in 1932 and 1936, only 28 of the 48 states, eight short of the necessary 36, had ratified it by the late 1930s. A powerful coalition of liberals, organized labor, women's groups, and urban reformers could not break through the social, religious, and economic conservatism that resisted the amendment in much of the country.

The child labor amendment had been born in frustration. Congress twice passed legislation to abolish the movement of child-made goods in interstate commerce, and twice the Supreme Court had struck down the statutes, once as an unlawful use of Congress's commerce power and once as an improper use of its power to tax (*Hammer* v. *Dagenhart*, 1918; *Bailey* v. *Drexel*, 1922). The second of those decisions, in fact, came only two years before the proposing of the amendment. But the movement that was strong enough twice to pass legislation and then see a constitutional amendment through a less than reformist Congress could not muster the national strength and the extraordinary majorities necessary to amend the Constitution.

In the end, though, it made little difference. The Supreme Court taketh away, but the Supreme Court giveth back. As a part of the Fair Labor Standards Act of 1938, the Congress once again outlawed the movement of goods made by children. Three years later the Court upheld the entire statute, conferring on the Congress the very powers that a national movement of impressive strength and persistence could not (*U.S.* v. *Darby*, 1941). Included in the opinion of the majority in *Darby* was, moreover, a renunciation of the very decision that had led to the amendment in the first place:

> The conclusion is inescapable that *Hammer* v. *Dagenhart* was a departure from the principles which have prevailed in the interpretation of the Commerce Clause both before and since the decision and that such vitality as a precedent, as it then had, has long since been exhausted. It should be and now is overruled.

Observers of constitutional politics could draw only some very familiar conclusions. Given the difficulty of the process of formal amendment, constitutional change falls largely to the Supreme Court. Moreover, in the Court one doesn't need mass movements or extraordinary majorities, but merely a suitable case, sympathetic justices, and a bit of strategic skill or luck.

Such lessons have not been lost on American interest groups. They have pursued the goals of constitutional change in the courts with increasing vigor and effectiveness in the last forty years. The trend has been especially marked among groups fighting for individual rights or equality of treatment. The National Association for the Advancement of Colored People [NAACP] and the American Civil Liberties Union [ACLU] have indeed come to symbolize the rise of group litigation for constitutional goals.

I. Finding the Right Question for the Answer

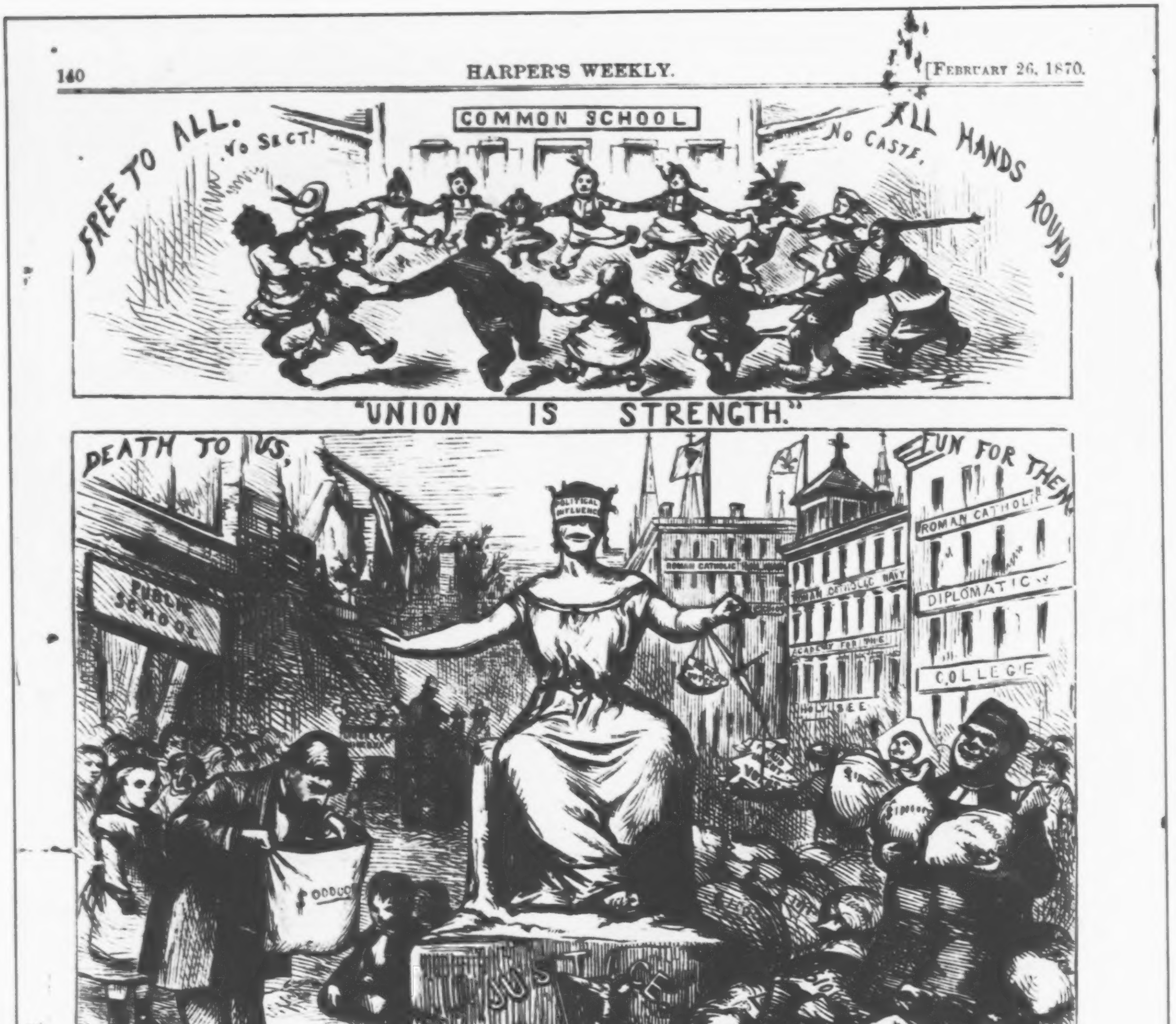
Two key words—"cases" and "controversies"—dot the convoluted phrases in Article Three of the Constitution.

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; ...to controversies to which the United States shall be a party; to controversies between two or more states....

The Supreme Court has always interpreted them to mean that it and the other federal courts would decide only genuinely adversary cases in which the parties had real and opposing interests. In other words, there must be, as the titles of cases suggest, someone against someone else—thus, no opinions about "possible" legality or constitutionality, no hypothetical questions, no answers to "let's suppose" questions. The federal courts, therefore, decide constitutional issues only when they are embedded in conflicts which the combatants bring to them.

If there is no legitimate "case", of course, an issue never comes to the Supreme Court. The Court never settled the constitutionality of the Alien and Sedition Acts because the Jeffersonians repealed them before a conviction under them could reach the Supreme Court. Other issues have come tardily to the Court. The Supreme Court had no occasion to rule on the constitutionality of the 1940 Smith Act—which made it a crime to urge, advocate, or teach the overthrow of the United States—until leaders of the American Communist party were convicted under the statute and appealed their conviction to the Court in 1951.

So, while the Supreme Court provides the constitutional answers, it is the litigants who ask the ques-



140 HARPER'S WEEKLY. [FEBRUARY 26, 1870.

FREE TO ALL.
NO SECT!
COMMON SCHOOL
NO CASTE.
ALL HANDS ROUND.

"UNION IS STRENGTH."

DEATH TO US.
FUN FOR THEM.
PUBLIC SCHOOL
POLITICAL INFLUENCE
ROMAN CATHOLIC
ROMAN CATHOLIC NAVY
ACADEMY FOR THE
ROMAN CATHOLIC
DIPLOMATIC
COLLEGE
JUSTICE
THE RICH AND POORMANS TAXES $1000 M
STATE MONEY $10 000
$10 000
TAX LEVY FOR SCHOOLS

DISTRIBUTION OF THE SECTARIAN FUND.

METHODIST SCHOOL
EPISCOPAL SCHOOL
LOW CHURCH SCHOOL
HIGH CHURCH SCHOOL
JEWISH
ROMAN CATHOLIC
AFRICAN SCHOOL
CHINESE SCHOOL
GERMAN
FRENCH
Th. Nast.

SECTARIAN BITTERNESS.

OUR COMMON SCHOOLS AS THEY ARE AND AS THEY MAY BE.—[SEE PAGE 141.]

"Our common schools as they are and as they may be," by Thomas Nast. Harper's Weekly, February 26, 1870. *Library of Congress.*

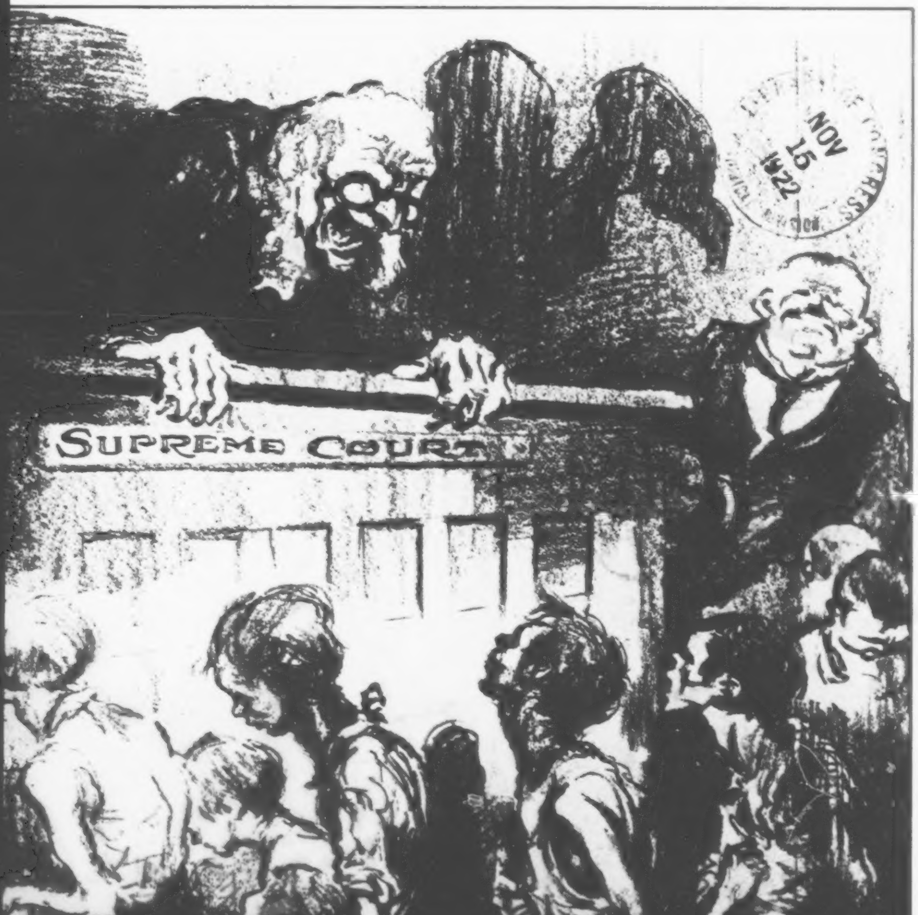
Full and early sponsorship of a case permits a litigating group the widest opportunity for strategic play and interaction with the courts.

tions. In a real sense they control the Court's agenda, for while the justices can pick among the cases they are asked to decide, they cannot reach beyond them. For this reason the Court is often described as a passive body, the prisoner of both the issues and the factual settings others bring to it.

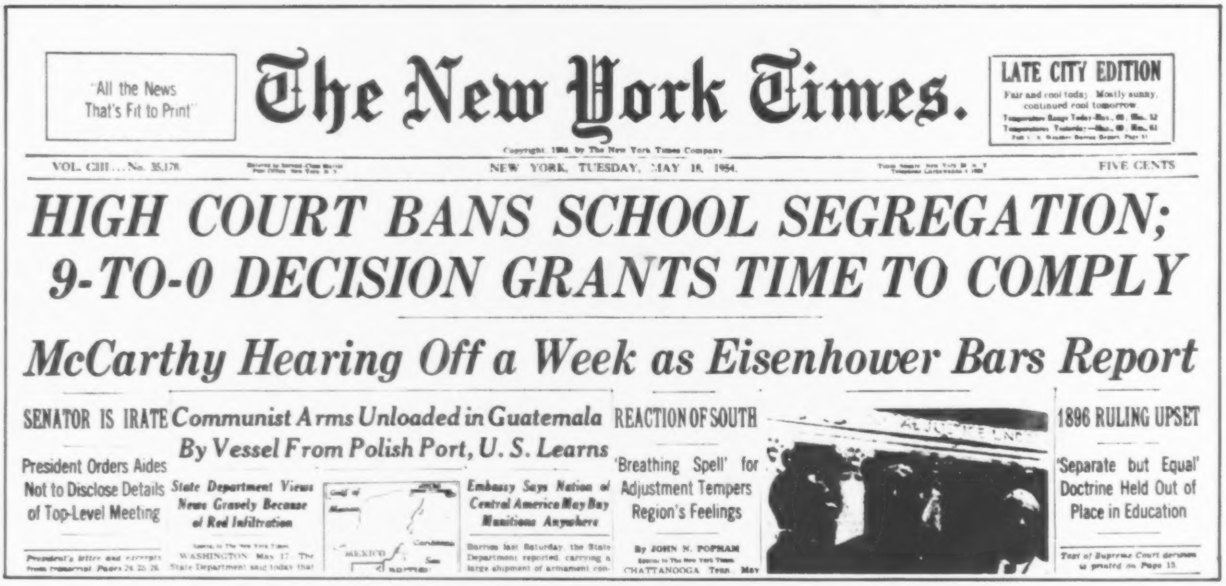
In setting the judicial agenda, litigating groups have two tasks: to convince the Court to take the case, and then to convince it to decide it "favorably." The first of the tasks is often more difficult, for the Supreme Court, in exercising its enormous discretion to pick and choose its cases, takes fewer than one in ten of those cases pressed upon it. Some of those cases—those on "appeal"—must be heard and decided, but in its much larger "certiorari" jurisdiction, federal statutes permit the Court to take what cases it wishes. (It is, therefore, very often pure bluster for disappointed litigants to threaten to "take this case all the way to the Supreme Court.")

The "case" then is the vehicle of litigating groups, and their relationship to it differs widely. At the maximum, a group may have organized all aspects of a case from the beginning—picking plaintiffs, providing lawyers, setting strategies, and paying costs. The NAACP, for example, sponsored all five desegregation cases that reached the Supreme Court in 1952 as *Brown* v. *Board of Education of Topeka*. But at the other extreme, a group may do no more than enter an existing case with a brief as a friend of the court, an "amicus curiae". (In Allan Bakke's celebrated challenge to the constitutionality of affirmative action programs, a record total of 116 organizations filed 58 amicus briefs; *University of California* v. *Bakke*, 1978.) In between those two extremes lies an almost infinite variety of litigating roles. A group may "adopt" an existing case for its appeal to the Supreme Court in order to assure the best possible legal argument, for example, or it may advise the lawyers and plaintiffs in a case without assuming full responsibility for it.

While entry into a case as an amicus curiae permits the group only a written legal argument, the more extensive roles allow it to set the higher strategies of litigation. Full and early sponsorship of a case often permits the group to choose between federal and state courts, to select the plaintiffs in the case, to frame the facts and recruit expert testimony, to decide on the direction of the legal argument, and to provide the legal and organizational talent to carry the enterprise forward. In short, the greater the role in the case, the greater the opportu-



The Labor Herald, July, 1922, on the Supreme Court decision striking down federal legislation prohibiting child labor in interstate commerce. ***Library of Congress.***



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The New York Times.

LATE CITY EDITION

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VOL. CIII...No. 35,178.

NEW YORK, TUESDAY, MAY 18, 1954.

FIVE CENTS

HIGH COURT BANS SCHOOL SEGREGATION; 9-TO-0 DECISION GRANTS TIME TO COMPLY

McCarthy Hearing Off a Week as Eisenhower Bars Report

SENATOR IS IRATE

President Orders Aides Not to Disclose Details of Top-Level Meeting

President's letter and excerpts from transcript, Pages 24, 25, 26.

Communist Arms Unloaded in Guatemala By Vessel From Polish Port, U. S. Learns

State Department Views News Gravely Because of Red Infiltration

Special to The New York Times.

WASHINGTON, May 17—The State Department said today that

Embassy Says Nation of Central America May Buy Munitions Anywhere

Barrios last Saturday, the State Department reported, carrying a large shipment of armament con-

REACTION OF SOUTH

'Breathing Spell' for Adjustment Tempers Region's Feelings

By JOHN N. POPHAM

Special to The New York Times.

CHATTANOOGA, Tenn., May

1896 RULING UPSET

'Separate but Equal' Doctrine Held Out of Place in Education

Text of Supreme Court decision is printed on Page 15.

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nity for strategic play and interaction with the courts.

Consider the NAACP and the Supreme Court as they approached the deciding of the desegregation cases between 1952 and 1955. The Court had already signalled its impatience with segregation by construing the prevailing "separate but equal" doctrine very literally. Texas had created a separate law school for blacks, but the Court found, not surprisingly, that it lacked the reputation, quality of faculty, and influential alumni (!) of the established law school at the University of Texas (*Sweatt* v. *Painter*, 1950). So, if the separate schools were not equal, integration was the alternative. Yet the "separate but equal" doctrine (*Plessy* v. *Ferguson*, 1896) still stood, and it was that nineteenth-century doctrine itself that was anathema to the NAACP.

It was easy for the NAACP to seize the moment. It had brought that Texas case to the Court, just as it had brought a similar test of Oklahoma's segregated graduate study. Its New York legal staff, headed by Thurgood Marshall, and its network of cooperating attorneys in the states were in touch with local NAACP chapters and local controversies over black elementary and secondary education. Its desegregation cases in Kansas, Delaware, Virginia, South Carolina, and the District of Columbia were simply the next leg of a journey well under way. Those five cases, moreover, bore the unmistakeable marks of NAACP sponsorship. The arguments of the lawyers in charge of each case had been sharpened in the usual NAACP rehearsals at the Howard Law School. All cases also used the same expert testimony to show the effects of segregation on the self-esteem of black children. (The experts, though, did differ from case to case; the best known of them, Kenneth Clark, testified in only two of the five cases.)

At the same time, however, the NAACP was able to present the Supreme Court with a useful diversity of findings and arguments. Three of the cases depicted distinctly inferior black schools, but the trial judge in the Kansas case found the separate school systems substantially equal. In the D.C. case the black plaintiffs had not even bothered to allege any disparities, preferring the more aggressive argument that segregation per se was unconstitutional. In these latter two cases, in other words, relief for the black plaintiffs was possible only if the Supreme Court were to overturn the "separate but equal" doctrine, which it did.

II. The Group Role: How Strong the Trend?

One set of cases, no matter how celebrated, does not make a trend or movement. Just how common is group participation in constitutional litigation, and when indeed did it begin? Certainly it began well before the American public became aware of it. Clement Vose, for example, has described the work of the National Consumers' League in defending wage and hour legislation in American courts as early as 1907. (The group strategy then was the reverse of today's; legislatures were willing to pass maximum hour and minimum wage laws, but such legislation needed the most persuasive defense to survive challenges in more conservative courts.) It was, in fact, Florence Kelley and Josephine Goldmark of the League who recruited the Boston attorney Louis Brandeis (Miss Goldmark's brother-in-law) to argue the cause of the state legislation. With him they fashioned the detailed, factual brief that came to bear his name. After Brandeis's appointment to the Supreme Court, the resourceful Kelley and Goldmark found a young Felix Frankfurter to take up some of his work.

Whatever the past of group litigation, there is every reason to think it has increased over the last generation or two. Examining all noncommercial cases that came to the Supreme Court from 1928 to 1980, Karen O'Connor and Lee Epstein find that the percentage of cases with amicus curiae briefs has risen sharply from less than two percent of the cases between 1928 and 1940 to more than 53 percent from 1970 to 1980. That latter percentage, however, masks variations in the rates of amici in specific kinds of noncommercial cases. They are at two-thirds or above for cases of race or sex discrimination, for example, but only 37 percent in criminal cases.

As useful as those data are, they leave some questions unanswered. They don't specify the rate of amicus participation in commercial cases; by the accounts of all observers, it is far lower. They also don't separate constitutional litigation from the total load of the Court; observers, though, would expect amici to be more common in cases hinging on the Constitution. Finally, these data on amici record the growth of only the least important of group roles.

For a fuller picture of group involvement one focuses on a single area of constitutional litigation, the establishment of religion clause, for example. Between 1951 and 1971, a total of sixty-seven cases raising constitutional issues of the separation of church and state reached the U.S. Supreme Court, the federal courts of appeal, or the highest courts of the states. Twelve of them involved publicly supported bus rides for pupils of religious schools, and ten resulted from prayer or Bible-reading in the public schools. Others grew out of a wide variety of disputes—tax exemptions for religious property, public support for religious schools and hospitals, and a cross in a public park among them.

As that total of sixty-seven cases suggests, the fifties and sixties were the period in which the meaning of the "no establishment" clause was first developed systematically. By the most generous count, the Supreme Court had decided only four church-state cases in the 160 years before 1950. In just the next two decades, it decided ten.

Stationed in the middle of this swirl of constitutional litigation were three national groups: the American Civil Liberties Union [ACLU], the American Jewish Congress [AJC], and Americans United for Separation of Church and State [AU]. The first came to separationism from secular humanism, the second from reform Judaism, and the third from conservative Protestantism. Individually or in alliance they participated in fifty-one of the sixty-seven cases (76 percent), and at least one had a role in all ten cases that the Supreme Court decided.

Florence Kelley. ***Library of Congress.***

Despite the different sources of their separationism, the three groups divided only once in these sixty-seven cases—a case on tax exemptions for property owned by religious groups. The ACLU opposed all such exemptions, but AU favored them if the property was used for religious purposes; the AJC was divided internally and therefore silent. Both AU and the AJC drew membership support from religious congregations; the ACLU did not. In truth, differences over the meaning of separation did surface in another issue: the hiring of Roman Catholic nuns as teachers in public schools. AU opposed it per se; the other two groups opposed it only if the nuns engaged in religious teaching or proselyting. Their differences were at least one reason why the issue was never brought to the Supreme Court.

Cooperation among the three groups was much more seriously impeded by their conflicting goals for constitutional litigation. For the AJC they were scrupulously legal: favorable judicial precedents and thus influence over the direction of constitutional development. The national organization of the ACLU agreed; its litigation guide explained:

> The ACLU cannot take every case where there is a civil liberties question being raised. Rather, it should direct its efforts to cases which have some reasonable promise of having broad impact on other cases. Thus, it is always appropriate to take a case which offers the possibility of establishing new civil liberties precedents which will control other cases.

But local ACLU affiliates and the local chapters of AU frequently wanted to press litigation for sheer vindication of their separationist position. Moreover, litigation often offered organization-building possibilities. Local publicity and fundraising benefitted from participation in a deeply-felt crusade in the courts. The result was litigation and appeals of litigation that the AJC considered reckless and even irresponsible.

Despite different goals and philosophies, the three separationist groups worked cooperatively in many cases and shared a collective wisdom about strategies in them. They certainly agreed on the wisdom of entering a case as soon as possible. In these sixty-seven cases, one or more of the groups were sponsors—"present at the creation", as it were—in twenty and something more than amici in another twenty-one. They preferred plaintiffs who came to their separationist position from religious conviction, who were stable members of the community, and who preferred anonymity to publicity. Increasingly they came to prefer bringing their cases in federal courts, because they usually provided a speedier and less costly route to the Supreme Court than state courts and because their judges were more sympathetic to separationist arguments and more willing to let the plaintiffs build a full factual record.

The most challenging moments for these three groups—for all litigating groups—involved the grander strategies. Ought an issue to be taken to the Supreme Court in the first place? To risk losing a case is to risk a greater loss: an unfavorable precedent that decides other cases. What ought a group to do about an unfavorable precedent, such as the Court's decision from the 1940s permitting public funding for transportation to religious schools? Attack it or work around it? Despite some reservation from AU, the groups chose the latter course, attacking bus rides instead in those states—Wisconsin, Oregon, and Hawaii, for instance—where the state constitutions erected higher walls of separation.

Such strategy touches also the pacing, timing, and sequencing of issues. In the words of a short-lived agreement among the ACLU, AU, and AJC:

> It would be desirable if the next case to come to the Supreme Court dealing with aid to sectarian schools showed a substantially higher degree of aid than busses down the road to full aid. Our best chance of turning it away from that road is to pose an issue requiring a large step or none.

The most skillful litigation groups, in other words, play something of a constitutional chess game, trying always to limit the options or force the moves of the Court.

However, not even three purposeful, national groups can control an entire universe of constitutional litigation. Some cases emerge and are decided too rapidly for group intervention. The challenge of the Louisiana Teachers Association to the state's aid to parochial schools in 1970 was filed on September 8 in a local court, removed to the state supreme court, and then argued before that court on September 25. More often, local groups or individuals begin ill-conceived litigation and can not be talked out of it. The litigation of Madalyn Murray O'Hair is a series of cases in point. Her earthy and combative style, her desire not to have co-plaintiffs, her ties to organized atheism, and her insistence on dominating her cases all made her an unacceptable collaborator. (She also considered the ACLU, AU, and AJC unacceptable allies.) Moreover, the quality of the legal work and the records of fact in her cases were at best unpredictable.

Thurgood Marshall. *Library of Congress.*

There is, of course, another side to all this church-state litigation: the groups that seek some form of government support for religion (the "accommodationists"). Since the Roman Catholic church operated the vast majority of religious schools in the country, the chief organization on the "other" side was the arm of the Catholic bishops, the U.S. Catholic Conference. However, the structure of church-state litigation inevitably cast some hapless school board, legislature, or other public authority in the role of defendant, rather than the Catholic Conference or another "accommodationist" group. The Catholic Conference had to create a place for itself in the cases as a codefendant, an intervening defendant, or an informal partner or advisor to the defendants. It is rarely easy, in other words, to translate adversarial group conflict into adversarial litigation.

III The Ingredients of Group Success

How is it that group litigation of constitutional issues has flourished? In part because the Supreme Court has blessed it. As the NAACP worked for enforcement of the desegregation decision in the South, a number of states retaliated. Virginia charged the organization's lawyers under old laws making barratry (the exciting or encouraging of litigation) a crime. In the final resolution of the case, the U.S. Supreme Court ruled that the activities of the NAACP were forms of political activity protected by the First Amendment and thus not subject to Virginia's law (*NAACP* v. *Button*, 1963). Wrote Justice Brennan:

> In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equal treatment by all government, federal, state, and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts.

Although the 1963 decision came well after the growth of litigating groups, it protected their gains.

Group litigation flourishes also because the groups are good at it. Not many plaintiffs command the legal expertise and experience that Thurgood Marshall and Leo Pfeffer

Litigating groups have helped create public expectations that the courts should and will be active, unabashed, agents of constitutional change.

exemplify. Pfeffer, of the American Jewish Congress, was not only the most experienced advocate in church-state law, but a major scholar in the field as well. Interest groups as well have the persistence, the memory, and the long-range view that enable them to see beyond the immediate case or incident. They also have the resources for litigation. It is not that they are wealthy. They are not, but their resources are at the disposal of constitutional litigation, and those of most wealthy Americans are not. To take a major case to the Supreme Court may require a cash outlay well into six figures. The central question is not whether a litigant is able to pay, but whether he, she, or it is willing to pay.

Perhaps the greatest asset of the litigating group is the trust of the courts, born both of respect and of need. Since groups develop better records of fact and make better legal arguments than do individual plaintiffs, the courts depend greatly on them, especially in constitutional cases. That fact probably accounts to a great extent for the success of litigating groups in getting their cases into the Supreme Court. Courts also know that groups will pay attention to the cues they give. When some justices of the Supreme Court became convinced that they had erred in permitting local school districts to force young Jehovah's Witnesses to salute the flag and indicated so in a footnote in a later case (*Jones* v. *Opelika*, 1942) they must surely have been confident that lawyers for the Witnesses would read the footnote and act on it.

IV. Group Litigation in the Eighties

The group role in constitutional litigation continues to expand. In part its growth reflects the increasing mobilization of interests, the explosion of group politics, in American political life. In part, too, it reflects the expanding agenda of American politics. Issues such as those of the environment, equality for women, abortion, and freedom of sexual preference have only lately become dominant, and each has brought new groups into litigation. As a consequence, group activity enjoys a support and respectability it never did in earlier decades. The Ford Foundation, for instance, has made substantial grants to several groups litigating cases on women's rights.

Explanations for the growth of the group role, however, cannot ignore the increasing willingness of the courts themselves to be agents of constitutional change. That willingness, even eagerness, to seize and decide controversial issues, to use the judicial power actively, inevitably encourages constitutional litigation. Judicial "activism" means easier access to the courts and a greater likelihood that judges will address the policy concerns of litigants. Innovating judges thus attract innovating litigants.

Group litigation today is expanding in another significant way. It combines the more conventional litigating of constitutional questions with litigation based on legislation. The 1970s especially saw the growth of rights and statuses in congressional legislation. So, while women's groups continue to legislate under the "equal protection" clause of the Fourteenth Amendment, they also litigate under the sections of the Civil Rights Act forbidding discrimination because of sex. Groups such as the environmentalists, moreover, have virtually no constitutional bases for their claims; of necessity they are largely limited to litigating statutory issues.

In their pursuit of constitutional goals, some groups succeed and some do not. Their litigation, however, does have an important and inevitable consequence beyond their individual goals: it alters the very judicial process it seeks to influence. Litigating groups have helped create public expectations that courts should and will be active, unabashed agents of constitutional change. They fuel the very judicial activism they reflect. Their skill in litigating also increases the pace of litigation, bringing one difficult question after another to the courts, especially to the U.S. Supreme Court. By bringing the courts more often into policy disputes, they leave them more and more vulnerable to the displeasure of losers in the disputes. In short, now that the struggle and competition among groups over public policy has come to the courts, neither the groups nor the courts will ever be the same again. Nor will the Constitution.

Suggested additional reading:

Richard C. Cortner, *The Supreme Court and the Second Bill of Rights* (1981).

Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (1976).

Michael Meltsner, *Cruel and Unusual: The Supreme Court and Capital Punishment* (1973).

Karen O'Connor, *Women's Organizations' Use of the Courts* (1980).

Frank J. Sorauf, *The Wall of Separation: The Constitutional Politics of Church and State* (1976).

Clement E. Vose, *Caucasians Only* (1959)

Clement E. Vose, *Constitutional Change* (1972)

Frank J. Sorauf is professor of political science at the University of Minnesota. In addition to his work on the judicial process he also writes on political parties and campaign finance.

Retrieving Self-Evident Truths: The Fourteenth Amendment

by HOWARD N. MEYER

In 1983, when Congress established a Commission on the Bicentennial of the Constitution, it observed that the document set forth the "inalienable rights, and the timeless principles of individual liberty and responsibility, and equality before the law." This was not always so. The concepts of "*un*alienable rights" and "equality" were indeed proclaimed by the Declaration of Independence of July 4, 1776 but they were not in the Constitution of September 17, 1787. The Constitution's Preamble announced a purpose to "secure the Blessings of Liberty," but the six Articles that followed gave little specific security. In 1791, the newly-ratified Bill of Rights began to close the gap between the Declaration and the Constitution. However, the establishment of liberty on a national scale, and the very idea of equality before the law, did not achieve constitutional status until the Fourteenth Amendment was ratified in 1868, the product of an agonizing civil war.

Abraham Lincoln, in his speech at Gettysburg in 1863, made the clearest call for the changes wrought by the Fourteenth Amendment. Recalling the establishment of a new nation in 1776, "conceived in Liberty" and dedicated to equality, he pointed to the "unfinished work" we had to do: to see to it that the nation "shall have a new birth of freedom." Because of its eloquence and brevity, the Gettysburg address has been memorized and recited by innumerable school children, and often quoted by politicians of every party. But rarely does anyone think about when and how the "new birth " Lincoln called for took place.

'All Men are Created Equal'

Lincoln took the self-evident truths of the Declaration of Independence seriously. In debating with Stephen Douglas, he said he had never embraced a political idea that did not spring from the Declaration. In his notable Cooper Union speech, he said that the Union of the States into a Nation dated not from the Constitution, but from 1776. Lincoln had defended Jefferson's generation for failure to take action in their own days to see to the equality they had pledged:

> The assertion that 'all men are created equal' was of no practical use in effecting our separation from Great Britain; and it was placed in the Declaration not for that, but *for future use.* [emphasis added]

The lasting promise of the Declaration, Lincoln had said on another occasion, was that "in due time the weight would be lifted from the shoulders of all men, and that all should have an equal chance." The key to that idea was in the words: "in due time."

From the very outset of their movement some thirty years before, all who advocated the abolition of slavery included in their pronouncements the "created equal" passage of the Declaration. Some denounced the Constitution as a betrayal, a "covenant with death," to use William Lloyd Garrison's phrase. Pragmatism motivated others to assert that the Bill of Rights of 1791 had implanted the ideas of 1776 into the document of 1787. James G. Birney, the Liberty Party candidate for President in 1844, argued that the Fifth Amendment forbidding deprivation of liberty without "due process of law" had ended constitutional sanction for slavery—or at least given Congress the power to abolish it.

Unfortunately, an 1833 Supreme Court decision (*Barron* v. *Baltimore*) stood in the way. The Court used this case, which did not involve slavery, to rule that the Fifth Amendment (and the rest of the Bill of Rights) were limitations on the federal government only. Thus, the states could disregard the "due process" clause and the other rights, privileges and immunities mentioned in the first ten amendments to the Constitution. The Bill of Rights, therefore, did not touch the question of slavery, or its repressive consequences.

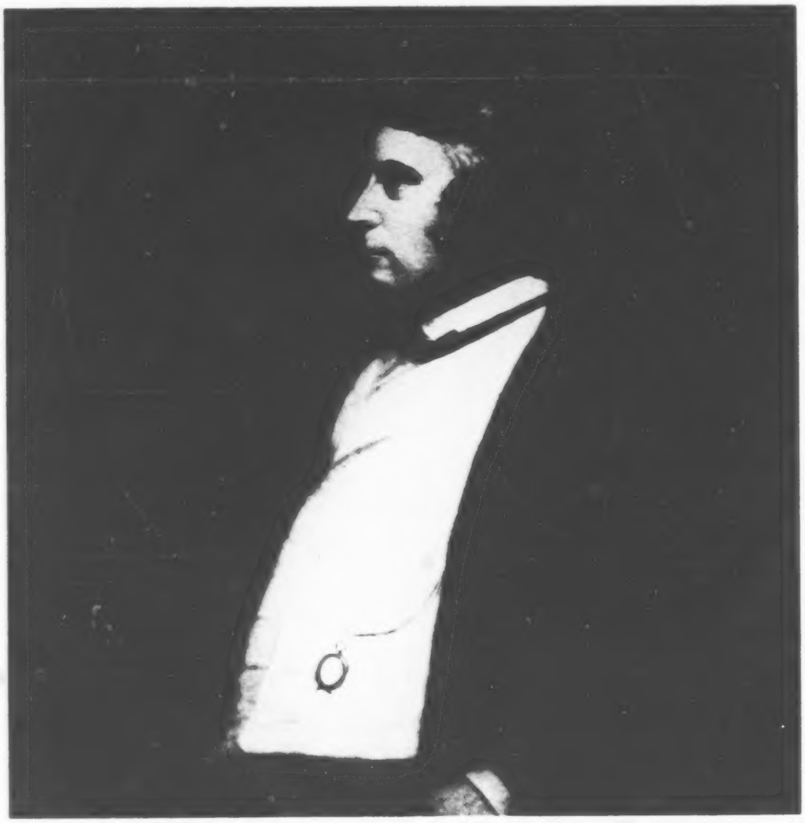
Neither that Court decision, nor propaganda mounted in slavery's defense, nor fear that abolitionism was a danger to the Union, could affect the status of the Declaration of Independence as a powerful symbol of nationhood. The Declaration was recited annually at Fourth of July celebrations. The "unalienable rights" were reiterated in many state constitutions. The egalitarian sentiments of the Declaration were taken seriously enough to be included in the platform of the newly-formed Republican Party in 1856, and repeated when Lincoln first ran in 1860.

After his election, Lincoln, in attempting to preserve the Union without bloodshed, disregarded that part of the platform. In his first Inaugural Address, he went so far as to tell the seceeding states and their sympathizers that he would support a constitutional amendment insulating slavery from abolition by future constitutional change. That proposed Thirteenth (!) Amendment had already been sent by Congress to the states and three had already ratified it. The two-thirds vote achieved in each House to submit it for ratification illustrated the fragility of the adherence to the "the proposition that all men are created equal." But despite the effort to accommodate the slave states, all attempts at peaceful settlement of the secession crisis failed, "and the war came . . . ," as Lincoln said in his second Inaugural speech. By that time, March of 1865, a new Thirteenth Amendment, now for total abolition, was well on its way; in April, Lincoln was assassinated by a Confederate sympathizer. In the eulogy he was selected to give the assassinated President, Charles Sumner, the abolitionist senator from Massachusetts, traced Lincoln's dedication to the Declaration throughout his career. Sumner, who had been isolated in the Senate when he joined that body but who was now one of its leaders, announced as the war drew to a close: "We shall insist upon the Declaration of Independence as the foundation of the new state governments."

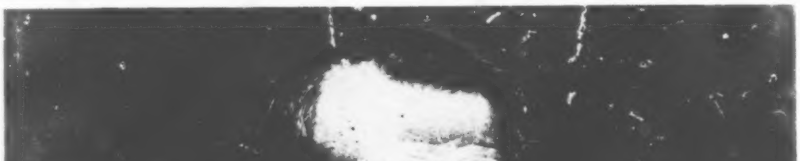
A Rapid Reversal of Opinion

The nation had undergone perhaps the most rapid reversal of "grass roots" public opinion in our history. Abolition sentiment spread as the conflict went on; support for equality began to develop after scores of black regiments were allowed to join the Union Army and they helped to turn the tide. As the war waned and the institution of slavery crumbled, new tragedies brought about even stronger sentiment for the ideas of 1776 than that which had made abolition inevitable. Lincoln's assassination, which inflamed anti-slavery feeling still more, also installed a new president in the White House who seemed intent on reversing the outcome of the war.

During the long Congressional recess, from the death of Lincoln in April until December of 1865, events moved rapidly. President Andrew Johnson rapidly restored former Confederates to power in their home states. While doing so,



Charles Sumner, painting by Walter Ingalls. ***Library of Congress.***



Andrew Johnson. ***Library of Congress.***

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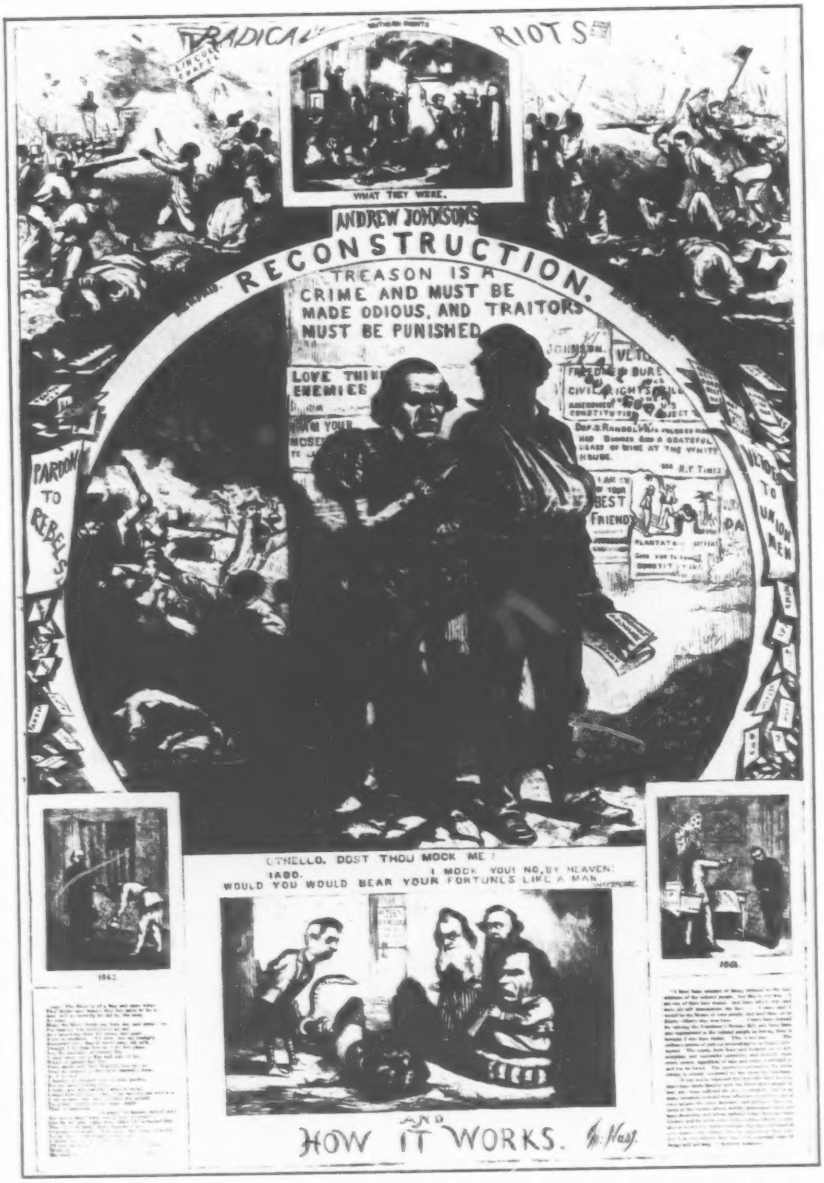
he required of them no safeguards for ex-slaves or former Union sympathizers, or even for the black Union veterans who had returned to their homes in the South. The effect was devastating. In the words of one of his own emissaries, former Union General and future statesman Carl Schurz, by December 1865, southern blacks, no longer the slaves of individuals, were becoming "the slaves of society."

Disclosure of Johnson's policies and news of their effect persuaded many that the mere outlawing of slavery was not enough— additional affirmative steps were needed to remedy its results and to insure against the return of bondage in another guise. But the President vetoed or sabotaged the civil rights laws enacted by the thirty-ninth Congress in 1865 and '66. Congressional response was decisive and in tune with public reaction. It included further legislation and the preparation and submission to the states of the Fourteenth Amendment.

Although President Johnson's policies were rejected in the 1866 midterm elections, he did not accept the verdict. He campaigned to defeat ratification of the Fourteenth Amendment, but he succeeded only in delaying it. In response, Congress produced the Fifteenth Amendment to enfranchise former slaves.


RADICAL RIOTS
WHAT THEY WERE.
ANDREW JOHNSON'S
RECONSTRUCTION,
TREASON IS A CRIME AND MUST BE MADE ODIOUS, AND TRAITORS MUST BE PUNISHED
LOVE THINE ENEMIES
PARDON TO REBELS
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OTHELLO. DOST THOU MOCK ME?
IAGO. I MOCK YOU! NO, BY HEAVEN: WOULD YOU WOULD BEAR YOUR FORTUNES LIKE A MAN.
1862.
1865.
AND HOW IT WORKS.
Th: Nast

"Andrew Johnson's Reconstruction, and how it works," by Thomas Nast. Harper's Weekly, September 1, 1866. *Library of Congress.*

'Equal Justice Under Law'

Convenient shorthand is available to identify the Thirteenth and Fifteenth Amendments: "abolition" for one and "voting rights" for the other. The Fourteenth cannot be so easily summed up. "Equal Justice Under Law" may do, if read with separate emphasis on the first two words, since the Fourteenth deals with both equality and justice. In the view of its framers, the Fourteenth Amendment in its first section was designed to give constitutional force to the human rights principles of the Declaration of Independence:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The fifth section gives to Congress

The hopes of the 'founding fathers' of the Fourteenth Amendment were not to be realized in their lifetime.

the power of enforcement "by appropriate legislation."*

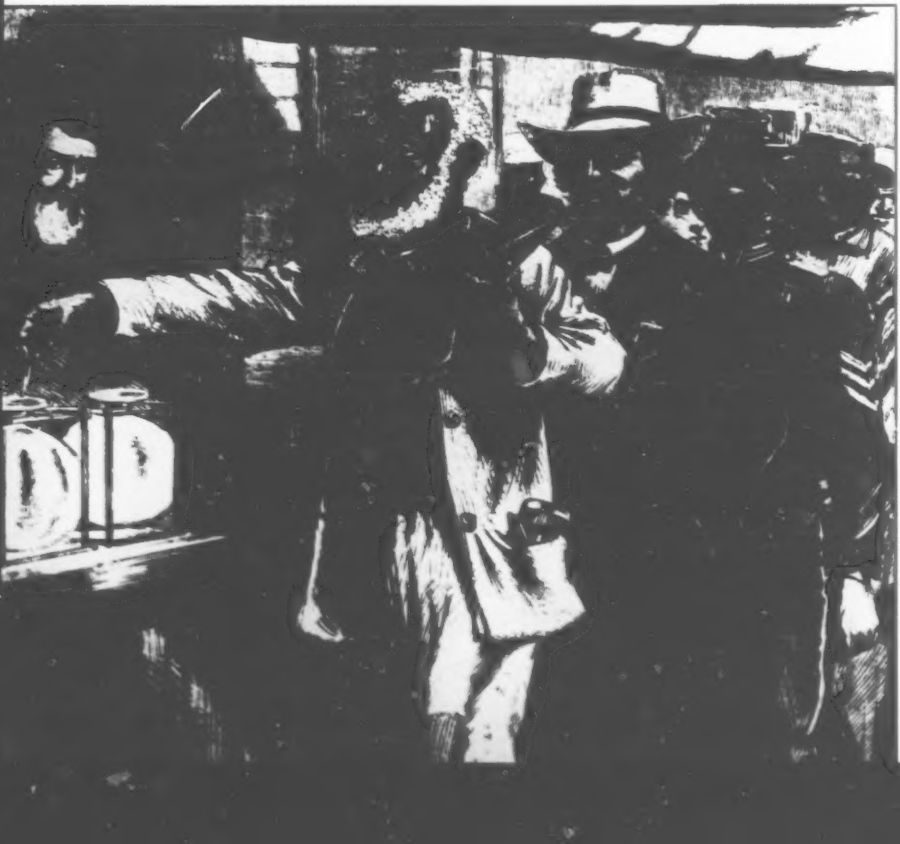
In its opening sentence, the first section of the Fourteenth Amendment aimed to undo the ruling in the ill-famed *Dred Scott* decision of 1857. That case had held that persons of African ancestry were not eligible for United States citizenship. Now a new definition remedied the omission in the 1787 charter that made such exclusion possible. It did more: it created a definite *national* citizenship, specified as prior to the connection with the state of residence. (The earlier view was that state citizenship was source, not product, of U.S. citizenship.) Now there was to be mutuality of relation directly between each person and the federal government.

Citizenship is a two-way connection embracing not only loyalty to the society from which it stems, but society's obligation equally to protect its citizens and to defend their rights. In the words of the Declaration of 1776, "to secure these rights, Governments are instituted among men": the new and explicit definition of national citizenship was aimed at making possible the fulfillment of that obligation. The equality of national citizens was expressly extended to *all* "persons" in the phrase (in the second sentence of the first section of the Fourteenth Amendment) that forbade "any state" to "deny to any person within its jurisdiction the equal protection of the laws." The "self-evident" truth of the Declaration, "that all men are created equal," was thus at last to be recognized by the Constitution.

The members of the congressional Joint Committee on Reconstruction had lived through years of pre-war state and local proslavery repression that had been immune from federal intervention. After they learned from their own official investigation and other sources that similar conditions persisted or were revived in parts of the nation reconstructed according to the ideas of Andrew Johnson, they wanted to secure federal power to act. They did not confine the new amendment's content to words pledging only equality of citizenship and personhood. They added language forbidding "any law which shall abridge the privileges and immunities of citizens" and they prohibited action by any state that would "deprive any person of life, liberty or property, without due process of law."

These quoted phrases were not novel.**They were not made up on

"The First Vote," by A. R. Waud. Harper's Weekly, November 16, 1867. ***Library of Congress.***



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*Only the provisions of the first section, and the power of Congress under the fifth are of active contemporary concern. The second clause, drafted three years before it was thought possible to forbid completely the denial of suffrage to black males, provided that states that cut their electorate by barring the vote to some portion of their male population should have the number of representatives curtailed in proportion. This law was never enforced, and it became moot when the voting rights laws of the 1960s went into effect. The third and fourth clauses dealt with disqualification of and amnesty for rebels and war debts and became obsolete in the course of time.

**Their genesis, and how they came to be used in the Fourteenth Amendment, was traced most authoritatively by two scholars, Jacobus tenBroek and Howard Jay Graham. The latter's magisterial essays were collected in book form in a 1968 edition, *Everyman's Constitution*, marking the Centennial of the ratification of the Amendment.

the spot as the Committee on Reconstruction was hammering out the Fourteenth Amendment. They are traceable to decades of debate and discussion, in print and from platform, initiated by the groups that sought to utilize or amend the Constitution to deal with slavery and the evils that it brought. Their leaders were concerned with the rights of the entire population, whether black or white, whether residing in slave state or free. Their interest ranged over the entire spectrum of rights that had been impaired in consequence of slavery: rights of free association and free speech, protection against unreasonable search and seizure, unlawful interrogation, cruel and unusual punishment. The expressions "privileges and immunities" and "due process of law" used by antislavery activists stymied by the ruling in *Barron* v. *Baltimore* seemed the best shorthand to employ when they had a chance to put words in the Constitution to repudiate that decision. This language would place the nation's reconstructed basic law in full accord with the Declaration of Independence, to achieve justice as well as equality. They concluded that one could not survive without the other.

Frustrated Objectives

These hopes of the "founding fathers" of the Fourteenth Amendment were not to be realized in their lifetime. They were to recede even further from realization for two more generations. One by one, their objectives were frustrated by a series of decisions of the Supreme Court that began with the *Slaughterhouse* cases of 1873, in which the Court ruled that the clause in the Fourteenth Amendment that prohibited states from abridging the privileges and immunities of citizens of the United States did not include the protection of ordinary civil liberties such as freedom of speech and press, religion, etc. Historian Charles Warren wrote of the ruling:

John Marshall Harlan. ***Library of Congress.***

> It came as a tremendous shock and disappointment; for [the] intent in framing the language of the Amendment was directly contrary to the narrow construction now placed upon it by the Court.

The result: With few exceptions, the ideals of equality before the law, federal protective power, and national insurance of local compliance with the Bill of Rights went down together. There was one great exception: property could not be taken without "just compensation." Trivial exceptions, such as affirmation of the right to a jury selected without racial bars, were voiced but failed to receive effective enforcement. The Fifteenth Amendment's voting right guarantee was treated similarly. The Court's decisions reflected the national mood. The majority of the population viewed the reconciliation of sectional differences in the aftermath of the war as more important than respect for the rights newly incorporated in the Constitution.

Freed from constitutional restraint by the Court's decisions, much of the country reinstituted its caste system, reinforced by a rigidly imposed structure of segregation. By 1915, half a century after the end of the Civil War, the Fourteenth Amendment had been nullified as a bulwark of liberty, equality and justice. The "new birth of freedom" for which President Lincoln had called, and for which, as he had said, so many had died, had been indefinitely postponed. But the presence of the words of the Fourteenth Amendment in the Constitution remained a guiding star, an objective for which many continued to strive.

Included among those who resisted the annulment of the Fourteenth Amendment was one staunch and determined Supreme Court justice, John Marshall Harlan of Kentucky, who sat on the Court from 1877 to 1911. His vigorous defense of every principle expressed in the Amendment gave heart to those who were to renew the struggle in the twentieth century. As much as any other justice in the Court's history, Harlan, in his dissenting opinions, appealed "to the brooding spirit of the law, to the intelligence of a future day," as he affirmed federal interest in the responsibility of the state governments to secure the civil liberties of their citizens, and to treat their citizens equally.

The "future day" that Justice Harlan must have hoped for as he

The invigoration of the Fourteenth Amendment was a halting process, punctuated by more than one step backward.

wrote his magnificent dissents did come— but not overnight. The invigoration of the Amendment was a halting process, punctuated by more than one step backward. It began during the tenure of Edward D. White, a Confederate veteran who became Chief Justice in 1910 after sixteen years on the Court. It continued during the incumbency of every successor; it was the product of persistent efforts over half a century, beginning as we entered one world war and culminating in the aftermath of the second.

Dramatic Renaissance

The dramatic renaissance of the Fourteenth Amendment began in 1917 under Chief Justice White with a Supreme Court decision invalidating an ordinance that extended segregation to the ownership of homes (*Buchanan* v. *Warley*). It continued under Chief Justice William Howard Taft in *Gitlow* v. *New York* (1925) which involved the prosecution of dissenters in the aftermath of World War I and which placed the states under the obligation to ensure the right of free speech.

In the 1930s, a pair of cases arose from prosecutions in Scottsboro, Alabama, that established additional responsibilities for state governments in protecting civil liberties. Under the direction of Chief Justice Charles Evans Hughes, in 1932 (*Powell* v. *Alabama*) the Court extended the Sixth Amendment's right of counsel for criminal defendants to state capital prosecutions. In 1935, the Court forbade the racially motivated exclusion of persons from jury service (*Norris* v. *Alabama*). The practice had been barred by statute since 1875 but the law had not been enforced. A 1923 decision (*Moore* v. *Dempsey*) required states to guarantee a degree of due process, by invalidating a trial in which the jury had been coerced by threat of mob violence.

The effects of the renaissance whose beginnings have been described here have been pervasive, but not unanimously welcomed. Some have argued that the developments were "judge-made" law, twentieth-century modifications of the Constitution. Greater familiarity with constitutional history, its seamy side as well as its nobler aspects, would compel recognition that there has been a restoration of rights rather than the "creation of new rights."

There is urgent unfinished business: many injustices spring from long-standing disregard of the command of the Constitution. As the late Judge Kenneth Keating observed during the Centennial of the Fourteenth Amendment: "Our difficulties are not caused by the recent Supreme Court decisions, but by the fact that those decisions and the principles which they embody did not come decades earlier." From this lag arises a question that does not lend itself to an easy answer: to what extent is differential treatment warranted for remedial purposes?

The "affirmative action" controversy cannot be lightly resolved. But equitable answers conforming to constitutional mandates must take account of the history of their nullification. At an 1854 women's rights convention, abolitionist Thomas Wentworth Higginson argued that those "cramped, dwarfed and crippled" by oppression deserved "more than mere negative duty. . . . By as much as we have helped to wrong them, we have got to help right them."

It is possible to suggest that the long-postponed "new birth of freedom" had arrived approximately at the period of the relatively unobserved Centennial of the ratification of the Fourteenth Amendment in 1968. Birth is a beginning, not an achieving, and there is in a dynamic and ever-changing society always more to seek in order to fulfill the objects for which, according to the Declaration of Independence, governments are instituted among men.

The commemoration of the Constitution's two-hundredth birthday should surely include consideration of the extent to which it has been humanized by the Fourteenth and its sister amendments. The changes they have wrought in the relationship between the federal government, the states and the people have created virtually a "Second Constitution."

In 1887, at the Centennial of the Constitution, journalist E. L. Godkin observed that the heroes of 1865 had completed what had been left unfinished in 1787, and the "next centennial" celebration would be focussed as much on the one date as on the other. At the very least, we should reserve some time and attention for the framers of the Fourteenth Amendment, the founding fathers of 1866.

Suggested additional readings:

Richard C. Cortner, *The Supreme Court and the Second Bill of Rights* (1981).

La Wanda Cox and John H. Cox, *Politics, Principle, and Prejudice, 1865–1866: Dilemmma of Reconstruction America* (1963).

Harold M. Hyman and William M. Wiecek, *Equal Justice Under Law: Constitutional Development, 1835–1875* (1982).

Eric L. McKitrick, *Andrew Johnson and Reconstruction* (1960).

Howard N. Meyer is an attorney and former special assistant to two attorneys general. He is the author of *The Amendment that Refused to Die* (Beacon Press, 1978) as well as biographies of Ulysses Grant and Thomas Wentworth Higginson.

Public Forum:
A New Constitutional Convention?

Article V of the Constitution provides two methods for proposing amendments to the Constitution. If two-thirds of both Houses vote in favor, Congress submits amendments to the states for ratification, or, if two-thirds of the states request, Congress calls a convention to propose amendments. In both cases, amendments must be ratified by three-fourths of the states (either by their legislatures or in conventions of their own) before becoming part of the Constitution.

Throughout the nation's history, only Congress has proposed amendments for consideration by the states; now, however, 32 of the necessary 34 states have petitioned Congress to call a convention specifically to draft an amendment requiring a balanced federal budget. The possibility of employing this constitutional, but unprecedented, method of proposing an amendment has prompted debate. Four expressions of opinion on this subject that appeared in the Washington Post *in recent months are reprinted in this issue's* **Public Forum.**

ARTICLE FIVE

Amendment of the Constitution

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

James Madison Wouldn't Approve

by MELVIN R. LAIRD

[reprinted from the *Washington Post*, February 13, 1984]

"*. . . The prospect of a second [constitutional] convention would be viewed by all Europe as a dark and threatening Cloud hanging over the Constitution.*"

These are the words of James Madison, the father of the U.S. Constitution; they were written in 1787, upon the adjournment of the only federal constitutional convention held in our nation's history. Although Madison, as it turned out, worried needlessly over the possible disruptive impact on our foreign relations of a constitutional convention in the 1700s, he along with "all Europe"—certainly the free nations of Europe—would have cause to worry in 1984. And so should America. In fact, most Americans may be surprised to learn that we may be on the verge of convening the Second Constitutional Convention.

As a former member of both the legislative and executive branches, I am concerned—particularly as we move toward elections in November—about the drastic and divisive consequences of action that would lead to the call for a constitutional convention.

Under Article V, there are two procedures for amending the U.S. Constitution. Under the only procedure used in our history, Congress considers, passes and submits a proposed amendment to the states for ratification. If ratified by three-quarters of the states, the amendment becomes a part of the Constitution. That has proved to be a responsive and orderly procedure.

The second procedure requires the convening of a full constitutional convention whose scope and authority are not defined or limited by our Constitution. If 34 states submit valid petitions to Congress for a convention, it must be convened. Any and all amendments that are considered and passed by such a convention are then forwarded to the states for ratification.

Our citizens understandably have been wary of a constitutional convention, and there is little or no historical or constitutional guidance as to its proper powers and scope. The Constitution does not spell out, for example, how delegates would be chosen or time limits for the convention or payment of costs.

The only precedent we have for a constitutional convention took place in Philadelphia in 1787. That convention, it must be remembered, broke every legal restraint designed to limit its power and agenda. It violated specific instructions from Congress to confine itself to amending the Articles of Confederation and instead discarded the Articles and wrote our present Constitution. Moreover, that convention acted in violation of the existing Articles of Confederation by devising a new method for ratifying the proposed Constitution, specifically prohibited by the Articles of Confederation.

Reputable scholars have recently grappled with these complexities, but the realistic fact remains that 200 years later there is no certainty that our nation would survive a modern-day convention with its basic structures intact and its citizens' traditional rights retained. The convening of a federal constitutional convention would be an act of the greatest magnitude for our nation. I believe it would be an act fraught with danger and recklessness.

Today, 32 of the required 34 states have petitioned Congress for a convention to draft an amendment requiring the federal government to maintain a balanced budget. Well-meaning and learned people differ on the desirability of mandating a balanced federal budget. I favor the adoption of an amendment through the traditional congressional procedure that would require the federal government to live within its means. Nevertheless, I cannot support and will oppose any attempt to force this issue upon Congress through petitions for a convention.

Ironically, while a constitutional convention could totally alter our way of life, the petitions for a convention regrettably have often been acted upon hastily at the state legislature level in a cavalier manner. Over one-half of the states calling for a convention have done so without the benefit of public hearings, debate or recorded vote. This momentous decision, in other words, is being made surreptitiously, as if it cannot withstand the scrutiny and discussion of a concerned and intelligent citizenry.

In addition to its perils for the internal workings of our nation, a constitutional convention would have serious, frequently overlooked, international repercussions. The United States is the oldest, largest and most stable Republic in the world. It is also the cornerstone of the entire economic life of the Western world and a significant factor in the economy of almost every country on the globe.

If Madison was justifiably concerned over the foreign policy implications of a U.S. Constitutional Convention in the 18th century, our concern should be multiplied by the infinitely more prominent world role our country plays in the 20th century. The potential disruptions to our vital foreign policy interests—NATO is an example—are disturbing to contemplate.

If a convention were called, our allies and foes alike would soon realize the new pressures imposed upon our Republic. The mere act of convening a constitutional convention would send tremors throughout all those economies that depend on the dollar; would undermine our neighbors' confidence in our constitutional integrity; and would weaken not only our economic stability but the stability of the free world. That is a price we cannot afford.

The domestic and international instability engendered by a convention cannot be justified by the prospect of a balanced federal budget. Even if the convention passed a balanced budget amendment in short order and then disbanded, the ratification process would take years. In addition, it is unlikely that an amendment would require a balanced budget in its first effective year: each of the drafts historically considered to date has allowed a multiyear phasing in of the limitations.

So even in the best case, a convention would not cure our budget deficit problems quickly. And the price for a long-term solution achieved through a convention would be incalculable domestic and international confusion.

The concept that a constitutional convention would be harmless is not conservative, moderate or liberal philosophy. That concept is profoundly radical, born either of naiveté or the opportunistic thought that the end justifies the means. Our duty, as citizens of this nation, is to guard and protect our Constitution, to uphold its integrity, and to weigh the impact not only of proposed revisions but also of the means proposed to adopt them. We must work together to preserve all that is good in our system and to resolve problems by rational means. This nation certainly does not need a constitutional crisis; it should not take the first steps toward a possible wholesale revision of its Constitution; it must not, by moving closer to a constitutional convention, engender crippling domestic and international uncertainty.

Especially now, when international relations are precarious and global economies are struggling to regain the momentum of growth, a convention would divert our domestic attentions from pressing national problems and legislative and executive branch responsibilities, while focusing global attention on what would certainly appear, to friends and enemies alike, as a profound weakness in our national fabric. To say a constitutional convention should be called to balance the federal budget is a deception. A convention cannot perform magic; at best, it could offer an over-the-horizon possibility of a balanced budget amendment, while creating the certainty of profound mischief.

photograph by Oscar Porter, U.S. Army Photo Agency.

Melvin R. Laird, secretary of defense in the Nixon administration, was a U.S. representative from 1952 to 1969.

It's a Constitutional Right

by ORRIN G. HATCH

[reprinted from the *Washington Post*, February 18, 1984]

My, how the stakes have risen. It used to be that critics of the constitutional convention amendment procedure were satisfied to argue that a convention would lead to a "constitutional crisis." Now, according to Melvin Laird ["James Madison Wouldn't Approve," op-ed, Feb. 13], such a convention would "totally alter our way of life," disrupt our foreign policy interests, weaken the dollar and create an international global crisis.

Why don't we all step back for just a moment and assay what it is we are talking about here. We are not talking about some extra-constitutional proposal or about suspending parts of the Bill of Rights or about postponing our periodic exercises in mass suffrage.

Rather, we are talking about the provisions of Article V of the Constitution—the amending clause. The first allows two-thirds of each house of Congress to propose an amendment subject to ratification by three-fourths of the states. The second, less well known, allows two-thirds of the states to call a convention that may propose an amendment, again subject to ratification by three-fourths of the states.

The principal reason for including the latter method was to ensure that the states could at any time initiate a constitutional amendment, however opposed to it the Congress might be. Particularly in the case of proposed amendments to restrict or better define the powers of Congress, it was considered unlikely that the legislative branch would be receptive to calls for change.

The controversy over the balanced budget constitutional amendment illustrates perfectly the intended role of the state-initiated amendment. The idea of a balanced budget amendment has been part of the public debate for at least several decades. It is one that has drawn consistently high levels of support among state legislators and, according to public opinion polls, the people generally.

Does this necessarily make the amendment a good idea? Of course not. But the balanced budget amendment has never even been accorded a respectful hearing by Congress until the past three years, when the current call for a constitutional convention heated up. Clearly, it is only because of the "specter" of the convention call that the

U.S. Senate during the last Congress approved the amendment by a two-thirds vote (with the House subsequently voting in the majority for the measure, but falling short of a two-thirds vote.).

Members of Congress have traditionally argued that such an amendment would be too "rigid," that it would "straitjacket" Congress in its fiscal responsibilities and that it would set up "inflexible" budgetary procedures. To many, including state legislators (the overwhelming number of whom conduct their legislative business within a balanced budget constraint), this sounded much like any other institution of government attempting to justify a somewhat calcified status quo in the face of manifestly reasonable proposals for change. To some, it appeared a classic instance of what the Founders were concerned about preventing—a recalcitrant Congress standing perpetually in the way of widely supported changes to its own constitutional authority.

I must confess that I find it at least slightly ironic that so much opposition to the *idea* of a convention (as distinct from the idea of a balanced budget amendment, for example) has come from those so fervently committed to populist and hyper-democratic rhetoric. Such individuals seem to be so very much more comfortable with changes in the meaning of the Constitution effected by a small core of well-educated, upper-middle-class lawyers, also known as federal judges. When such judges sit as a "continuing constitutional convention" and issue decisions, representing major departures in constitutional policy in such areas as abortion, racial quotas and school prayer, their wisdom is commended. They are subject to tributes and encomiums for understanding the need for a "living" and "growing" and "evolving" Constitution.

When, however, the citizenry, in a genuinely grass-roots effort, attempts to make use of its express constitutional authority by engaging in one of the quintessential exercises in participatory democracy set forth by the Constitution, we are subject to doomsday rhetoric and dire predictions of domestic and international disaster.

It is occasionally sobering to some in American government to learn that it is *really* the citizenry, not Congress, that is the responsible party in our political system. If any institution threatens to "run away" from its proper role within our constitutional system, it is less likely to be the people through a well-structured constitutional convention than a Congress unable to discipline its own fiscal practices. If there is anything that can now be characterized as "runaway," it is the rhetoric in opposition to the constitutional convention process.

Orrin G. Hatch is a Republican senator from Utah.

Get Off the Bandwagon

Editorial, the *Washington Post*, April 7, 1984

Maryland was one of the first states to petition Congress to call a constitutional convention in order to adopt a balanced budget amendment. It was never a good idea, and now, correctly, legislators are having second thoughts.

The U.S. Constitution sets out two methods of amendment. The only one that has ever been used successfully calls for Congress to adopt an amendment by two-thirds vote; then three-quarters of the states must ratify it. The alternative allows two-thirds of the states to call upon Congress to organize a constitutional convention to consider amendments, which would also have to be ratified by the states. This method is most often invoked when there is little support in Congress for an amendment. It was tried, for example, in the '60s on school prayer. Proposals to limit the federal income tax and to overturn the Supreme Court's reapportionment decision were also first considered by state legislatures. As in these cases, there is now more enthusiasm in the states than in Congress for requiring the federal government to balance its budget, and 32 states, of the required 34, have passed resolutions calling for a constitutional convention on this matter.

Maryland Attorney General Stephen Sachs has urged the legislature to withdraw its call. Without addressing the merits of the balanced budget amendment, he counsels against a constitutional convention because he believes such a gathering could not be limited to discussing a single subject such as balanced budgets. Many legal experts agree that the possibility of a runaway convention is real. Mr. Sachs believes that Maryland, which led in calling for a convention, should be among the first to withdraw the call. Such a step might inspire some of the 31 other states on this bandwagon to step off too.

The Maryland senate's constitutional and public law committee has voted to order a study to be completed before the new legislature convenes. This delay is regrettable, but the study should convince the next legislature that it is both legal and prudent to withdraw the 1975 resolution. Maryland should not be part of an effort to promote a constitutional convention when the ultimate actions of that body cannot be predicted or controlled.

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Constitutional Convention: Oh, Stop the Hand-Wringing

by GRIFFIN B. BELL

[reprinted from the *Washington Post*, April 14, 1984]

Like most Americans, I am deeply concerned by the federal government's continuing failure to control the budget deficits. The interest payments on the debt now amount to 12 percent of the current budget. Basic to this failure is that no counterforce exists against the special interest groups that are the driving force behind excessive government spending.

Because Congress has failed to control runaway government deficits, the people have acted through their state legislatures, 32 of which have called for a constitutional convention to draft a balanced federal budget amendment. When 34 states have so acted, Congress under Article V of the Constitution, must call a convention.

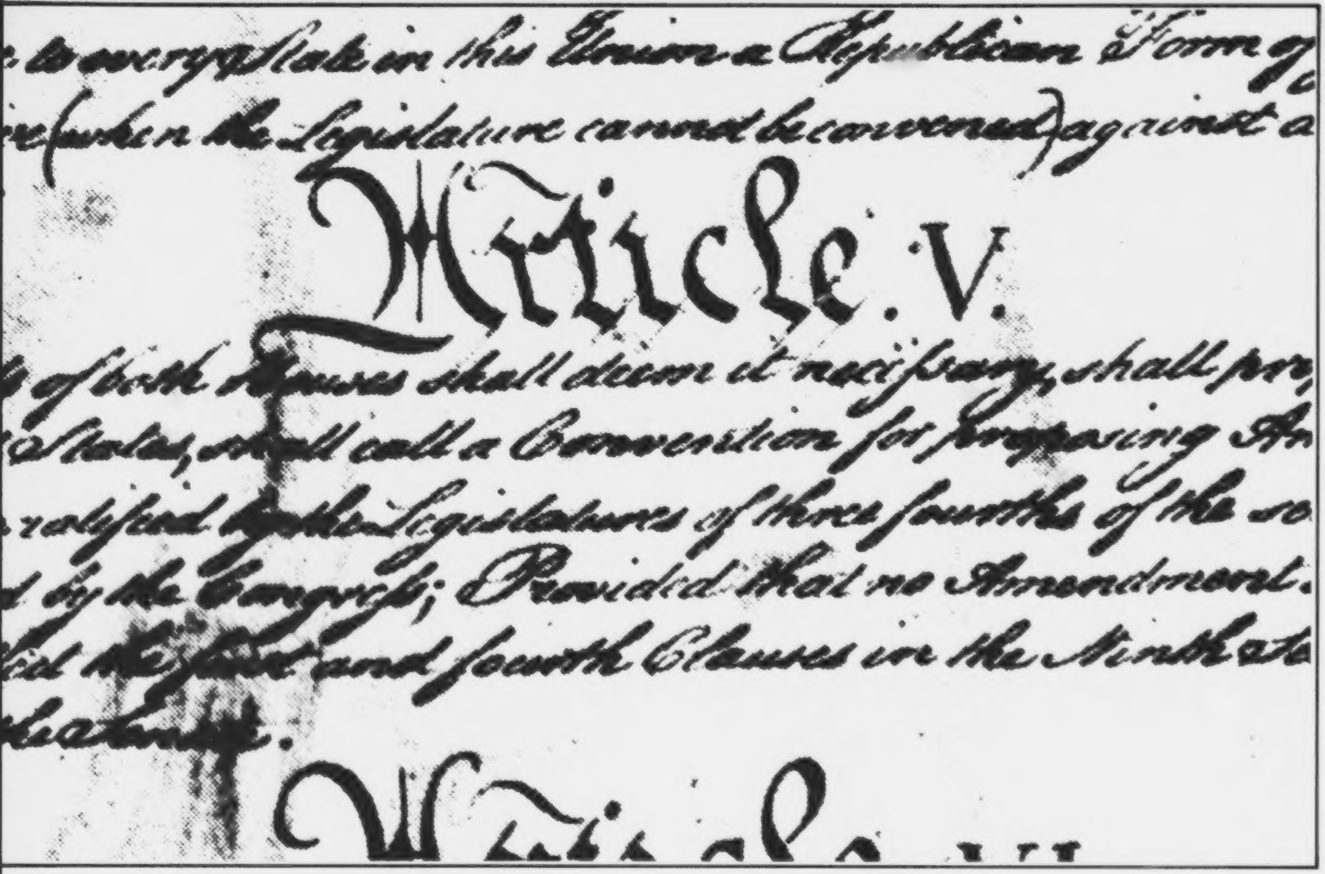
We are now hearing predictions of doom and gloom that have not been heard since the passage of the 17th Amendment 72 years ago ["Get Off the Bandwagon," editorial, April 7]. In our original Constitution, senators were appointed by the state legislatures rather than elected by the people. By 1912, the people had concluded by a wide margin that the Senate should be elected, not appointed. The House of Representatives agreed, five times passing a proposed constitutional amendment to make the Senate elective.

But five times the Senate killed the amendment in committee, thereby forcing the people to take action. State legislatures began passing conditional calls for a convention, if Congress did not approve the amendment.

At that time, the two-thirds required was 32 state legislatures. When 31 states had acted, the Senate read the handwriting on the wall and passed the amendment. Without the use of the alternative route in Article V of our Constitution, the 17th Amendment would not have been passed and senators would still be appointed.

This is precisely what the Founding Fathers had in mind. They provided for amendment through action of the state legislatures to deal with those situations in which Congress was part of the problem and would not act. That situation prevailed in 1912. It prevails equally in 1984.

Aside from the specious argument that a convention is "alien" to the constitutional process, we also hear other objections. It is argued that our friends abroad would recoil in horror at the prospect of a U.S. constitutional convention that would presumably destabilize America. But the free world has been decimated by our interest rates and the dollar exchange rate, which foreign financial experts attribute to our huge deficits and general fiscal profligacy. A serious effort to install long-term constitutional control over U.S. fiscal practices would be welcomed by our friends abroad.



Also, we are bombarded with ominous stories about a "runaway" constitutional convention that, presumably, would repeal the Bill of Rights, dismantle the Constitution and install some sort of totalitarian regime. Well, while we have not had a federal convention since 1787, there have been over 200 conventions held in various states, many of whose constitutions provide for periodic conventions to propose amendments. Such gatherings have brought out the best, not the worst, in people's government.

It is claimed that James Madison said a "new" constitutional convention would be a cloud over the Constitution. He did in fact utter those words, but in response to critics who declared that the Constitution written in Philadelphia in 1787 should be rejected and a new convention be held immediately. Thomas Jefferson, author of the Declaration of Independence, assumed that we would have a new convention about every 20 years.

In fact, fears about a "runaway" convention are groundless. The various state applications to Congress not only exhort Congress to pass the Tax Limitation-Balanced Budget Amendment but limit the scope of a convention to the sole and exclusive purpose of the balanced budget issue.

Those who wring their hands over the prospects of a convention run the risk of exposing their elitism, implying that the average citizen cannot be trusted. At the same time, they are willing to place their full faith in Congress, the very institution that has precipitated the fiscal mess that, in turn, has prompted the Tax Limitation-Balanced Budget movement.

But, suppose that other resolutions were offered at the Balanced Budget Convention. Congress would not be compelled, nor would it have any incentive, to send along to the states for ratification any proposals emanating from the convention that exceeded the scope of the call. And 38 states are not about to ratify any proposal that does violence to or seeks to dismantle fundamental constitutional protections and guarantees.

Finally, it is important to understand that a convention will not necessarily take place upon the application of 34 states. The state calls have said: if Congress does not pass the amendment, then a convention for that purpose is called. The calls are conditional, not absolute. I believe there will not be a balanced budget constitutional convention. Congress simply will not abide letting mere citizens decide its taxing and spending power. Congress will act, I predict, as it did on the issue of the direct elections of senators—when overwhelming pressure from the states and the people can no longer be ignored.

Griffin B. Bell was attorney general in the Carter administration.

DOCUMENTS

The Virginia Plan of 1787: James Madison's Outline of a Model Constitution

by ROBERT A . RUTLAND

In 1834, almost fifty years after he walked forward to sign the Constitution at Philadelphia in September of 1787, James Madison had to be flattered when an admiring citizen spoke of him as "*the* writer of the Constitution of the U. S." But Madison quickly set the record straight. "You give me a credit to which I have no claim," the eighty-three-year-old Virginian explained, for the Constitution "was not, like the fabled Goddess of Wisdom, the offspring of a single brain. It ought to be regarded as the work of many heads & many hands."

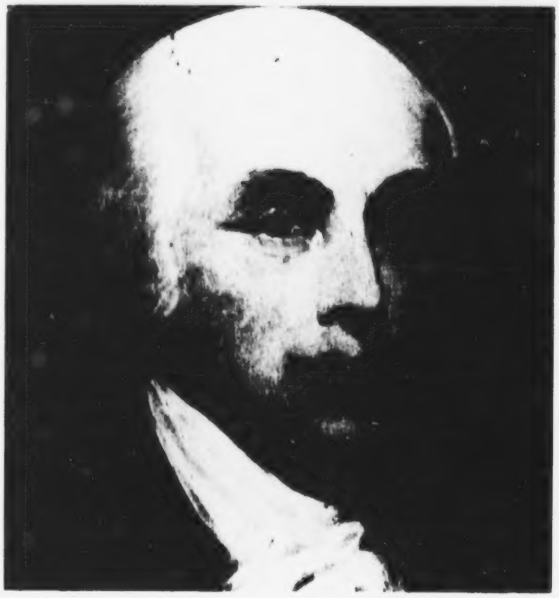
Madison's self-effacement has not misled scholars. What has eluded historians is Madison's total involvement in the convention process, and most particularly his key role in drafting the all-important Virginia Plan. From start to finish, Madison was busy digging a grave for the Articles of Confederation and giving birth to a new constitution that would redeem the promise of the American Revolution.

As the last survivor of the Federal Convention of 1787, Madison knew he had an obligation to keep the creation of the Constitution in perspective. Moreover, he was acutely aware of what it meant to have the nation's esteem as the remaining patriot of the fifty-five who had assembled in Philadelphia in a mood of anxiety if not desperation. "Having outlived so many of my co[n]temporaries," he told Jared Sparks in 1831, "I ought not to forget that I may be thought to have outlived myself." The "Father of the Constitution" simply thought of himself as one of the committee members who struggled during the summer of 1787 to save the Republic. Or so he said. Despite his modesty Madison knew that he, along with James Wilson, George Mason, and Gouverneur Morris had done most of the talking and the drafting of the document that emerged in mid-September.

At the Constitutional Convention, Madison had been well prepared to address the subject of national government. During the years 1780 to 1783, when he served in the Continental Congress, he perceived the Republic was in trouble as state interests checked even the slightest expansion of national power for the common good. The Articles of Confederation provided for unanimous action on such vital matters as the creation of a duty on imports and repayment of the war debt. Unanimity on such matters proved to be impossible. Although no longer on the Virginia delegation in Congress in 1784, Madison was acutely aware of the sectional strains that occurred when foreign secretary John Jay negotiated with Spain in 1784-85 for a commercial outlet on the Mississippi, and he saw New Englanders ready to swap American rights for river traffic in exchange for a European market for their codfish. Madison also looked at the empty Continental treasury and contrasted its barren coffers with the comfortable New York cash balance built at the expense of imports going to neighboring states. Meanwhile, not a cent was contributed to hold down the mounting national war debt, and even Virginia rescinded an earlier vote for a national impost.

Troubled by the inconsistent behavior of his fellow delegates and anxious to keep the national government from collapsing, Madison during 1786 and early 1787 delved into histories of ancient republics and confederacies as a doctor would seek pathological knowledge. The disease was easy to diagnose—an empty treasury, a cash-poor economy, and a leaderless national government that was powerless to remedy problems of the purse or sword. To Madison's scholarly mind the remedy lay in a study of the problems which confronted the ancient Greek confederacies. What kept the Achaeans together, and how had the Swiss confederation solved its problems of inter-cantonal jealousy?

In April 1787, some months after preparing his intellectual exercise in ancient and recent history, Madison took up his pen again to dissect ills closer to home. With the Philadelphia meeting only



James Madison. Library of Congress.

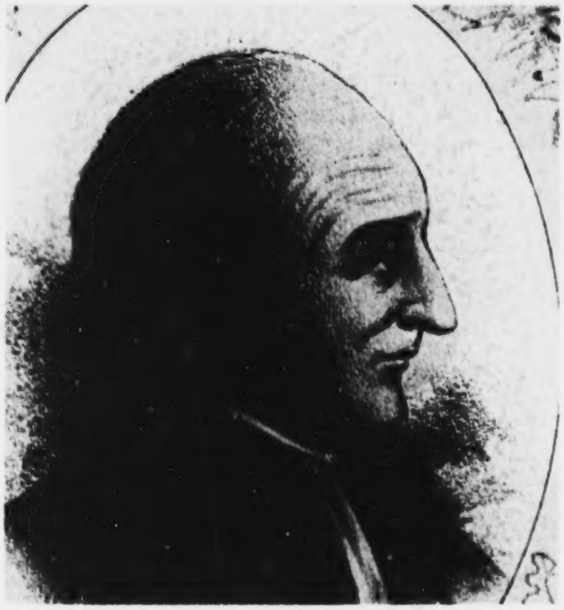
weeks away, Madison's memorandum on "Vices of the Political system of the U. States" was mainly an indictment of the state legislatures. These assemblies all but ignored Continental requisitions; they had no sense of national interest when parochial concerns hung in the balance; and they overlegislated to the point that they created a "multiplicity of laws ... a nu[i]sance of the most pestilent kind." In this private paper, Madison added a section on "the people themselves," with an analysis of self-interested segments in society that was a precursor of his *Federalist* No. 10 essay.

> ***All civilized societies are divided into different interests and factions, as they happen to be creditors or debtors — Rich or poor — husbandmen, merchants or manufacturers — members of different religious sects — followers of different political leaders — inhabitants of different districts — owners of different kinds of property &c &c. In republican Government the majority[,] however composed, ultimately give the law.***
>
> **Vices of the Political System of the U. States**

Madison saw that combinations of these elements became a headstrong majority capable of "unjust violations of the rights and interests of the minority, or of individuals." Madison perceived that a republic had to bend to the will of the majority, but where there were no checks on rapacious factions chaos would result. Thus the challenge to republican government: "to controul one part of Society from invading the rights of another, and at the same time [be] sufficiently controulled itself."

What Madison accomplished in the Virginia legislature between early 1785 and the end of 1786 was remarkable. He kept the forces of local intolerance at bay, worked for a cooperative effort with Maryland to redress interstate problems on the Potomac, and then fashioned a call for a national meeting in Annapolis to discuss remedies for the faltering confederation.

At first not much developed; even Maryland would not bother to send delegates to his Annapolis convention. But Madison talked there with a few delegates and particularly with Alexander Hamilton, who agreed that matters were moving from bad to worse. The vague plan which emerged from Annapolis took Madison back to Richmond, where a national call was sent out by the authority of the Virginia General Assembly, asking each state to send delegates to Philadelphia on May 14, 1787, for a general meeting. The purpose of the emergency meeting at Philadelphia was clear, as one of the delegates later said: "A nation without a national government" was "an awful spectacle."

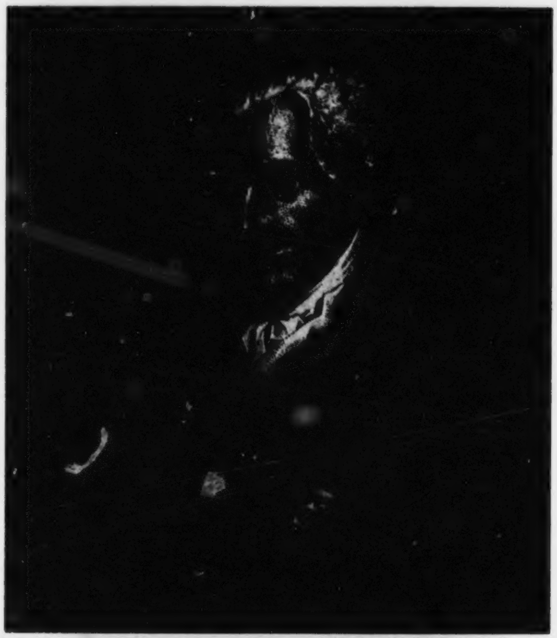


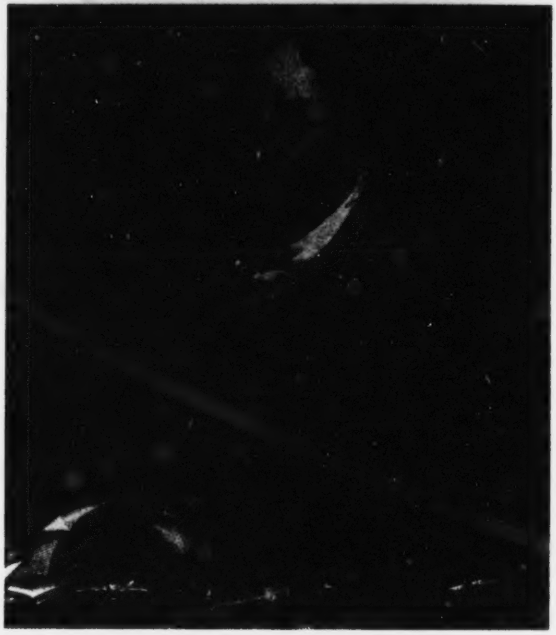
George Wythe. Library of Congress.

As Madison saw matters, so far so good. He begged and cajoled Washington into agreeing to come to Philadelphia. He tried to get the best men in Virginia to join the general, and with the likes of George Mason, George Wythe, and Governor Edmund Randolph he felt comfortable. Good news came from other states, too. The New England states were sending such men of substance as Rufus King, Oliver Ellsworth, and Elbridge Gerry. Somehow, Hamilton had been picked from New York, along with Gouverneur Morris and James Wilson from Pennsylvania. The southern contingent, led by the Virginians, included two Pinckneys, Hugh Williamson, and Pierce Butler from the Carolinas.

From his experience in the Virginia House of Delegates, Madison knew that the introduction of a general framework would be critical at the early convention sessions. "We all look to Virginia for examples," John Adams had said at an earlier time, half in flattery, half in truth. During the eleven days preceding the opening of the Convention in May, Madison coddled and prodded his fellow Virginia delegates into holding daily sessions to discuss what kind of blueprint they needed to get the convention moving, once a quorum was present. The result was the Virginia Plan. The plan was a masterly device urged by Madison to prevent debate on a revision of the Articles of Confederation and move directly to the heart of the matter: the creation of a new, stronger, and essentially consolidated republic. Weeks and perhaps months were saved by this clever move.

As governor and hence titular head of the state


Elbridge Gerry. *Library of Congress.*


Rufus King. *Library of Congress.*

delegation, Edmund Randolph presented the plan on the floor of the Convention; the proposed outline of the government thus became known as the Randolph Plan, as well as the Virginia Plan. Neither of these familiar names reveals its true creator. Although Madison never claimed that this plan was his exclusive brainchild, a comparison of its text with his letters to Jefferson on March 19, to Randolph on April 8, and to Washington on April 16 leave little doubt as to the main authorship of the Virginia Plan. All the ideas for a new constitution were embodied in these three letters, although one (an absolute veto over state laws by the federal government) had to be toned down considerably.

James Madison to Thomas Jefferson
March 19, 1787 — New York, New York
(James Madison Papers, Library of Congress)

> *. . . What may be the result of this political experiment cannot be foreseen. The difficulties which present themselves are on one side almost sufficient to dismay the most sanguine, whilst on the other side the most timid are compelled to encounter them by the mortal diseases of the existing constitution. These diseases need not be pointed out to you who so well understand them. Suffice it to say that they are at present marked by symptoms which are truly alarming, which have tainted the faith of the most orthodox republicans, and which challenge from the votaries of liberty every concession in favor of stable Government not infringing fundamental principles, as the only security against an opposite extreme of our present situation. I think myself that it will be expedient in the first place to lay the foundation of the new system in such a ratification by the people themselves of the several States as will render it clearly paramount to their Legislative authorities. 2dly. Over & above the positive power of regulating trade and sundry other matters in which uniformity is proper, to arm the federal head with a negative* in all cases whatsoever *on the local Legislatures. Without this defensive power experience and reflection have satisfied me that however ample the federal powers may be made, or however Clearly their boundaries may be delineated, on paper, they will be easily and continually baffled by the Legislative sovereignties of the States. The effects of this provision would be not only to guard the national rights and interests against invasion, but also to restrain the States from thwarting and molesting each other, and even from oppressing the minority within themselves by paper money and other unrighteous measures which favor the interest of the majority. In order to render the exercise of such a negative prerogative convenient, an emanation of it must be vested in some set of men within the several States so far as to enable them to give a tempo-*

rary sanction to laws of immediate necessity. 3dly. to change the principle of Representation in the federal system. Whilst the execution of the Acts of Congs. depends on the several legislatures, the equality of votes does not destroy the inequality of importance and influence in the States. But in case of such an augmentation of the federal power as will render it efficient without the intervention of the Legislatures, a vote in the general Councils from Delaware would be of equal value with one from Massts. or Virginia. This change therefore is just. I think also it will be practicable. A majority of the States conceive that they will be gainers by it. It is recommended to the Eastern States by the actual superiority of their populousness, and to the Southern by their expected superiority. And if a majority of the larger States concur, the fewer and smaller States must finally bend to them. This point being gained, many of the objections now urged in the leading States agst. renunciations of power will vanish. 4thly. to organise the federal powers in such a manner as not to blend together those which ought to be exercised by separate departments. The limited powers now vested in Congs. are frequently mismanaged from the want of such a distribution of them: What would be the case, under an enlargement not only of the powers, but the number, of the federal Representatives? These are some of the leading ideas which have occurred to me, but which may appear to others as improper, as they appear to me necessary. . . .

James Madison to Edmund Randolph
April 8, 1787 — New York, New York
(James Madison Papers, Library of Congress)

. . . I think with you that it will be well to retain as much as possible of the old Confederation, tho' I doubt whether it may not be best to work the valuable articles into the new System, instead of engrafting the latter on the former. I am also perfectly of your opinion that in framing a system, no material sacrifices ought to be made to local or temporary prejudices. An explanatory address must of necessity accompany the result of the Convention on the main object. I am not sure that it will be practicable to present the several parts of the reform in so detached a manner to the States as that a partial adoption will be binding. Particular States may view the different articles as conditions of each other, and would only ratify them as such. Others might ratify them as independent propositions. The consequence would be that the ratification of both would go for nothing. I have not however examined this point thoroughly. In truth my ideas of a reform strike so deeply at the old Confederation, and lead to such a systematic change, that they scarcely admit of the expedient.

I hold it for a fundamental point that an individual independence of the States, is utterly irreconcileable with the idea of an aggregate sovereignty. I think at the same time that a consolidation of the States into one simple republic is not less unattainable than it would be inexpedient. Let it be tried then whether any middle ground can be taken which will at once support a due supremacy of the national authority, and leave in force the local authorities so far as they can be subordinately useful.

The first step to be taken is I think a change in the principle of representation. According to the present form of the Union, an equality of suffrage if not just towards the larger members of it, is at least safe to them, as the liberty they exercise of rejecting or executing the acts of Congress, is uncontroulable by the nominal sovereignty of Congress. Under a system which would operate without the intervention of the States, the case would be materially altered. A vote from Delaware would have the same effect as one from Massts. or Virga.

Let the national Government be armed with a positive & compleat authority in all cases where uniform measures are necessary. As in trade &c. &c. Let it also retain the powers which it now possesses.

Let it have a negative in all cases whatsoever on the Legislative Acts of the States as the K. of G. B. heretofore had. This I *conceive to be essential and the least possible abridgement of the State Soveriegnties. Without such a defensive power, every positive power that can be given on paper will be unavailing. It will also give internal stability to the States. There has been no moment since the peace at which the federal assent wd have been given to paper money &c. &c.*

Let this national supremacy be extended also to the Judiciary departmt. If the judges in the last resort depend on the States & are bound by their oaths to them and not to the Union, the intention of the law and the interests of the nation may be defeated by the obsequiousness of the Tribunals to the policy or prejudices of the States. It seems at least essential that an appeal should lie to some national tribunals in all cases which concern foreigners, or inhabitants of other States. The admiralty jurisdiction may be fully submitted to the national Government.

The supremacy of the whole in the Executive department seems liable to some difficulty. Perhaps an extension of it to the case of the Militia may be necessary & sufficient.

A Government formed of such extensive powers ought to be well organized. The Legislative department may be divided into two branches: One of them to be chosen every   years by the Legislatures or the people at large; the other to consist of a more select number, holding their appointments for a longer term and going out in rotation. Perhaps the negative on the State laws may be most conveniently lodged in this branch. A Council of Revision may be superadded, including the great ministerial officers.

A National Executive will also be necessary. I have scarcly venturd to form my own opinion yet either of the manner in which it ought to be constituted or of the authorities with which it ought [to be] cloathed.

An article ought to be inserted expressly guarantying the tranquility of the States agst. internal as well as external dangers.

To give the new system its proper energy it will be desirable to have it ratified by the authority of the people, and not merely by that of the Legislatures.

I am afraid you will think this project, if not extravagant, absolutely unattainable and unworthy of being attempted. Conceiving it my self to go no further than is essential. The objections drawn from this source are to be laid aside. I flatter myself however that they may be less formidable on trial than in contemplation. The change in the principle of representation will be relished by a majority of the States, and those too of most influence. The Northern States will be reconciled to it by the actual *superiority of their populousness: the Southern by their* expected *superiority in this point. This principle established, the repugnance of the large States to part with power will in a great degree subside, and the smaller States must ultimately yield to the predominant Will. It is also already seen by many & must by degrees be seen by all that unless the Union be organized efficiently & on Republican Principles, innovations of a much more objectionable form may be obtruded, or in the most favorable event, the partition of the Empire into rival & hostile confederacies, will ensue.*

To Washington, he repeated the thoughts in the first two letters but enlarged his ideas on a national judiciary.

James Madison to George Washington
April 16, 1787 — New York, New York
(George Washington Papers, Library of Congress)

> *. . . The National supremacy ought also to be extended as I conceive to the Judiciary departments. If those who are to expound and apply the laws, are connected by their interests and their oaths with the particular States wholly, and not with the Union, the participation of the Union in the making of the laws may be possibly rendered unavailing. It seems at least necessary that the oaths of the Judges should include a fidelity to the general as well as local Constitution, and that an appeal should be to some National tribunals in all cases to which foreigners or inhabitants of other States may be parties. The*

> *admiralty jurisdiction seems to fall entirely within the purview of the National government.*
>
> *The National supremacy in the Executive departments is liable to some difficulty, unless the Officers administering them could be made appointable by the Supreme government. The Militia ought certainly to be placed in some form or other under the authority which is entrusted with the general protection and defence.*
>
> *A government composed of such extensive powers should be well organised and balanced. The legislastive department might be divided into two branches; one of them chosen every years by the people at large, or by the Legislatures; the other to consist of fewer members, to hold their places for a longer term, and to go out in such a rotation as always to leave in office a large majority of old members. Perhaps the negative on the laws might be most conveniently exercised by this branch. As a further check, a Council of revision including the great ministerial officers might be superadded.*
>
> *A national Executive must also be provided, I have scarcely ventured as yet to form my own opinion either of the manner in which it ought to be constituted or of the authorities with which it ought to be cloathed.*
>
> *An article should be inserted expressly guarantying the tranquillity of the States against internal as well as external dangers.*
>
> *In like manner the right of coercion should be expressly declared. With the resources of commerce in hand, the national administration might always find means of exerting it either by sea or land; But the difficulty and awkwardness of operating by force on the collective will of a State, render it particularly desirable that the necessity of it might be precluded. Perhaps the negative on the laws might create such a mutuality of dependance between the general and particular authorities, as to answer this purpose. Or perhaps some defined objects of taxation might be submitted along with commerce, to the general authority.*
>
> *To give a new system its proper validity and energy, a ratification must be obtained from the people, and not merely from the ordinary authority of the Legislatures. This will be the more essential as inroads on the* existing Constitutions *of the States will be unavoidable. . . .*

So it fell to Randolph to bring forward, on May 29, 1787, the first day of real business, Madison's framework for a totally new constitution — a framework that suggested the Articles of Confederation needed revision and then in the next breath proposed to abandon them forever. The core of the problem facing delegates was a realignment of the state-nation relationship. States would no longer vote one vote as states (the largest and smallest being equal) but would share power in the two-house legislature according to their population. The legislators would pick "a National Executive" who would serve one term as the chief magistrate of the nation and who would have the power to make appointments, see that the national laws were enforced, conduct the nation's business when its legislature was not in session, and (in a vague way) conduct foreign policy. The acts of state legislatures might be nullified by the national congress, and a council of revision would work with the executive to review national acts before they went into operation; and if the executive and his council thought an act from the national congress improper, they could block its implementation. However, the questioned act would become law if the legislature became insistent by passing it a second time.

Undoubtedly Madison urged these ideas before the Virginia caucus because they appeared to remedy the chief flaws in earlier attempts at representative government. Madison was no Demosthenes or Patrick Henry, but in small groups he was convincing and persuasive; and the Virginia Plan which he pushed through that state caucus bore his hallmark on almost every clause. (Randolph himself could hardly have been the author. Thomas Jefferson expressed a common view of the man when he said of Randolph later: "He is the poorest cameleon I ever saw having no colour of his own, & reflecting that [of the person] nearest him.") The Virginia Plan became a document within a document — both a knockout blow to the old Articles and the framework of all future discussion.

The Virginia Plan

Resolutions proposed by Mr. Randolph in Convention
May 29, 1787

1. Resolved that the Articles of Confederation ought to be so corrected & enlarged as to accomplish the objects proposed by their institution; namely, "common defence, security of liberty and general welfare."

2. Resd. therefore that the rights of suffrage in the National Legislature ought to be proportioned to the Quotas of contribution, or to the number of free inhabitants, as the one or the other rule may seem best in different cases.

3. Resd. that the National Legislature ought to consist of two branches.

*4. Resd. that the members of the first branch of the national Legislature ought to be elected by the people of the several States every   for the term of   ; to be of the age of   years at least, to receive liberal stipends by which they may be compensated for the devotion of their time to public service; to be ineligible to any office established by a particular State, or under the authority of the United States, except those beculiarly [*sic*] belonging to the functions of the first branch, during the term of service, and for the space of   after its expiration; to be incapable of re-election for the space of   after the expiration of their term of service, and to be subject to recall.*

5. Resold. that the members of the second branch of the National Legislature ought to be elected by those of the first, out of a proper number of persons nominated by the individual Legislatures, to be of the age of   years at least; to hold their offices for a term sufficient to ensure their independency; to receive liberal stipends, by which they may be compensated for the devotion of their time to public service; and to be ineligible to any office established by a particular State, or under the authority of the United States, except those peculiarly belonging to the functions of the second branch, during the term of service, and for the space of   after the expiration thereof.

6. Resolved that each branch ought to possess the right of originating Acts; that the national Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation; to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union; and to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof.

7. Resd. that a National Executive be instituted; to be chosen by the National Legislature for the term of   years, to receive punctually at stated times a fixed compensation for the services rendered, in which no increase or diminution shall be made so as to affect the Magistracy, existing at the time of increase or diminution, and to be ineligible a second time; and that besides a general authority to execute the National laws, it ought to enjoy the Executive rights vested in Congress by the Confederation.

8. Resd. that the Executive and a Convenient number of the National Judiciary, ought to compose a Council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of the said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negatived by   of the members of each branch.

9. Resd. that a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature, to hold their offices during good behaviour; and to receive punctually at stated times fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution. That the jurisdiction of the inferior tribunals shall be to hear & determine in the first instance, and of the supreme tribunal to hear and determine in the dernier resort, all Piracies & felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachments of any national officers, and questions which may involve the national peace and harmony.

10. Resolvd. that provision ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a voluntary junction of Government & Territory or otherwise, with the consent of a number of voices in the National legislature less than the whole.

11. Resd. that a Republican Government & the territory of each State, except in the instance of a voluntary junction of Government & territory, ought to be guaranteed by the United States to each State.

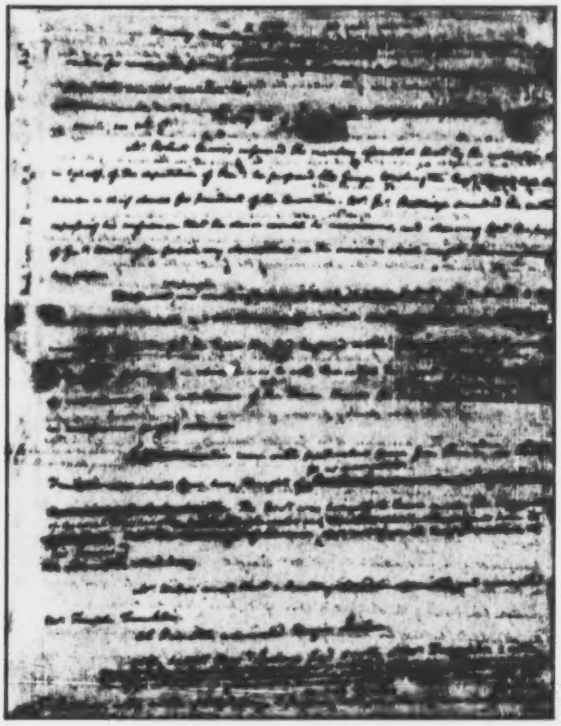
12. Resd. that provision ought to be made for the continuance of Congress and their authorities and privileges, until a given day after the reform of the articles of Union shall be adopted, and for the completion of all their engagements.

13. Resd. that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto.

14. Resd. that the Legislative Executive & Judiciary powers within the several States ought to be bound by oath to support the articles of Union.

15. Resd. that the amendments which shall be offered to the Confederation, by the Convention ought at a proper time, or times, after the approbation of Congress to be submitted to an assembly or assemblies of Representatives, recommended by the several Legislatures to be expressly chosen by the people to consider & decide thereon.

Few scholars have pointed out that this document, now an integral part of Madison's "Notes on Debates," his personal record of the convention proceedings, was a genuine landmark in the history of American constitutionalism. The genius of Madison was evident. He had lobbied for a revision of the Articles, worked for a convention to turn the country around through a new system of government, and then laid before that convention a plan that was radical in concept and yet so close to what most of the delegates had been thinking that they immediately went into a Committee of the Whole on the State of the Union to consider the Virginian's plan.



The first page of Madison's "Notes on Debates," with typical crossed-through clauses and later additions made as Madison sought greater accuracy in his text. *Library of Congress.*

If the original draft was finally handed to the Convention's Secretary, William Jackson, it must have been among the papers that this inept man burned before he prepared the journal and other papers for Washington's safekeeping. But we can be sure that the version Madison copied into his own "Notes on Debates" is as faithful a copy of the original as we will ever see; and it was a framework for what, after four tempestuous months and many changes, survived as the Constitution sent by the convention to the states. Had Madison's services to the convention ended on May 29 he would still deserve to be thought of as the Father of the Constitution. As we all know, he considered his work only begun.

Robert A. Rutland is editor-in-chief of the Papers of James Madison at the University of Virginia. His books include *The Birth of the Bill of Rights* and *The Ordeal of the Constitution: the Antifederalists and the Ratification Struggle of 1787-1788* (both reprinted by Northeastern University Press, 1983).

For the Classroom

Race and Slavery in the American Constitutional System: 1787–1865

by Don E. Fehrenbacher, Stanford University

In 1983, with the support of the Lilly Endowment, Inc., of Indianapolis, Indiana, Project '87 conducted four week-long summer seminars on the Constitution for college faculty in history and political science. The seminars were designed to enhance teaching about the Constitution in introductory college courses. In order to reach a wider audience of college faculty, the directors of the seminars wrote essays and prepared bibliographies on the seminar topics which were published in *News for Teachers of Political Science*, Spring, 1984. Because these materials should also be useful to secondary school teachers, we are including the essay by Don E. Fehrenbacher in ***this Constitution.*** The other essays are: "The Judicial Function Under the Constitution," by Henry J. Abraham, University of Virginia, "Constitutionalism and Bureaucracy in the 1980's: Some Bicentennial Reflections," by Herman Belz, University of Maryland, and "The Constitution and Black America," by E. Wally Miles, San Diego State University. A copy of *News for Teachers of Political Science* that includes all the essays may be obtained by writing to: Constitutional Essays, Project '87, 1527 New Hampshire Avenue, N.W., Washington, D.C. 20036. There is a $2.00 charge for handling and mailing, payable to Project '87, which must be enclosed with the request.

AM I NOT A MAN AND A BROTHER?

Abolitionist medal. *Division of Political History, Smithsonian Institution, Washington, D.C.*

Introduction

For some time now, physical anthropologists have been disengaging themselves from the use of race as an objective characteristic of humankind.[1] But historians, and especially historians of the United States, must continue to deal with race as a subjective reality—that is, with the idea or consciousness of race as a social force. Of course racial distinctions are never entirely free from cultural connections. Thus Africans brought in chains to colonial America were regarded as ideally fitted for servitude, not only because of their perceived physical characteristics (including intellect and disposition) but also because they were viewed as heathens and savages. Conversely, ethnocultural distinctions may have strong racial overtones, such as in the image and identity of twentieth-century Hispanic-Americans. This essay is concerned with the white-black relation because it is the one most emphatically based on racial distinctiveness, because it alone has been associated with institutionalized chattel slavery, and because of its sustained and surpassing influence on the American constitutional system. Attention might also be given to American Indians and to Asian Americans, as two other racially distinguished groups, but their constitutional involvement largely postdates the Civil War. By the "American constitutional system," I mean the fundamental structure and conduct of government at both the national and subnational levels in the United States, embracing not only formal constitutional arrangements but the actions and handiwork of legislative, executive, and judicial branches as well. In spite of the vast existing literature on the interaction of race and slavery with the law of the land (a small sampling of which is provided in the bibliographical section of this essay), the subject is far from being exhausted as a field of research.

Slavery and Race in the Federal Constitution

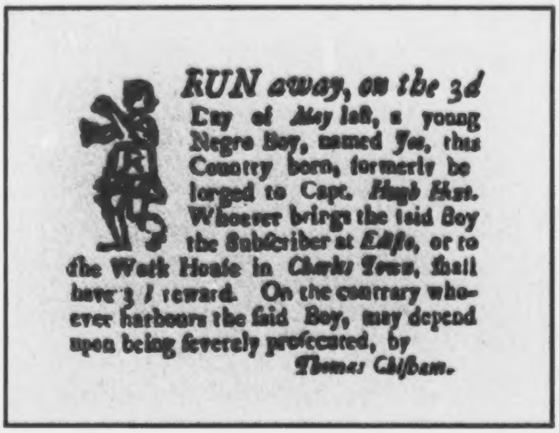
Justice John Marshall Harlan was not entirely accurate when he declared that the Constitution is "color blind." True, there are no distinctions drawn between white and black races, but the document does set Indians apart as a special group, and furthermore, although African slvary is never mentioned by name, three clauses related directly and primarily to that institution obviously have racial meaning.[2] First, in Article I, Section 2, both representation and direct taxes are apportioned among the states "according to their respective numbers," determined by adding to the total of free persons "three-fifths of all other persons." Second, a provision of Article I, Section 9, prohibits for at least twenty years any congressional ban on the importation of slaves from abroad into the thirteen existing states. Third, a part of Article IV, Section 2, provides in effect that fugitive slaves crossing state lines shall be returned to their owners.

Taken together, the three clauses recognized the existence of slavery in the United States but designated slaves as persons, rather than as property, and granted the institution no positive protection except whatever was vaguely implied in the fugitive-slave clause. Furthermore, by exempting the foreign slave trade from federal control for only twenty years, by limiting that exemption to the thirteen original states, and by carefully avoiding use of the word "slave" or slavery" itself, the framers of the Constitution gave reason to believe that they viewed the institution as something less than permanent in the fundamental scheme of American society. They left the federal government free either to ignore slavery, for the most part, or to become significantly involved (as it actually did) in the protection and expansion of the institution. Slavery as it existed in 1789 was almost entirely a creature of state law and a responsibility of state and local government.

State Law and Slavery

Slavery at the time of the Constitutional Convention was in the process of becoming a sectional institution. The sovereign power of a state to abolish it had already been demonstrated, emancipation having begun in New England and Pennsylvania, and seeming certain to come eventually in New York and New Jersey. Although none of the first state constitutions contained any direct mention of slavery, it was well established in the common and statute law of the Southern states. Later Southern constitutions did incorporate some provisions respecting slavery, but the legal basis of the system continued to be primarily codified law and judicial precedent.

The slave law of the South varied from state to state and changed over time. It was supplemented, of course, by many local regulations and plantation rules. The legal ambiguities of slavery, such as the dual status of the slave as person and property, lent added complexity to a system shot through with moral contradictions. Slave codes had been well developed in the Old South by the time of the Revolution and were ready for appropriation by new slaveholding states as they entered the Union, beginning with Kentucky in 1792. The law of slavery lost some of its severity as it moved westward, and everywhere harsh provisions were likely to be in some degree mitigated by lenient enforcement. Many of the cruel physical punishments of the eighteenth century were gradually abandoned, but since imprisonment of slaves in large numbers would have been economically disadvantageous, whipping continued to be the standard penalty for lesser offenses, and the list of capital crimes actually lengthened. With the passing years, Southern law came to accord slaves some measure of protection against mistreatment, but enforcement of such legislation was difficult and apparently infrequent, partly because slaves could not testify against white persons. To a considerable extent, Southern slave law was directed at reducing the danger of riot, insurrection, and other violent forms of servile resistance. Security legislation of this kind restricted white as well as black behavior. It forbade teaching slaves to read and write, for instance, and also prohibitied supplying them with guns, liquor, and poisonous drugs. Certain laws providing severe punishment for dissemination of abolitionist doctrines were clearly in conflict with the spirit of the First Amendment and with the letter of state constitutional guarantees. Thus, if changes in Southern slave law from the 1780s to the 1850s reflected the humanitarian tendencies of the nineteenth century, along with some desire to disprove the harsh picture of slavery drawn by abolitionists, they also reflected mounting Southern apprehensions and a hardening Southern determination to defend the slaveholding system at all costs against all enemies.



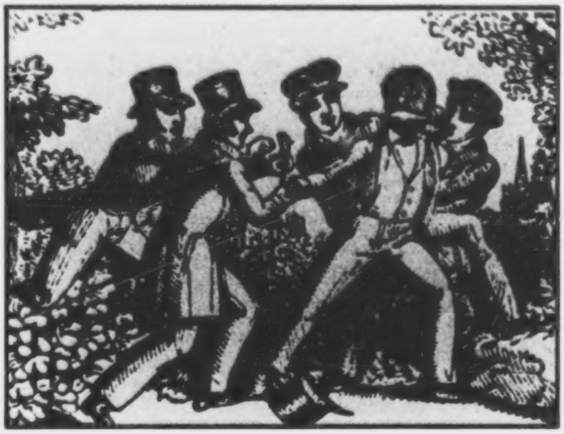
RUN away, on the 3d
Day of *May* laſt, a young
Negro Boy, named *Joe*, this
Country born, formerly be-
longed to Capt. *Hugh Hext*.
Whoever brings the ſaid Boy
the Subſcriber at *Ediſto*, or to
the Work Houſe in *Charles Town*, ſhall
have 3 *l* reward. On the contrary who-
ever harbours the ſaid Boy, may depend
upon being ſeverely proſecuted, by
Thomas Chiſham.

Slavery also impinged in a number of ways upon the legal systems of the Northern states. There were the various programs of gradual emancipation to be carried out, for instance. There were legal actions in free-state courts involving slaves held elsewhere, such as the probating of wills and the enforcement of contracts. There were the problems sometimes arising from the presence of slaves brought within free-state boundaries by their owners for one reason or another. And there were the many difficulties associated with the capture and return of fugitive slaves. Slave law, like other American law, was further complicated by the overlapping of jurisdictions in a federal system. The principles of interstate comity (of "conflict of laws") came frequently into play and were placed under increasing strain by the worsening sectional controversy. The classic comity problem, illustrated in the Dred Scott case, was that of a Negro who claimed to be free under the law of one state and was claimed as a slave under the law of another.

The law of slavery has been a subject of considerable historical interest and controversy in recent years. Attention shifted some time ago from the content of statutes and codes to the manner of their application and especially to the judicial process. Study of slave laws has accordingly become more behavioral and somewhat more theoretical, assimilating with broader scholarly efforts to explain the ideological and social foundations of the whole legal system. One leading authority in the field, A.E. Keir Nash, has demonstrated that although the varieties of Southern judicial behavior discourage simple generalization, there was a relatively high degree of concern—in appellate decisions, at least—for fair legal treatment of slaves within the limits of the slave system. From another scholar, Robert M. Cover, comes a provocative study of the ways in which Northern antislavery judges relied upon legal formalism to justify their enforcement of fugitive-slave legislation. Probably the most controversial work is that of Mark Tushnet, a Marxist law school professor who views Southern slave law as a system impelled naturally toward autonomy, yet at the same time bound circumstantially to the bourgeois social and economic order.[3]

The Federal Government and Slavery

Under the Constitution, slavery might have been limited to one corner of the country and placed on the path to ultimate extinction. Instead, by 1860, it had become a national institution, legal wherever not forbidden by state law and enjoying considerable federal protection. The antebellum United States was a slaveholding repub-



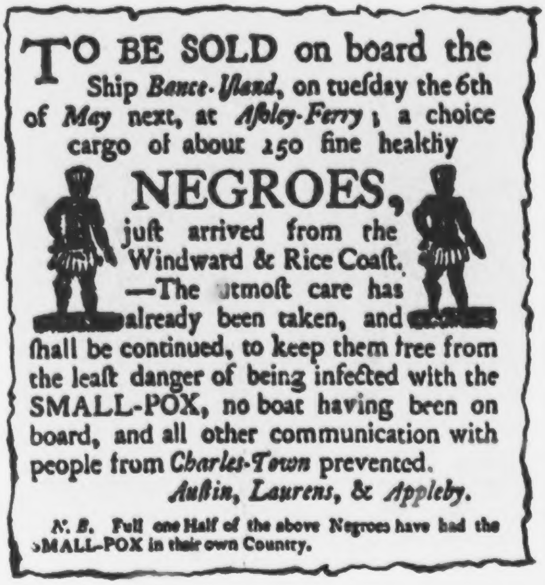
lic. That was the impression given by the tenor of American foreign policy, by the nationwide operation of the Fugitive Slave Law, by the presence of slavery in the national capital, by the inadequate enforcement of laws against the African slave trade, and by the Supreme Court in the Dred Scott decision. Abolitionists attributed the proslavery inclination of the federal government to a sedulous "slave power conspiracy" dating back to the framing of the Constitution. No doubt the bias did reflect the extraordinary weight of Southern influence in the formulation of national policies from 1789 to 1861, but it also resulted from Northern indifference, and to some extent it was simply the accumulated effect of many routine public actions taken without strong purpose or serious thought.

In 1789, the administration of George Washington inherited the task of seeking restitution for several thousand slaves carried off by British military forces at the close of the Revolution. Thus the national government created by the Constitution was plunged immediately into the role of acting as the agent for slaveholders who had claims upon foreign powers. The same problem arose during the War of 1812, when many slaves were taken away from the Chesapeake region by the British fleet, contrary to explicit provisions of the treaty of peace. John Quincy Adams, as minister to Great Britain, did not allow any antislavery sentiment to curb the energy and persistence with which he pressed the issue until he had won the promise of a settlement. During his presidency in the following decade, the United States government tried repeatedly to secure formal agreements with Mexico and with Britain (respecting Canada) for the return of fugitive slaves. After those efforts failed, American officials then tried for nearly three decades, with little success, to recover slaves from Canada through extradition proceedings. The United States also expended considerable effort demanding recompense for owners of slaves liberated by British officials in the West Indies after the coasting vessels carrying them were shipwrecked there or driven into port by storms. The demands became especially heated in the case of the *Creole*, a ship taken over by rebellious slaves and sailed to Nassau, where all the slaves, even the leading mutineers, were allowed to go free.

Of course fugitive slaves were a serious domestic problem too, and the Constitution called for interstate rendition of runaways, but without specifying what role the federal government should play in the process. Placed in Article IV, which is concerned primarily with states and statehood, rather than in Article I with the delegated powers of Congress, the fugitive-slave clause might well have been regarded simply as a limitation on state authority, enforceable through interstate comity and by the federal judiciary. Instead, Congress chose to implement the clause with legislation in 1793, and when that eventually proved inadequate, Henry Clay and his fellow compromisers added the more notorious act of 1850. The constitutionality of both measures was upheld by the Supreme Court.[4] Only a very strict constructionist could argue that Congress had no power to enact any kind of fugitive-slave legislation whatsoever, but antislavery critics were undoubtedly correct in maintaining that the informal, summary procedures actually established for recovery of fugitives threatened the liberty of free blacks and thus violated their constitutional rights. In the slaveholding states, a black person was presumed to be a slave unless he could prove otherwise. The fugitive-slave acts had the effect of forcing this presumption upon the free states, thus giving extrajurisdictional force to slave law. The "personal liberty laws" passed by many Northern legislatures, although they amounted in some instances to open defiance of federal authority, were designed primarily to strike a fairer balance between the rights of slaveholders and the rights of free blacks threatened by the fugitive-slave legislation.

The establishment of a slaveholding national capital seems to have been achieved almost absentmindedly and certainly without much thought about its implications for the future. Majorities in both houses of the First Congress favored placing the "seat of government" in Pennsylvania, but they could not agree upon the specific location. The site on the Potomac was ultimately selected as part of a sectional bargain designed to save Alexander Hamilton's proposal for the assumption of state debts. Then, when it came time to provide a system of laws for the new District of Columbia, Congress took the easy way out by directing that the laws of Maryland and Virginia should continue in force. In this offhand and quiet way, slavery was legalized in the District. As a consequence, the several branches of the federal government were put into the business of supervising and administering the local slaveholding system. The legal presence and social respectability of slavery in the national capital had an effect upon public policy which, though not measurable, was probably not inconsiderable.

Slavery in the District of Columbia was an obvious target for abolitionists, who organized a vigorous campaign of petitions against it in the 1830s. Congressional authority had established slavery there and presumably could also abolish it, especially since the Constitution empowered Congress "to exercise exclusive Legislation in all Cases whatsoever, over such District." Yet many Southerners opposed abolition in the District on constitutional grounds and insisted that Congress had no right even to accept petitions on the subject. The reason most commonly advanced was that such abolition would violate a tacit pledge to Virginia and Maryland, made at the time they ceded the land to the United States. John C. Calhoun argued more broadly that the national government, as trustee for the sovereign states, could not touch



TO BE SOLD on board the Ship *Bance-Iſland*, on tueſday the 6th of *May* next, at *Aſhley-Ferry*; a choice cargo of about 250 fine healthy

NEGROES,

juſt arrived from the Windward & Rice Coaſt. —The utmoſt care has already been taken, and ſhall be continued, to keep them free from the leaſt danger of being infected with the SMALL-POX, no boat having been on board, and all other communication with people from *Charles-Town* prevented.

Auſtin, Laurens, & Appleby.

N. B. Full one Half of the above Negroes have had the SMALL-POX in their own Country.

slavery in Washington, D.C., or anywhere else, except to give it the same protection accorded other forms of property. The Fifth Amendment, a restraint solely upon federal authority and therefore more relevant in the District than in the states, was invoked on both sides of the argument. Abolitionists labeled slavery a deprivation of *liberty* without due process of law; Southerners replied that abolition in the District would constitute deprivation of *property* without due process of law.

In 1836, the House of Representatives imposed its notorious "gag" upon antislavery petitions of all kinds, and the resulting political uproar never subsided until the rule was abandoned eight years later.[5] The controversy identified abolitionism dramatically with the cause of civil liberties and brought the slavery question once and for all to the center of national politics. Although the Compromise of 1850 put an end to slave trading within the District of Columbia, slavery itself was not abolished in the national capital until after the secession of eleven Southern states made it possible.

In one respect, to be sure, Congress did adopt and follow a consistently antislavery policy. It prohibited foreign slave trade into the federal territories and extended the ban to the thirteen original states as soon as the Constitution allowed it to do so—that is, on January 1, 1808. But enforcement was something else again. That remained inadequate right down to the Civil War, in spite of much supplementary legislation aimed at strengthening the original law. The Navy was not strong enough to do the job alone, and, owing in large part to the traditional American suspicion of British sea power, the United States government participated only halfheartedly in the organized international effort to suppress the slave trade.

The slave-trade clause proved most controversial, however, in a constitutional implication drawn from it by antislavery leaders, to wit: Congress was acknowledged by the clause to have control over the foreign slave trade, presumably by virtue of the commerce clause; therefore, Congress likewise possessed the power, under the same clause, to regulate and even proscribe interstate trade in slaves. Southerners vehemently rejected this reasoning and placed interference with the domestic slave trade upon their list of federal actions that would justify secession. No serious effort to enact such legislation was ever made.

At the very heart of the sectional conflict over slavery, of course, was the constitutional question of federal power to exclude the institution from the western territories. Beginning in 1789 with reenactment of the Northwest Ordinance, Congress exercised the power a number of times, though it adopted a policy of doing so only for territory lying north of an established dividing-line (first the Ohio River and subsequently latitude 36 30'). The constitutionality of such legislation was challenged during the Missouri controversy of 1820, but it did not become a major issue in American public life until after introduction of the Wilmot Proviso in 1846.

Much depended upon how one interpreted the somewhat ambiguous clause in Article IV, Section 3, which read: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Antislavery spokesmen maintained that the clause endowed Congress with full control of the territories, including the authority to forbid slavery there if it chose. A Supreme Court decision rendered by John Marshall in 1828 lent support to this point of view.[6] The opposing argument, embraced by many Northern Democrats together with most Southerners, rested upon a narrow construction of the territory clause as referring only to the disposal of public land. In providing government for a territory, the argument ran, Congress could do nothing more than what was absolutely necessary to prepare the territory for statehood. That did not include either the prohibition or the establishment of "domestic institutions." Thus the only constitutionally justifiable policy for Congress to follow was one of "nonintervention" with slavery in the territories. But what authority prevailed, then, in the absence of congressional power? One answer, associated with John C. Calhoun, was that property rights in slavery were legitimized in every territory by direct force of the Constitution. Another answer, associated with Northerners Lewis Cass and Stephen A. Douglas, was that nonintervention meant leaving the question of slavery to be decided by each territorial electorate—that is, to "popular sovereignty."

In the Dred Scott decision of 1857, Chief Justice Roger B. Taney endorsed the Calhoun theory and ruled that congressional exclusion of slavery from federal territories was unwarranted by the Constitution and therefore void. Democratic disagreement over the nature of popular sovereignty and its relationship to the Dred Scott doctrine contributed significantly to the disruption of the party in 1860. Meanwhile, the new Republican party repudiated Taney's decision and went on reiterating its conviction that Congress had the power and the duty to abolish slavery throughout the territories. The slaveholding interest, having won its case before the Supreme Court, then lost it in the election of 1860, and seven states from South Carolina to Texas concluded that the prospect of living under a Republican regime was fearful enough to justify secession. Thus the sectional conflict of the 1850s, whatever the number and complexity of its cause, was in some measure shaped and driven toward crisis by constitutional considerations.

Free Negroes in the Constitutional System

In the American nation of 1789, ninety-two percent of all black persons were slaves and ninety-eight percent of all free persons were white. The term "free Negroes" was consequently something of an anomaly. Everywhere, except in some parts of New England, a dark skin amounted to a badge of servitude unless one could prove otherwise. Discrimination against free blacks in the colonial era, though common enough, had been haphazard and relatively informal—a matter primarily of custom rather than law. But in the South during the early nineteenth century, with the substantial growth of the free black population tending to aggravate the mounting fear of slave revolt, racial restraints became progressively more numerous and severe. One by one, the southern states formally disfranchised the free Negro, exluded him from jury service, restricted his freedom of movement, and even threatened him in one way or another with a return to servitude. Increasingly, southern law lumped free black persons with slaves. This often made them subject to search without warrant and to trial without jury for all but capital offenses. They were commonly denied the right of assembly and forbidden to own or carry firearms. They were excluded from schools, and, indeed, in some states it was a crime to teach a free black to read or write.

In the North, free blacks were less handicapped by the linkage with slavery and subject to fewer formal restraints and disabilities. Nevertheless, they lived marginal lives as a despised and deprived minority. At a time when white suffrage was being liberalized, black suffrage lost ground. By the 1850s, it was confined to five New England states (where Negroes were less than one percent of the total population), together with New York, which had a discriminatory property qualification that greatly reduced black eligibility. In contrast with the South, most Northern states did provide some education for free black children, but it was usually carried on in segregated schools of inferior quality. Racial prejudice was stronger and more extensively institutionalized in the western free states. There, for example, several constitutions prohibited black immigration, and a larger number of states outlawed black testimony in any case involving a white person as a party. Yet, on the whole, free blacks in the North probably suffered less from legally imposed disabilities than they did from the patterns of social custom that denied them access to economic opportunity and full participation in community life.

The United States Constitution provided no basis for racial discrimination, but given the climate of opinion in the North as well as the South, it is not surprising that the federal government should have fallen into a number of discriminatory practices. It excluded blacks from the militia, the Navy, and the Marine Corps; it forbade their employment as mail carriers; it sometimes disfranchised them in the territories; it more often than not refused to furnish them with passports; and, after years of vacillation, it ultimately denied them pre-emption rights on the public lands. Within the District of Columbia, Congress discriminated against free Negroes much as though it were a southern state legislature—disfranchising them, excluding them from certain kinds of business activity, and assimilating them in many respects to the laws regulating slaves.

One question arising again and again was whether free blacks were citizens of the United States and of the states in which they lived. The issue was complicated by the Negro's marginal social status, by the sectional variations in his treatment, by the vague meaning and variant usage of the word "citizen" itself, and by the duality of citizenship in a federal republic. Not even within the slaveholding states did authorities reach total agreement on the subject. In general, it can be said that there was a strong disposition to view state citizenship as the primary condition upon which national citizenship depended,[7] and that only a few states in the Northeast did actually recognize their black residents as citizens. But those few states posed a threat to the racial policies of the rest of the country and thus to the security of the southern slave system because their black citizens seemed to be protected by the clause in Article IV, Section 2, of the Constitution, which declares: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." This problem evoked much heated discussion in Congress during the debates over the admission of Missouri in 1821. It was ultimately resolved by Roger B. Taney in the Dred Scott decision. Taney held that citizenship conferred by a state had no force beyond its boundaries. The federal Constitution, he said, had been written for white Americans. It conferred neither citizenship nor any other rights or privileges upon the members of the black race, who were totally outside its purview. The framers had left it "altogether with the several States to deal with this race, whether emancipated or not, as each State may think justice, humanity, and the interests and safety of society require." Thus, on the eve of the Civil War, free blacks were constitutionally much worse off than they had been in 1787.

The Civil War as a Racial Revolution

The outbreak of hostilities at Charleston in April 1861 sent tremors through the structure of slavery, signaling cataclysmic changes ahead. Talk of abolition began immediately among antislavery radicals. Just sixteen days after the first major battle at Bull Run, Congress passed a law providing for the emancipation of slaves used in support of the rebellion. Soon thereafter, General John C. Fremont issued his startling proclamation (subsequently overruled by the President) freeing Confederate slaves in Missouri. Already some bondsmen had begun to proclaim emancipation in their own way by fleeing inside Union lines. In the spring of 1862, Congress abolished slavery in the District of Columbia. Two months later, it defied the Dred Scott decision and abolished slavery throughout the territories. At about the same time, the United States concluded a treaty with Britain for truly effective suppression of the African slave trade. Abraham Lincoln's two famous emancipation proclamations of September 22, 1862, and January 1, 1863, were major events indeed, but each was part of a sustained progress toward total abolition that lasted more than four years and eventuated in the Thirteenth Amendment. Yet the emancipation of some four million black slaves, which in itself amounted to a racial revolution of the first order, was as much a beginning as a culmination. The collapse of slavery removed a screen that had shielded most white Americans from direct confrontation with the problem of race. Few of them in 1865 were morally and intellectually prepared to face the question of the Negro's place in a nation formally dedicated to human equality. Given the racial preconceptions of most nineteenth-century white Americans, what is most striking about the complex of changes called Reconstruction is the magnitude of its achievement, however temporary, in conferring citizenship, equality before the law, and suffrage upon a race still widely viewed as innately inferior. Reconstruction, to be sure, ended in failure, and the racial sequel to emancipation was postponed for a century. But the constitutional foundations of racial justice were well and truly laid in the aftermath of the Civil War. That substructure remained intact—ready for use when the time came, and a constant reminder to Americans of the gulf separating their ideals and their conduct as a nation.

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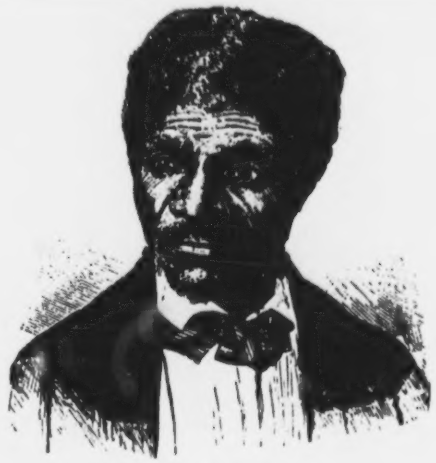

DRED SCOTT.

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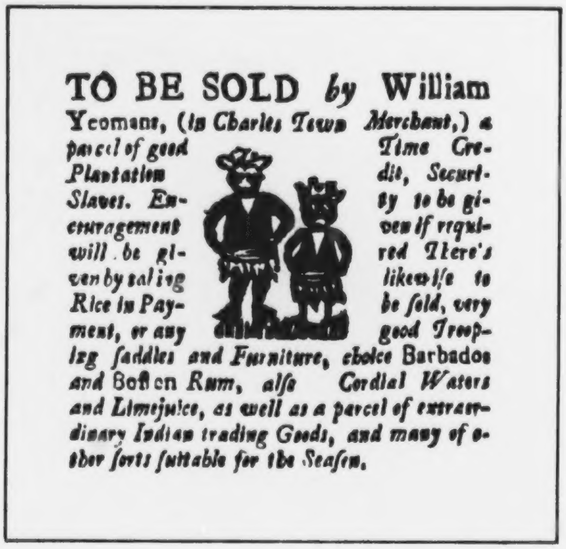

TO BE SOLD *by* William Yeomans, (*in Charles Town Merchant,*) *a parcel of good Plantation Slaves. Encouragement will be given by taking Rice in Payment, or any Time Credit, Security to be given if required. There's likewiſe to be ſold, very good Trooping ſaddles and Furniture, choice* Barbados *and* Boſton *Rum, alſo Cordial Waters and Limejuice, as well as a parcel of extraordinary Indian trading Goods, and many of other ſorts ſuitable for the Seaſon.*

For the middle decades of the 19th century, there is much on slavery in Harold M. Hyman and William M. Wiecek, *Equal Justice Under Law: Constitutional Development, 1835-1875* (1982). Still an excellent source of information is W.E.B. DuBois, *The Suppression of the African Slave-Trade to the United States of America, 1638-1870* (1904). On the fugitive-slave laws and their repercussions, see Thomas D. Morris, *Free Men All: The Personal Liberty Laws of the North, 1780-1861* (1974); and Stanley W. Campbell, *The Slave Catchers: Enforcement of the Fugitive Slave Law, 1850-1860* (1968). Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (1981), is an exhaustive treatment of slavery as an interstate problem. For the constitutional debate on slavery in the federal territories, see Fehrenbacher, *The Dred Scott Case;* Arthur Bester, "State Sovereignty and Slavery: A Reinterpretation of Proslavery Constitutional Doctrine, 1846-1861," *Journal of the Illinois State Historical Society,* 54: 117-80 (1961); and Harry V. Jaffa, *Crisis of the House Divided: An Interpretation of the Issues in the Lincoln-Douglas Debates* (1959). In Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War* (1970), there is an excellent chapter on antislavery constitutional theory. J.G. Randall has two chapters on emancipation in his *Constitutional Problems Under Lincoln* (revised ed., 1951): but see also Herman Belz, *Emancipation and Equal Rights: Politics and Constitutionalism in the Civil War Era* (1978).

Leon F. Litwack, *North of Slavery: The Negro in the Free States, 1790-1860* (1961) is complemented by Ira Berlin, *Slaves Without Masters: The Free Negro in the Ante-Bellum South* (1974). See also, Phyllis F. Field, *The Politics of Race in New York: The Struggle for Black Suffrage in the Civil War Era* (1882). James H. Kettner, *The Development of American Citizenship,* 1608-1870 (1978), has an extensive chapter on "The Status of Indians, Slaves, and Free Negroes."

NOTES: Race and Slavery Under the Constitution

[1] See the summary of the "race, no-race" controversy among anthropologists, with the comments of numerous scholars, in Alice Littlefield, Leonard Lieberman, and Larry T. Reynolds, "Redefining Race: The Potential Demise of a Concept in Physical Anthropology," *Current Anthropology,* 23:641-55 (1982).

[2] It has been argued that the framers had slavery in mind when they wrote certain other clauses of the Constitution, such as the provision in Article IV, Section 4, assuring each state of federal protection against "domestic violence" (see, for example, Wiecek, *Sources of Antislavery Constitutionalism,* pp. 62-63.). Perhaps they did, but not exclusively or even primarily so. The guarantee of protection against domestic disorder would surely have been included even if slavery had not existed. Only the three clauses discussed in the text clearly owed their presence in the Constitution to the presence of slavery in the Republic.

[3] A.E. Keir Nash, "A More Equitable Past? Southern Supreme Courts and the Protection of the Antebellum Negro," *North Carolina Law Review,* 48: 197-242 (1970); Nash, "Fairness and Formalism in the Trials of Blacks in the State Supreme Courts of the Old South," *Virginia Law Review,* 56:64-100 (1970); Nash, "Reason of Slavery: Understanding the Judicial Role in the Peculiar Institution," *Vanderbilt Law Review,* 32:7-218 (1979); Nash, "In Radical Interpretations of American Law: The Relation of Law and History," *Michigan Law Review,* forthcoming; Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (1975); Mark Tushnet, "Approaches to the Study of the Law of Slavery," *Civil War History,* 25:329-38 (1979); Tushnet, *The American Law of Slavery, 1810-1860: Considerations of Humanity and Interest* (1981). See also Kempes Y. Schnell, "Court Cases Involving Slavery: A Study of the Application of Anti-Slavery Thought to Judicial Argument," Ph.D. Dissertation, University of Michigan, 1955; Michael S. Hindus, *Prison and Plantation: Crime, Justice and Authority in Massachusetts and South Carolina, 1767-1878* (1980); Eugene D. Genovese, "Slavery in the Legal History of the South and the Nation," *Texas Law Review,* 59:969-98 (1981); John Phillip Reid, "Lessons of Lumpkin: A Review of Recent Literature on Law, Comity, and the Impending Crisis," *William and Mary Law Review,* 23:571-624 (1982).

[4] *Prigg v. Pennsylvania,* 16 Peters 539 (1842): *Ableman v. Booth,* 21 Howard 506 (1859). In the Prigg case, five out of seven justices endorsed the "historical necessity" thesis setting the fugitive-slave clause apart as a "fundamental article" of the Constitution without which the Union could never have been formed. There is no sound historical basis for such an interpretation.

[5] The House in 1836 ordered that all antislavery resolutions be tabled automatically, without being printed or referred to committee. A standing rule adopted in 1840 went even further by providing that such petitions should not be received at all. The Senate achieved the same purpose less formally by tabling motions to receive or not receive petitions.

[6] *American Insurance Co. v. Canter,* 1 Peters 511. In legislating for the territories, Marshall said, "Congress exercises the combined powers of the general and of a State government." Since the authority of a state government to establish or abolish slavery was generally acknowledged, Marshall's words seemed to confirm congressional control over slavery in the territories.

[7] One significant manifestation of this tendency was a ruling in 1821 by Attorney General William Wirt. Asked by another cabinet member whether a free black might command an ocean-going vessel operating out of Norfolk, given the fact that such commanders must by law be citizens of the United States, Wirt answered in the negative. Blacks living in Virginia, he said, were not treated as citizens of that state and therefore could not be citizens of the United States. *Official Opinions of the Attorneys General of the United States,* I, 506-9.

Bicentennial Gazette

Network of Scholars

Project '87 hopes to assist planners of Bicentennial programs to locate specialists in the Constitution who are interested in participating in local events. Toward that end, we asked constitutional specialists to let us know if they would like to be involved in these projects. The historians, political scientists, lawyers and others who responded to this call are listed below, by state, with an indication of their field of expertise. Planners should get in touch directly with those whom they would like to have participate in their programs.

Editor's note: A number of entries were received too late to be included in this issue. A supplement to the network will appear in the winter issue.

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"Do you ever have one of those days when everything seems un-Constitutional?"

Drawing by Joe Mirachi. © 1974 The New Yorker Magazine, Inc.

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A Fundamental Contentment:

an excerpt from an interview with Martin Diamond by Jim Lehrer, taken from *The MacNeil/Lehrer Report*, December 31, 1976. When the interview was conducted, Martin Diamond was professor of political science at the University of Northern Illinois. He died in the summer of 1977, as he was to assume the Leavy Chair in the Government Department at Georgetown University.

LEHRER: The Constitution was a document that was written basically for three million people, most of whom were from a rural background. Why is it that that document still works today? What is the unique character of it that makes it still work?

DIAMOND: In a way that I think is at the very center of the Bicentennial—the question of the continued utility, the continued health of this two-hundred-year-old set of political institutions, those devised in the founding decade from 1776 through the Constitution. You say it was a constitution framed for a tiny country on the Atlantic seaboard, three million people, all in rural circumstances. Forgive me if I say that's not quite so. We tend to think that all political things are reflections of the circumstances within which they are created. Not so. The American Constitution was framed not for three million farmers, but for 100 million people in a modern, commercial society. The founding fathers had in mind not serving the needs of the existing society but setting the basis for a continental union of a highly modern character.

LEHRER: Aren't you giving those guys an awful lot of credit?

DIAMOND: Only what is their due. That is to say, only what they themselves say in so many words. I can prove it with one simple quote. In a letter by James Madison in the 1820s he said, "We have framed a constitution that will probably be still around when there are 196 million people." He was anticipating the enormous population increase that the Constitution had been devised to contain. Their writings make clear that they were speaking of a nearly continental union and that they were anticipating the growth of commerce and industry and of far larger cities than any they knew. They were creating the future, not reflecting the past, and that's one of the reasons why their old political system continues to be workable in extraordinarily changed circumstances.

LEHRER: Other nations have tried similar consitutional forms of government, and they haven't lasted as long as ours. Why? What is the unique character of ours?

DIAMOND: Well, in asking the question, you prompt me to say you have to have the courage to face the truth no matter how pleasant it is.

LEHRER: (Laughing) All right.

DIAMOND: One of the greatest difficulties that people have, and the more intellectual the greater the difficulty, is to recognize the possibility that the American republic truly was what Gladstone said, "the most remarkable work ever struck off by the mind of man at one sitting." It was a remarkable achievement. The reason it succeeded [are] the kinds of reasons Tocqueville, the great French commentator, gave. We had had a happy, colonial habituation to liberty. We were blessed by good luck. The people who came here were already habituated to liberty and to orderly politics, relatively orderly. Second, the leading framers really were remarkable men, and they wrought intelligently, not too loftly and yet firm, a sensible and shrewd system of government for a decent, political order. So a second reason for the remarkable success is that the fundamental frame of government was well-structured. A third reason is they left room within that framework for each decade and for each generation to do its own thing. You see, the Constitution is constituted, structured, made to stand. It is a framework. They framed a government. That doesn't mean they settled race policy or foreign policy, or that they settled economic policy. They left that for each generation to do in its own way. But what they did was to work a remarkably sound, sober, skillful frame of government, and we are the beneficiaries of its two centuries of effective usage.

LEHRER: Is there a tendency at a time like this, during a Bicentennial year, during the patriotic euphoria that we all feel, . . . whether [on an] intellectual level as you just explained, or on a more gut level, just feeling good about the country, that we Americans during this year could become overly smug about what this neat thing is that we have?

DIAMOND: I must say that smug self-satisfaction of a patriotic kind is probably the last danger to worry about in the 1970s. We've had so many years, so many years of self-criticism, of self-debunking, of corrosgating self-criticism that I must say that I find the idea that we'll become too smug as a result of this Bicentennial year of celebration unpersuasive and unfrightening. But I emphasize to take joy and satisfaction in the extraordinary, singular success of your frame of government is no reason to be smug about ghettos or slums. It's no reason to be smug about foreign adventures. It's no reason to be smug about secrecy. There is reason for concern and anxiety on the policy level, doing sensible things to face each day's budget of troubles. There is no conflict between saying, "We've got a tremendously successful, two-century-old, still viable frame of government," and be[ing] nervous and anxious about what we'll do with the economy, the cities, foreign policy and all our other policy concerns.

LEHRER: But, do people see that connection?

DIAMOND: Well, I think they see the separation.

LEHRER: The separation between frame and policy?

DIAMOND: Yes. You see, nothing the founding fathers could do could make us sensible about war, could make us capable of courage. Nothing they could do could tell us how much to do with taxes or when to do this or that with exports. There was no way they could address themselves to our daily problems. That's left to our intelligence or our stupidity, our courage or our timidity. But what they did was to set up a frame of government that sifts, that's rooted in the localities, that has checks capable of protecting our liberties and which continues to supply us a reasonable public debate and reasonable public leadership.

LEHRER: But do you think the average person now—if we were to go out and do the traditional man-on-the-street interview, and I'm sure there are a lot of them being done, about "What did the Bicentennial mean to you, Mr. America or Ms. American, little Mr. and Ms. America?" I'm curious as to what kind of answers people would give and what those answers would mean.

DIAMOND: Would you let me switch the question a little?

LEHRER: All right.

DIAMOND: Instead of asking "What did the Bicentennial mean to you?" which I think causes people to freeze up or to say it didn't mean much, or to come out with phony and pompous answers, if we'd ask them, "Did you have a good time at any time during the Bicentennial; did you go down to the Mall; did you see any of the tall ships; did you watch any of the programs; did you tune in on any of the things at your local university; did you have a good time?" And I think the answer for most will be, "Yeah, it really was pretty good. I really got a kick out [of it]..."

LEHRER: But you wouldn't have to have a Bicentennial to do that.

DIAMOND: Well, sure. You can't have a good time all the time. It takes New Year's Eve to celebrate New Year's Eve. It takes a Bicentennial to have a celebration. But what you could then do is to say, "Why did you have a good time? What did you feel good about?" And I think you'd begin to get some answers that would be very...

LEHRER: Like what? What kind of answers?

DIAMOND: When you come right down to it, we've been doing business here for a long time, and we're still in pretty good fundamental shape. I think that's the answer. It's valuable to have people feel that way. You see, there's a contemporary notion that in order to get good done people have to be miserable, sore, annoyed, frustrated. I'm not at all sure that's true.

LEHRER: But doesn't history support that theory? I mean, nothing happened in contemporary problems. Contemporary problems don't get solved under our system, as perfect or as wonderful as it is, until people are screaming and hollering about the problem.

DIAMOND: Well, I don't know about the screaming and hollering.

LEHRER: Well, figuratively.

DIAMOND: I think that it helps to get political problems solved if people know that the fundamental frame of government is not in question. You're not in the midst of a great crisis, but there is this problem today and that one tomorrow, and as you know, today's solution will become tomorrow's problem anyway, it is entirely possible to have a fundamental contentment regarding your basic, political system and be active as the dickens in fighting for this or that specific policy. And the American people do it all the time.

LEHRER: You're asking a lot of an individual to say, "All right, I'm unemployed and I'm having problems feeding my family, and yet I am content that this system under which I live will eventually take care of my unemployment problem," and that sort of thing. I mean, contentment, are you sure that's a legitimate word when it relates to this kind of thing?

DIAMOND: I think so. Contentment about the Constitution; contentment about the Declarations's principles of liberty. And I think a great many of the unemployed—and I've been unemployed from time to time—would answer that way. I don't think that's really fair to say—would the seven or eight percent unemployed be the ones to express basic satisfaction with the system? The other 92 percent count as well.

LEHRER: Sure.

DIAMOND: Also if you think of the implication of what you are saying, I think it's this. In previous depressions, the Great Depression, there should have been change in the political system because all those unemployed were so unhappy and so discontented. Franklin Roosevelt's greatest contribution to American public life, according to Norman Thomas, the fine, Socialist leader, his greatest contribution was restoring the faith of the American people in democracy and in American constitutional democracy. He made those unemployed—he gave to them the conviction that solutions could be found within the American political framework. That was an immense contribution.

LEHRER: And now we go to a new Administration at the end of this year now, and there has been talk going around that there would be kind of an aura of Bicentennial euphoria that would carry any new Administration into 1977. Has it happened, or do you think you'd go back to your point that it was irrelevant in the first place?

DIAMOND: No more should there be pre-Bicentennial gloom should there be post-Bicentennial euphoria. Just reasonable good cheer and to face each day's problems as they come along would be sufficient.

LEHRER: I think that's a very good message on which to leave tonight. Dr. Martin Diamond, thank you very much for being with us tonight, and have a Happy New Year and New Year's celebration and a happy 1977.

Martin Diamond, 1919-1977, photograph by Barry Stark. Courtesy Northern Illinois University.

Martin Diamond was the author of *The Founding of the Democratic Republic* (Peacock, 1981).

ORGANIZATIONS and INSTITUTIONS

CITIZENS' FORUM

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The Citizen's Forum, a group which has been sponsoring meetings, symposia, and conferences on important public issues for a decade will hold a two-day conference on the Constitution in Buffalo early in 1985: "Concepts of the Constitution: A Bicentennial Dialogue."

The program will feature Project '87 co-chairmen James MacGregor Burns and Richard B. Morris, as well as historian Henry Steele Commager and a variety of other scholars, journalists, lawyers, and community leaders. The conference is designed to illuminate the basic philosophical and social tenets of Enlightenment thought upon which the Constitution is based, and to show how these principles have endured.

The meeting will open with a presentation by Henry Steele Commager, Simpson Lecturer in History, Amherst College, who will describe the development of ideas and institutions which influenced the Founding Fathers. Murray B. Light, Editor of the *Buffalo News*, will moderate a panel which will consider the relevance of the original ideas to such contemporary issues as federalism, national power, and freedom of the press.

A second presentation by James MacGregor Burns, Professor of Political Science, Williams College, will trace the events which led to the Constitutional Convention of 1787. A panel moderated by Joan Photiadis, First Vice President, Buffalo Metro League of Women Voters, will discuss the future of democracy.

Further sessions will include presentations by Richard B. Morris, Professor Emeritus, Columbia University on *The Federalist Papers* and the role of New York State in the ratification. A panel moderated by W. Howard Mann, Professor of Law, SUNY at Buffalo, will consider the current relevance of *The Federalist Papers* as applied to such issues as civil liberties, constitutional flexibility, and equality.

An afternoon panel chaired by Killian Vetter, Chair, Citizens' Forum will focus on the role of the press in shaping constitutional interpretations. Finally, Joan K. Bozer will conduct a panel discussion on the future of our constitution and form of government over the next hundred years.

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This monthly lecture series, supported by the D.C. Community Humanities Council, is continuing through December, 1984. The speakers are Henry S. Reuss, former member, U.S. House of Representatives, on "Suppose we did have a Constitutional Convention?" (July 18), Harold C. Relyea, Congressional Research Service, on "Stretch points of the Constitution—national emergency powers" (August 15), Robert S. Peck, American Bar Association, on "The Constitution and American Values" (September 19), Richard B. Morris, Columbia University, on "The Writing of the *Federalist Papers*" (October 17), Michael D. Barnes, member, U.S. House of Representatives, on "The Constitution and foreign policy: the role of the Congress" (November 15), and Edd Doerr, Americans for Religious Liberty, on "Religious liberty in America: a constitutional perspective" (December 19).

All meetings are held at noon in room 105 of the National Archives Building; there is no admission charge. In addition, the Study Group has published a pamphlet containing the text of the Constitution. It is available to persons who attend the lectures.

MARSHALL-WYTHE SCHOOL OF LAW THE COLLEGE OF WILLIAM AND MARY

Williamsburg, Virginia
23185
Contact: James W. Zirkle

The Marshall-Wythe School of Law at the College of William and Mary, Williamsburg, Virginia, has planned a full calendar of Bicentennial activities for 1984 and beyond. The schedule includes series of forums and symposia on constitutional topics, as well as colloquia on related subjects of special interest.

Members of the Marshall-Wythe School participated in the first of twenty forums on constitutional issues at the Colonial Courthouse of Williamsburg February 28. The "Court Days Forums" will be held in historic Virginia courthouses during 1984–1986 under a $200,000 grant from the National Endowment for the Humanities.

On March 8–10, the National Conference on State Constitutional Developments was held at William and Mary. The colloquium provided the first opportunity for extended dialogue on the increased importance of state courts in establishing legal precedents. The meeting was cosponsored by the National Center for State Courts and the National Conference on State Constitutional Developments. Over one hundred state judges from about forty states attended panels on state constitutional law and practical application. A number of papers dealing with such topics as civil rights, the First Amendment, and property rights were presented by legal scholars and judicial officials.

The First Amendment was the focus of a symposium April 6 and 7 held by the *William and Mary Law Review* in conjunction with the Institute of Bill of Rights Law. The meeting, "Defamation and the First Amendment: New Perspectives," included sessions on the new defamation action and its application to public officials. The Institute of Bill of Rights Law was established in 1982 at the Marshall-Wythe School to support scholarly research on the constitutional principles contained in the Bill of Rights, particularly First Amendment law.

Finally, Constitution Day, 1984—designated as September 17 or the nearest weekend thereto — will inaugurate a five-year series of symposia on themes related to the bicentennial. For further information, contact Professor Zirkle at the address above.

MEDIA PROGRAMS

SCHOOL OF CONTINUING STUDIES UNIVERSITY OF MIAMI

P. O. Box 248005
Coral Gables, Florida 33124
(305) 284-3933
Contact: J. Calvin Leonard, Interim Dean

The School of Continuing Studies of the University of Miami is planning a series of activities in connection with the Bicentennial of the Constitution of the United States. It is presently anticipated that the University will support research into the future implications of current constitutional issues; sponsor conferences to highlight specific constitutional issues of interest to scholars and other professionals; and develop programs of public education utilizing the materials developed by the research and in the conferences. The first three conferences, now scheduled for 1985, will cover "The Presidency," "Government and the Media," and "Federalism."

FAIRLEIGH DICKINSON UNIVERSITY

285 Madison Avenue
Madison, New Jersey 07940
Contact: Sr. Margherita Marchione
(201) 538-2886

Fairleigh Dickinson University and the New Jersey Historical Commission will sponsor "The Constitutional Society of 1784: A Bicentennial Symposium" on October 27, 1984, at the University's Florham-Madison campus. It is supported by a grant from the New Jersey Committee for the Humanities.

Richard P. McCormick, professor emeritus of history at Rutgers University, will deliver the opening paper on "New Jersey's Contribution to the Constitutional Convention." Sister Margherita Marchione, director of the Center for Mazzei Studies at Fairleigh Dickinson, will speak on "The Constitutional Society of 1784, Forerunner of the Constitutional Convention." Other papers will deal with the politics of the states which led to the Constitutional Convention and the connections between American and European currents of political thought during this period. Stanley S. Idzerda of the College of Saint Benedict will act as moderator and commentator.

An exhibition and an interpretative guide will feature the documents of the Constitutional Society of 1784.

UNITED STATES CONSTITUTIONAL BICENTENNIAL

P.O. Box 1623
Natchez, MS 39120
Contact: Donald F. X. Finn

The United States Constitutional Bicentennial is attempting to locate and document all existing representations of the signers of the Constitution, including portraits, miniatures, drawings, and engravings or photographs of missing or destroyed items. The USCB is assembling a catalog and a collection of 35mm color slides of available representations for use by interested Bicentennial participants. Information on the location of any known representation, whether an original, copy, or re-creation, would be appreciated.

In addition, a summary biography and bibliography is being prepared for each signer. The USCB would like to hear from others who are engaged in developing similar materials.

THE CONSTITUTION PROJECT

1126 S.W. 13th Ave.
Portland, Oregon 67205
Contact: Matthew E. Simek

The Constitution Project, a nonprofit Oregon corporation, has outlined a series of thirteen television programs on constitutional themes for national broadcast during the Bicentennial observation. The series will focus on the relationship between the government and the individual citizen, examining the intent of the founders, the organization of the government under the Constitution, and the role of each citizen in the governmental process. Individual segments will treat the origins of the Constitution in European and colonial history; the structure of government as conceived by the Convention of 1787; the function and processes of the executive, legislative, and judicial branches; government financing; state sovereignty; and citizen influence.

It is anticipated that the hour-long programs will be shown on the Public Broadcasting System with funding from the National Endowment for the Humanities, the Corporation of Public Broadcasting, and other public and private sources. An advisory panel of national experts will oversee content development.

Project '87

Project '87 would like to know about events being planned for the Bicentennial of the United States Constitution, which we will report on in ***this Constitution.*** Please send notices to:

this Constitution
1527 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Photographs and camera-ready art of logos, posters, etc. are welcome and will be returned.

STATE HUMANITIES COUNCILS UPDATE

PENNSYLVANIA HUMANITIES COUNCIL

401 N. Broad St., Suite 818
Philadelphia, Pa. 19108
(215) 925-1005 or (800) 462-0442

The Pennsylvania Humanities Council is planning a major state-wide program to celebrate the Bicentennial of the United States Constitution. A three-year series of events, beginning in 1985, will focus public attention on the document's unique characteristics, its history, its application, and its future.

The program will include a series of major conferences, reading and discussion groups, traveling exhibits, teacher-training institutes, and newspaper supplements. The first of the conferences, which will be held each year in Independence Hall, Philadelphia, will cover the background of the Constitution, the Bill of Rights, and the process of ratification. In 1986, the meeting will focus on interpretations of the Constitution and extensions of its meaning through amendments and the judicial process. The future of the Constitution and its significance in American life will be the theme of the 1987 conference.

The Pennsylvania Humanities Council will develop a syllabus on the Constitution for use in public classes to be held at major libraries, historical societies, and other cultural organizations. To augment such forums, traveling exhibits on the Constitution will be prepared in cooperation with the National Park Service. In order to strengthen instruction on the Constitution in state educational institutions, the Council will organize teacher-training institutes to impart factual knowledge and develop effective teaching strategies for this material.

Finally, each year the Council will commission a twelve-page newspaper supplement on the Constitution to be distributed across the state. The subject of each supplement will be the topic of the conference for that year.

The Pennsylvania Humanities Council has issued a call for participants and program sites. Those interested should contact the Council at the above address.

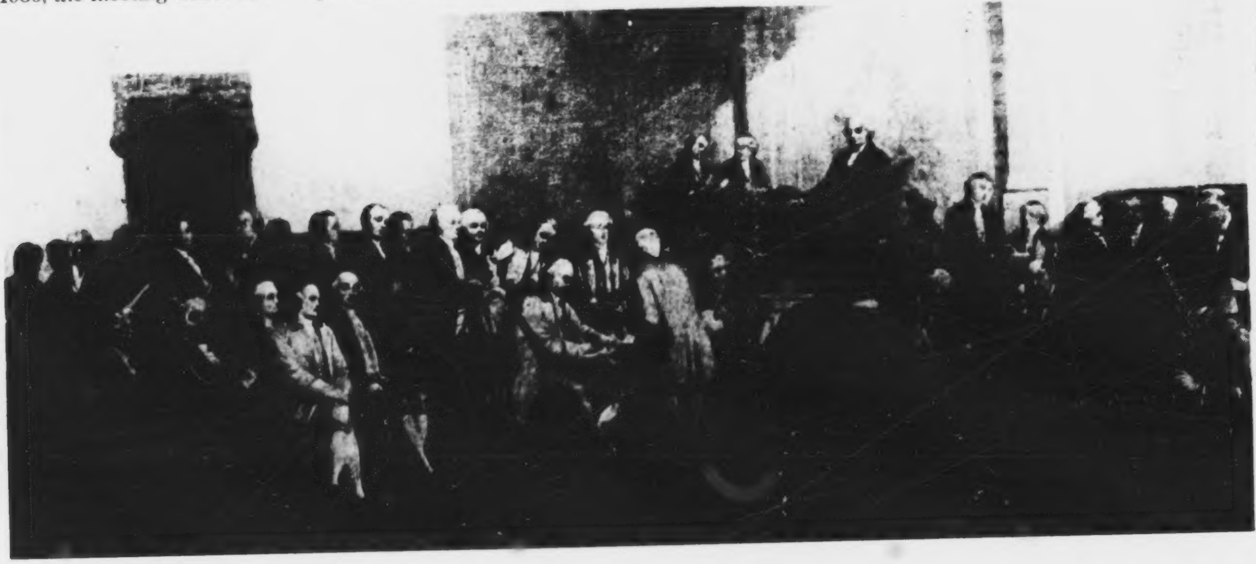
COLORADO HUMANITIES PROGRAM

1836 Blake St., #100
Denver, Colorado
(303) 292-4458

The Colorado Humanities Program has begun development of a project to create a series of short dramatic works based on the constitutional debates of 1787. A series of 20-30 minute self-contained and historically accurate sketches will use the debates and characterizations of the Founding Fathers to focus attention on the difficult issues involved in framing the Constitution. Packages of historical background material will be prepared to accompany each production.

Each piece will center around one or more of the subjects which have proved to be of enduring importance to constitutional law and democratic government. The dramatizations will be mounted in a simple, economical manner so as to lend themselves to production in a variety of settings—for example, city parks, plazas, and shopping centers. The scripts and background materials developed through the project will be available to any Colorado group, institution, or individual for use in a humanities program.

Qualified project sponsors include Colorado nonprofit theater groups, as well as history departments, theater departments, and law schools of any Colorado college or university. In order to assure high quality projects, the Colorado Humanities Program has solicited proposals to develop model programs to be used as guides by subsequent applicants. For more information about the project and proposal guidelines, contact the Colorado Humanities Program at the above address.



Signing of the Constitution, *sketch by J. P. Rossiter. Library of Congress.*

Greetings to Members of the National Council for the Social Studies

In order to encourage efforts to improve teaching about the U.S. Constitution, the National Council for the Social Studies is pleased to send ***this Constitution*** to its members as part of their NCSS membership.

NCSS is committed to developing cooperative activities with others interested in the advancement of social studies education. The mailing of ***this Constitution*** to NCSS members, beginning with this issue, is a reflection of that commitment.

SUBSCRIPTION INFORMATION

The National Endowment for the Humanities is underwriting the publication of ***this Constitution*** as a quarterly magazine so that it may be distributed free to institutions planning Bicentennial programs. Such institutions may write and ask to be placed on the free mailing list. Institutions wishing to receive more than one copy may do so by subscribing for additional copies. Individuals also must subscribe. Subscription rates are listed below. Each issue of the magazine will be available for purchase at bulk rate.

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Three Coming Centennials

The Statue of Liberty
Ellis Island

The Statue of Liberty and Ellis Island, two of the nation's most notable national symbols, are undergoing major restoration efforts. A twenty-member commission, headed by Lee A. Iacocca, has been raising funds for the restoration projects.

Almost two million people a year visit the Statue of Liberty, a gift to the United States from France to commemorate France's alliance with the American colonies during the American Revolution. It was designed by Frederic Auguste Bartholdi, a French sculptor; the French people raised $400,000 to have it built. After it was completed and presented to the United States in Paris in 1884, the Statue was dismantled and shipped to America. The Statue of Liberty will be 100 years old in 1986. The extensive renovation is expected to be completed prior to the Centennial festivities.

It was not until after the turn of the century that the Statue of Liberty became closely identified with the great flow of immigrants who landed on nearby Ellis Island. In 1903, a bronze plaque was affixed to the statue; it bears a sonnet by Emma Lazarus, entitled "The New Colossus" which includes the lines: "Give me your tired, your poor, Your huddled masses yearning to breathe free . . . ."

The Ellis Island Immigration Station opened in 1892 and operated until 1954. During this period, some seventeen million immigrants passed through the New York harbor site. These were the forebears of about 40 percent of the U.S. population today. In 1965, Ellis Island was declared a historic shrine and added to the Statue of Liberty National Monument in recognition of its role as the nation's foremost immigration gateway. The Centennial of Ellis Island will be celebrated in 1992 with the opening of the refurbished buildings and a historical museum.

Fourth of July celebrations will be held in 1984 commemorating the gift of the Statue of Liberty by the French people. During the summer of 1985 a hundred-day International Festival will be held in tribute to this nation's cultural and ethnic background. In 1986, more sailing vessels than participated in Operation Sail during the nation's revolutionary bicentennial in 1976 will sail into New York harbor as part of a special salute to the statue's one-hundredth birthday. Also during the summer of 1986, each of the fifty states will participate in two days of celebrations of their heritage as part of a second hundred-day festival marking the Centennial.

For further information, contact the Statue of Liberty—Ellis Island Foundation, Inc. 101 Park Avenue, New York, New York 10178 or call (212) 883-1986.

Debarkation site, Ellis Island. ***National Park Service, U.S. Department of the Interior.***

Eleanor Roosevelt

October 11, 1984 will mark the Centennial of Eleanor Roosevelt's birth. In tribute to her leadership both in the United States and in the world, Congress has established a commission to commemorate this occasion, one of the few times an individual has been so honored. The joint resolution creating the commission cites her work as First Lady, her devotion to improving the lives of the disadvantaged, her campaign for human rights, her efforts on behalf of children, and her "compassionate advocacy of the highest American ideals." At its first meeting in February, 1984, the commission elected Trude W. Lash, the chair of the Eleanor Roosevelt Institute, to serve as chair of the commission.

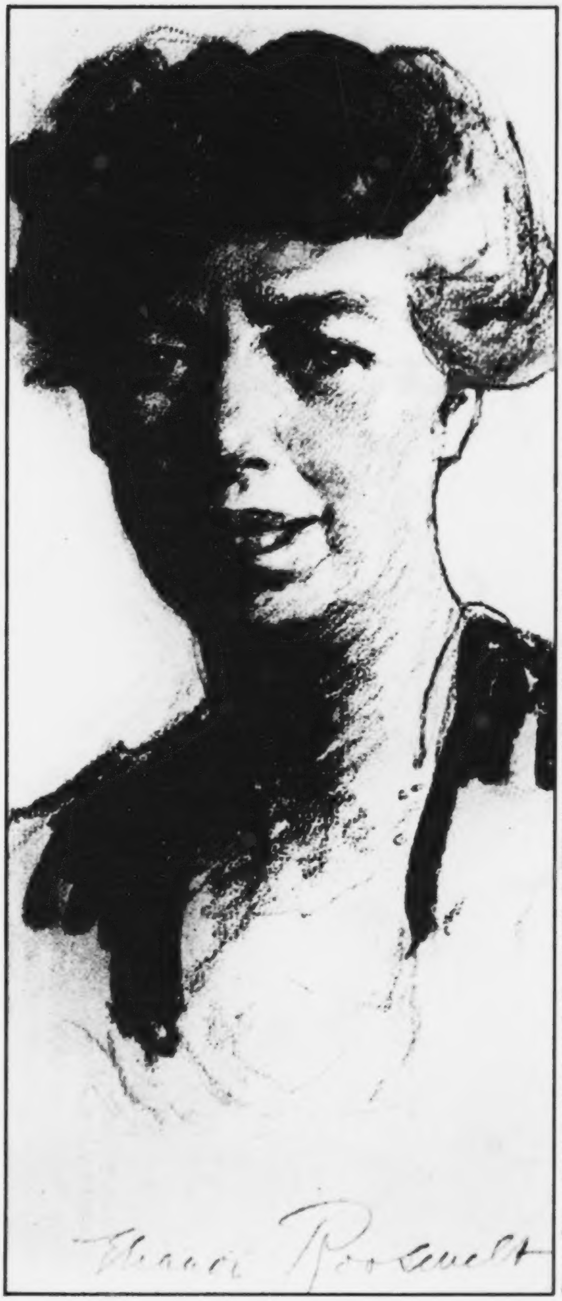
The Commission staff, headed by Fredrica S. Goodman, has provided support and encouragement to federal, state and local organizations planning activities to honor Eleanor Roosevelt. A calendar records all such centennial events. More than half of the nation's governors have appointed state coordinators to assist in the commemoration.

On October 11, 1984, several hundred invited guests will observe Eleanor Roosevelt's birthday at a gathering at Val-Kill, her Hyde Park home, which is now a national historic site. The ceremonies, which will include succeeding first ladies and members of the Roosevelt family, will be open to the public.

In addition, a traveling exhibit, "The Roosevelt Special," will begin a tour around the northeastern states at the end of June. The exhibit will feature photographs and artifacts pertaining to ER. Curriculum materials are available to prepare children for a visit to the exhibit.

International events will also mark Eleanor Roosevelt's centennial. At Middelburg, the Netherlands, the site of the Eleanor and Franklin Roosevelt Study Center which is now under construction, Freedom Medals will be awarded to several internationally renowned figures, including Simone Veil, Harold Macmillan and Liv Ullmann.

For further information, or to report centennial events, write: The Eleanor Roosevelt Centennial Commission, 4 Burnett Boulevard, Poughkeepsie, New York 12603, or call: (914) 431-5913 (NYS) or (800) ERC-1884 (outside NYS).



Eleanor Roosevelt, charcoal on paper by Samuel J. Woolf. National Portrait Gallery, Smithsonian Institution, Washington, D.C.

continued from inside front cover

ARTICLE THIRTEEN

> *No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State.*

In the twentieth century two proposed amendments were not ratified by three-fourths of the States: the child-labor amendment and the equal rights amendment.

The proposed child-labor amendment, which was submitted to the States during the 1st session of the 68th Congress in June 1924, was ratified by 28 States.

> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), *That the following article is proposed as an amendment to the Constitution of the United States, which, when ratified by the legislatures of three-fourths of the several States, shall be valid to all intents and purposes as a part of the Constitution:*

ARTICLE —

> *Section 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under 18 years of age.*
>
> *Section 2. The power of the several States is unimpaired by this article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress.*

The amendment relative to equal rights for men and women, was proposed by the Ninety-second Congress. It passed the House on October 12, 1971 and the Senate on March 22, 1972.

> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), *That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:*

ARTICLE —

> *Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.*
>
> *Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.*
>
> *Section 3. This amendment shall take effect two years after the date of ratification.*

The deadline for the ratification of the equal rights amendment was extended by House Joint Reso-

lution 638, 95th Congress, 2d session. It passed the House on August 15, 1978, and the Senate on October 6, 1978, and was approved by the President on October 20, 1978.

> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, *That notwithstanding any provision of House Joint Resolution 208 of the Ninety-second Congress, second session, to the contrary, the article of amendment proposed to the States in such joint resolution shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States not later than June 30, 1982.*

As of the final date, the amendment was ratified by only 35 states and was therefore not adopted.

The amendment to provide for representation of the District of Columbia in the Congress was proposed by the 95th Congress. It passed the House on March 2, 1978, and the Senate on August 22, 1978. It is still pending.

> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), *That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:*
>
> ARTICLE —
>
> *Section 1. For purposes of representation in the Congress, election of the President and Vice President, and article V of this Constitution, the District constituting the seat of government of the United States shall be treated as though it were a State.*
>
> *Section 2. The exercise of the rights and powers conferred under this article shall be by the people of the District constituting the seat of government, and as shall be provided by the Congress.*
>
> *Section 3. The twenty-third article of amendment to the Constitution of the United States is hereby repealed.*
>
> *Section 4. This article shall be inoperative, unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.*

As of June 30, 1984, 16 states have ratifed this amendment.

Beginning with the proposed 18th amendment, Congress has customarily included a provision requiring ratification within 7 years from the time of the submission to the States. The Supreme Court in *Coleman* v. *Miller*, 307 U.S. 433 (1939), declared that the question of the reasonableness of the time within which a sufficient number of States must act is a political question to be determined by the Congress.

Project '87

The American Constitutional Bicentennial

Project '87 is a joint undertaking of the American Historical Association and the American Political Science Association. It is dedicated to commemorating the Bicentennial of the United States Constitution by promoting public understanding and appraisal of this unique document.

The Project is directed by a joint committee of historians and political scientists that is chaired by two scholars of international reputation—Professor Richard B. Morris of Columbia University and Professor James MacGregor Burns of Williams College. The Chief Justice of the United States serves as Honorary Chairman of Project '87's Advisory Board.

The implementation of Project '87 has been divided into three distinct but interrelated stages. Stage I, devoted to research and scholarly exchanges on the Constitution, has been underway for the past several years. The Project has awarded fifty-one research grants and fellowships and supported five major scholarly conferences dealing with various aspects of the Constitution. Activities in connection with Stage II—teaching the Constitution in schools and colleges—began in 1980, and Project '87 is now planning Stage III, the development of programs for the public designed to heighten awareness of the Constitution and to provoke informed discussion on constitutional themes.

It is the hope and expectation of the Project's governing committee that, through its activities and those of others, both students and the public alike will come to a greater awareness and comprehension of the American Constitution.

Core support for Project '87 comes from the William and Flora Hewlett Foundation. Additional grants for specific programs have been provided by the National Endowment for the Humanities, which funds the magazine, and by the Lilly Endowment, Inc., of Indianapolis, Indiana, the Rockefeller Foundation, the Ford Foundation and the Mellon Foundation.

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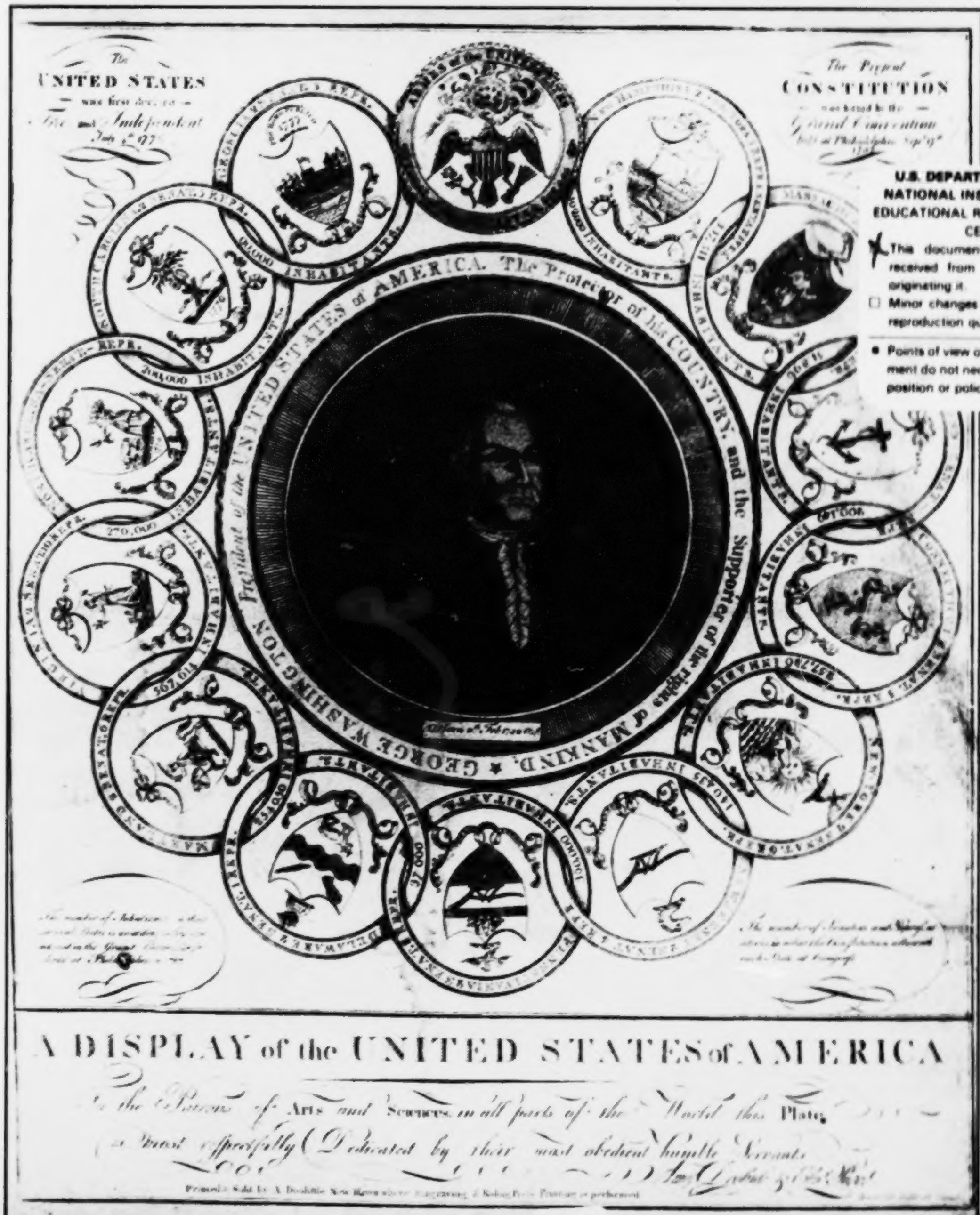
A Bicentennial Chronicle Winter 1984, No. 5


The UNITED STATES was first declared Free and Independent July 4th 1776
The Federal CONSTITUTION was formed by the General Convention held at Philadelphia Sep 17th 1787
GEORGE WASHINGTON President of the UNITED STATES of AMERICA. The Protector of his COUNTRY, and the Supporter of the rights of MANKIND.
A DISPLAY of the UNITED STATES of AMERICA
To the Patrons of Arts and Sciences in all parts of the World this Plate is most respectfully Dedicated by their most obedient humble Servants
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Project '87

Chronology of Bicentennial Dates from the End of the American Revolution to the Ratification of the Bill of Rights

After the Continental Congress voted in favor of independence from Great Britain on July 2, 1776, and adopted the Declaration of Independence on July 4, it took up the proposal of Richard Henry Lee for a "plan of confederation." On July 12, 1776, a congressional committee presented "Articles of Confederation and Perpetual Union," which the Congress debated for more than a year. The body adopted the Articles of Confederation on November 15, 1777, and submitted them to the thirteen states for ratification, which had to be unanimous. By March 1, 1781, all the states had given their assent. The Articles of Confederation gave limited powers to the federal government; important decisions required a super-majority of nine states. Congress could declare war and compact peace,but could not levy taxes, or regulate trade between the states or between any state and a foreign country. All amendments had to be adopted without dissenting votes. In 1786, James Madison described the Articles as "nothing more than a treaty of amity and of alliance between independent and sovereign states." As attempts to amend the Articles proved fruitless, and interstate disputes over commercial matters multiplied, the weaknesses of the Articles of Confederation as a fundamental charter became apparent. The march toward a new form of government began.

September 3, 1783: Articles of Peace ending hostilities between Great Britain and the United States are signed by Britain in Paris.

November 25, 1783: British troops evacuate New York City.

December 23, 1783: George Washington resigns his commission as Commander-in-chief of American forces and takes leave "of all the employments of public life."

March 28, 1785: MOUNT VERNON CONFERENCE. George Washington hosts a meeting at Mount Vernon of four commissioners from Maryland and four from Virginia to discuss problems relating to the navigation of the Chesapeake Bay and the Potomac River. After negotiating agreements, the commissioners recommend to their respective legislatures that annual conferences be held on commercial matters, and that Pennsylvania be invited to join Maryland and Virginia to discuss linking the Chesapeake and the Ohio River.

January 16, 1786: Virginia's legislature adopts a statute for religious freedom, originally drafted by Thomas Jefferson and introduced by James Madison. The measure protects Virginia's citizens against compulsion to attend or support any church, and against discrimination based upon religious belief. The law serves as a model for the First Amendment to the United States Constitution.

January 21, 1786: Virginia's legislature invites all the states to a September meeting in Annapolis to discuss commercial problems.

continued on page 51

Sources: Richard B. Morris, ed. *Encyclopedia of American History* (New York: Harper & Row, 1976); Samuel Eliot Morison, *The Oxford History of the American People* (New York: Oxford University Press, 1965).

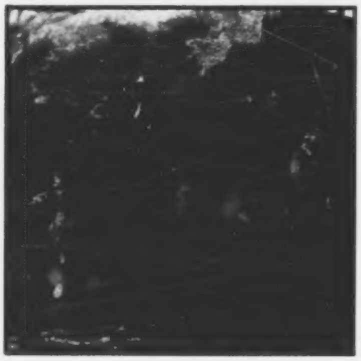
...do ordain and establish

this Constitution

for the United States of America.

A Bicentennial Chronicle

No. 5 **Winter, 1984**



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Cover: A display of the United States of America, ***engraving by Amos Doolittle.***
John Carter Brown Library, Brown University.

this Constitution **is published with the assistance of a grant from the National Endowment for the Humanities as part of its special initiative on the Bicentennial of the United States Constitution. Editorial offices are located at 1527 New Hampshire Avenue, N.W., Washington, D.C. 20036. All material in this publication may be photocopied if attributed as follows: "Reprinted from *this Constitution: A Bicentennial Chronicle,*Winter, 1984, published by Project '87 of the American Historical Association and the American Political Science Association." Project '87 would appreciate notification from those who photocopy material in this issue for use in presentations to other groups.**

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this Constitution

published by Project '87 of the American Historical Association and the American Political Science Association

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From the Editor

The framers of the Constitution intended Congress to represent the people's interests in the national government. In this issue of ***this Constitution,*** Michael J. Malbin, a resident fellow at the American Enterprise Institute for Public Policy Research, describes how the design of Congress was intended to channel the ambitions of representatives so that these did not take precedence over the interests of their constituents. Austin Ranney, a resident scholar also at the American Enterprise Institute, takes a look at current proposals to alter the Constitution, and whether or not Congress is representing the public view by taking action on the changes. In the documents section, Charlene Bickford, the editor of the papers of the First Federal Congress, shows how the first Congress went about establishing itself as *the* representative body in a republic. Professor Thomas Pangle takes a more general view of the founders of the government, in an essay which examines the framers' ideas of the meaning and status of "virtue" in a republic.

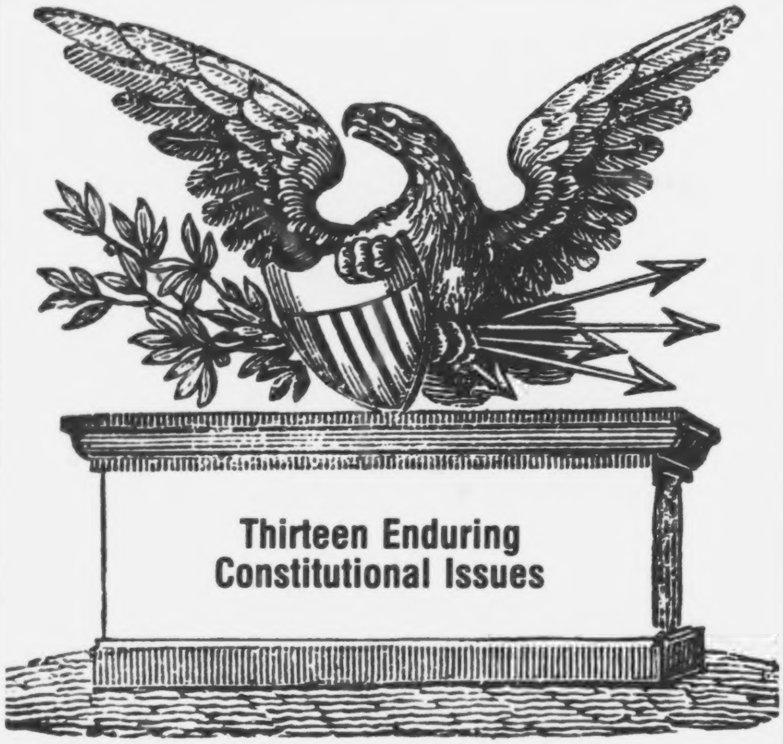
In the first issue of ***this Constitution,*** we published a Chronology of Bicentennial Dates. Our readers have told us that the Chronology has been very useful, and so we are reprinting it. It begins on the inside front cover.

In this issue, we inaugurate a new feature in the Bicentennial Gazette—descriptions of each of the twelve state delegations to the Constitutional Convention. We start with Delaware, the first state to ratify the Constitution. We also include a supplement to the Network of Scholars, published in the last issue of the magazine. "For the Classroom" features a lesson designed by the New Hampshire Bicentennial Education Commission.

As ever, we look forward to comments and suggestions from our readers.

Correction:

In issue no. 3, the address given for *The Federalist Newsletter* was incorrect. The editor is Professor Danny M. Adkison and he may be contacted at the Department of Political Science, Oklahoma State University, Mathematical Sciences 519, Stillwater, Oklahoma 74078. The editor regrets the error.



Thirteen Enduring Constitutional Issues

- National Power—limits and potential
- Federalism—the balance between nation and state
- The Judiciary—interpreter of the Constitution or shaper of public policy
- Civil Liberties—the balance between government and the individual
- Criminal Penalties—rights of the accused and protection of the community
- Equality—its definition as a Constitutional value
- The Rights of Women Under the Constitution
- The Rights of Ethnic and Racial Groups Under the Constitution
- Presidential Power in Wartime and in Foreign Affairs
- The Separation of Powers and the Capacity to Govern
- **Avenues of Representation**
- Property Rights and Economic Policy
- Constitutional Change and Flexibility

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Framing a Congress to Channel Ambition

by MICHAEL J. MALBIN

Debates over the role and structure of Congress took up well over half of the 1787 Constitutional Convention. In fact, the convention probably owed its success to the way profound, divisive issues were presented in the context of specific choices about institutions and about representation. Much of the credit goes to James Madison and other Virginians who helped draft, and then persuaded the respected Governor Edmund Randolph to introduce, a series of fifteen concrete resolutions that were much more far-reaching in their overall effect than they may have seemed on first appearance.

The Convention began its substantive work on May 30. For two weeks, until June 13, the Virginia Plan dominated the agenda, as delegates considered and amended its proposals twice through clause by clause. During these weeks, as historian Forrest McDonald has said, "the delegates spoke and voted as if the question before them were *what kind* of a national government would be created.... [But] the real issue, throughout, was whether there would be a national government—and therefore a nation—at all."

The basic issue was not joined directly until William Paterson of New Jersey presented a set of counterproposals to the convention on June 15. The New Jersey plan would have "revised, corrected and enlarged" the Articles by creating a new executive and judicial branch of government and by increasing Congress's power. But the Paterson plan sharply disagreed with Virginia's on a key feature of the confederal system. The Virginia plan provided for a two-chamber legislature with each chamber allocating representatives on the basis of population. The New Jersey plan maintained Congress as a unicameral legislature, as it was under the Articles of Confederation, with each state having an equal vote. The dispute between the two plans over representation became the core issue dividing delegates who wanted to preserve the Confederation from those who wanted a more national government.

In his classic 1913 study of the convention, Max Farrand wrote:

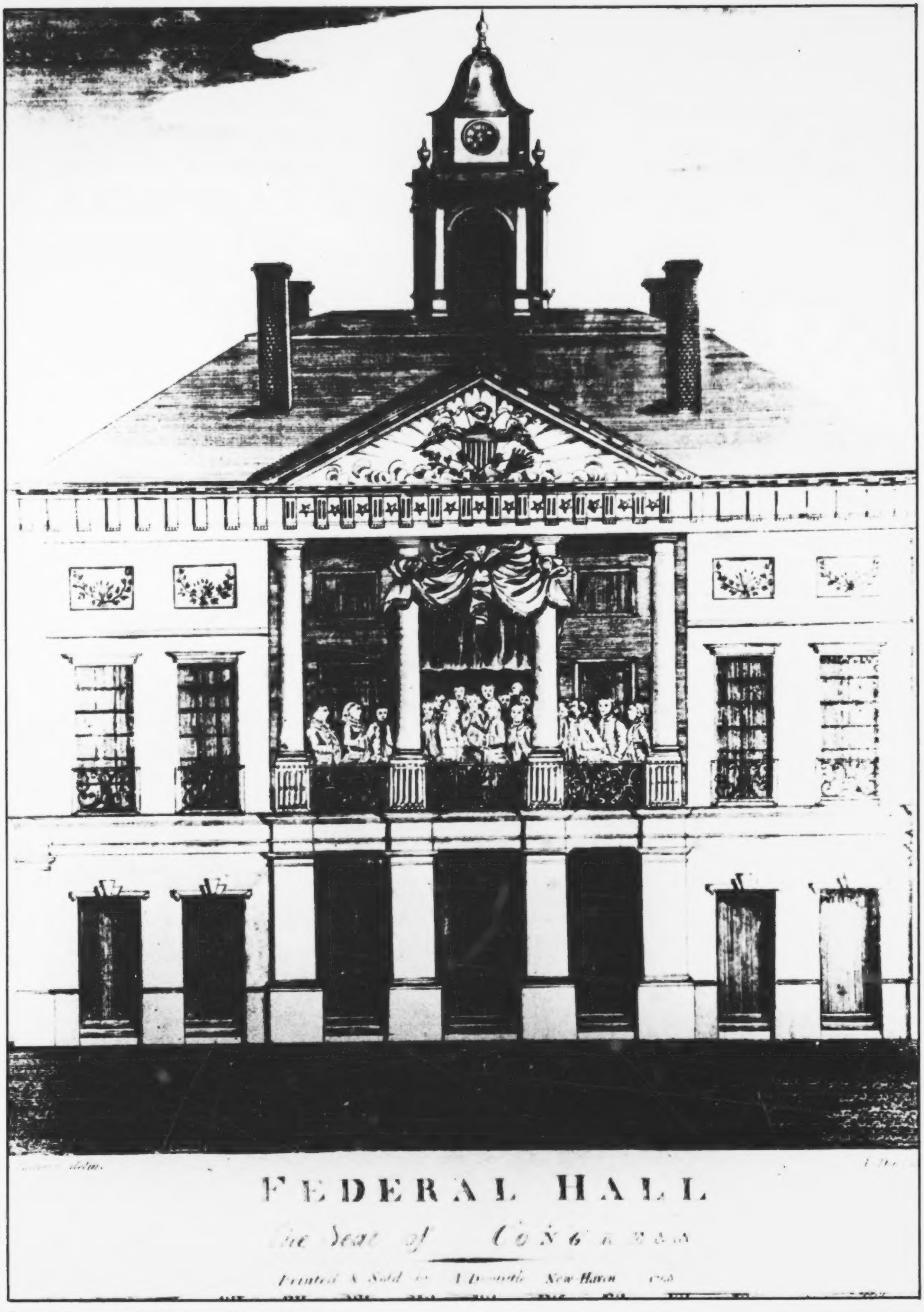
> It is altogether possible, if the New Jersey plan had been presented to the convention at the same time as the Virginia plan, that is on May 29, and if without discussion a choice had then been made between the two, that the former would have been selected.... But in the course of the two weeks' discussions, many of the delegates had become accustomed to what might well have appeared to them at the outset as somewhat radical ideas.

On June 19, the convention voted 7 to 3 (with one state divided) to proceed with the Virginia plan. One vote did not settle the matter, however. Over the next month the original supporters of the New Jersey plan tried numerous times to reargue the basic issue, first by trying unsuccessfully to gain equality of state representation in the House, and then finally by winning a compromise that tilted heavily toward the nationalists, but gave the states equality in the Senate.

Because the representational issues dividing the New Jersey and Virginia plans were seen by the delegates as being the most crucial ones before them, the convention's records pose some problems for understanding how the Framers might have intended Congress to perform. The primary question was: "What should the government represent, people or states?" (A few delegates, including Pennsylvania's Gouverneur Morris and South Carolina's General Charles Pinckney wanted to add property to the basic two-part dispute.) The question of "what" is conceptually distinct from and logically prior to the question of "how." *How* representatives ought to behave can only be determined once you know *what* they are supposed to represent and *why*. But these concerns became thoroughly intertwined in the convention and ratifying period, and so they must remain here. To understand how the Framers were hoping Congress would behave, we must start with more basic issues. In so doing, we will be able not only to learn about Congress, but also to understand the role of institutions more generally in the thinking of the Constitution's Framers.

Basic Premises

Most of the participants in the 1787 Convention, and most Federalists and Anti-Federalists in the subsequent debate over ratification, had remarkably similar views about both the bedrock nature of human beings and the desired ends of government. They agreed, for example, that people are naturally selfish creatures whose equal and natural rights derive from their self-interested origins. They also agreed that without civil society, people's natural and equal rights to life, liberty and the pursuit of happiness were constantly imperiled. Finally, to use the language of the Declaration of Independence on the purpose of government, they agreed that "to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed." In other words, the American debate of 1787-89 was conducted, as Herbert Storing has shown, among people who agreed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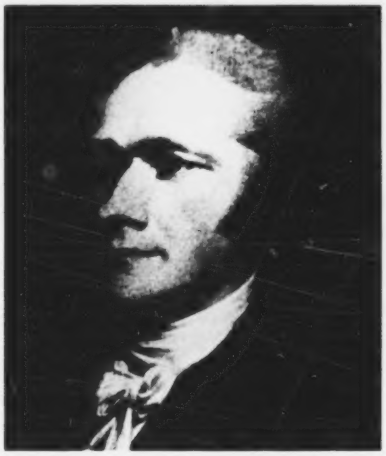
FEDERAL HALL
The Seat of Congress
Printed & Sold by A. Doolittle New Haven 1790

Federal Hall, *engraving by Peter Lacour. Library of Congress.*

The Federalist and Anti-Federalist agreement on the primacy of self-interest led both to be concerned that people in government might use power to serve their own ends at the expense of ordinary citizens.



Alexander Hamilton, ***oil painting by John Trumbull. National Portrait Gallery, Washington, D.C.***

both about the unchangeable starting point (human nature) and about the desired end. In both these matters, the disagreeing Americans stood squarely within a common, modern, philosophic framework.

If the two contending sides of 1787-89 agreed about where their discussion should begin and end, they disagreed sharply about how to get from one place to the other. The Federalist and Anti-Federalist agreement on the primacy of self-interest led both to be concerned that people in government might use power to serve their own ends at the expense of ordinary citizens. The first level of protection against this, for both Federalists and Anti-Federalists, lay in the people's ability, directly or indirectly, to choose their own representatives. From this point on, their arguments diverged.

For the Anti-Federalists, keeping the government true to its proper end would require the people to maintain a vigilant watch and zealous control over the actions of their representatives. As presented in the state ratifying conventions, this meant frequent elections, the ability to instruct representatives on specific legislative issues, the ability to recall representatives in mid-term and, most of all, it meant legislative districts that were small enough for people to know and judge their representatives personally.

If districts are to be kept small then so must the nation, or else the legislature would become so large as to be unwieldy. But many—not all, but many—of the Anti-Federalists had another, more basic, reason for preferring small republics to large ones. For them, the preservation of liberty required citizens not only to be vigilant but also to exercise self-restraint, to moderate their self-interest in the name of the general welfare. These Anti-Federalists also believed preserving freedom required the government to educate citizens to care about the public good, and that such education was only possible in a regime that was small enough for citizens to feel they belonged to a common community.

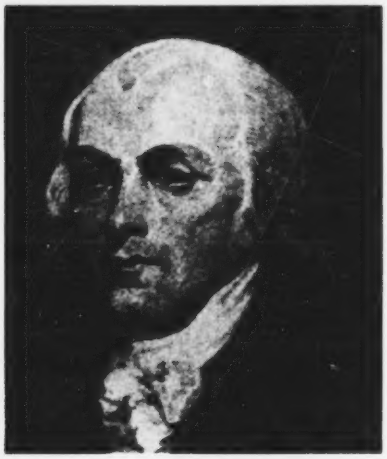
The supporters of the Constitution rejected the Anti-Federalist notion that zealous watchfulness, even if supplemented by citizenship education, could preserve liberty in a small republic. This disagreement was central to the Federalists' ideas about institutions in general, and Congress in particular.

Federalists on Faction and Representation

The clearest statement of the Federalists' rejection of the small republic argument is in James Madison's *Federalist* No. 10. Vigilance is not enough to protect freedom in a small republic, Madison argued, because a vigilantly self-interested majority could still use its power to oppress a minority. The problem, Madison argued, is that human beings by nature will have different passions, opinions and interests, and that groups of people with similar passions, opinions and interests will tend to band together to form factions that will try to take actions that are adverse either to the rights of other citizens or to the permanent and aggregate interests of the community. The problem of faction, Madison went on, could not be avoided by educating citizens to be virtuous, or to act in the name of the common good. Even if citizens could be made to care about the common good, they could not all be given the same opinions. Inevitably, their opinions will be colored by their self-interest, replacing factions founded on low calculations of self-interest with even more dangerous ones founded upon selfishly informed, uncompromising righteousness.

The constitutional solution, as is well known, was an extended or large, commercial republic in which factions would be encouraged to multiply. The more factions there were, the less likely would it be that any one could become a majority and use its position to oppress the minority. From a multiplicity of factions immediately flows a legislative process in which legislators must think of others' needs to achieve their own objectives. If no single faction comprises an electoral majority by itself, legislative majorities in a large republic ordinarily have to be made up of coalitions of minorities that come together only after a process of accommodation and compromise. Factions that help form today's legislative majority will moderate their demands because they may be part of tomorrow's minority. For the same reason, today's minorities will not feel so frustrated as to think of rebellion, because they might well help form tomorrow's majority.

But large republics do more than produce multiple factions and the Constitution provides for something more than a pluralistic politics of compromise and coalition. Large republics are representative rather than direct democracies, and representatives do not simply reflect the opinions or factions that exist in the general public. Instead, Madison said in No. 10, the effect of representation *necessarily* is to "re-



James Madison, engraving by David Edwin. National Portrait Gallery, Washington, D.C.

The challenge to a constitution-writer is to create institutions within which both great and not-so-great people will be motivated to satisfy their personal ambitions by behaving in ways that in fact serve the public interest.

fine and enlarge the public views"—sometimes by improving them, and sometimes by making them worse. The aim of the Constitution was to create institutions that would improve as they refined.

Self-Interest and the Electoral Connection

One reason legislators "refine and enlarge the public views" is that they, like everyone else, act primarily from self-interested motives. Legislators may share some of their constituents' interests and passions, but they will also have some of their own. The Framers saw self-interest as anything but a monolithic passion. The fact is, as they noted, that people define their interests differently: some want wealth, others want small tokens of honor, and a few will be satisfied with nothing less than lasting fame. (See *The Federalist* Nos. 57, 25 and 71.)

The danger of representative government is that greedy legislators may use the policy arena to their private advantage or that, more rarely but more seriously, great-souled people in search of lasting fame may seek to usurp power for themselves. The challenge to a constitution-writer is to create institutions within which both great and not-so-great people will be motivated to satisfy their personal ambitions by behaving in ways that in fact serve the public interest. Alexander Hamilton put the issue this way during the New York state ratifying convention in a speech outlining the dangers of mandatory term limits: "Men [i.e., legislators forced to retire] will pursue their interests. It is as easy to change human nature as to oppose the strong current of the selfish passions. A wise legislator [i.e., constitution writer] will gently divert the channel, and direct it, if possible, to the public good." A great deal of the discussion about Congress in the Constitutional Convention and, especially, in the state ratification debates was about how the self-interests of legislators might be channelled in just such a fashion.

The point can be seen in a cursory examination of the topics that were discussed. Given the importance of institutions to the Framers, it is remarkable how little time they spent talking about the way Congress should be organized, apart from the crucial suffrage and apportionment issues involved in the basic nation-state dispute. Except for a few details, the United States Constitution is silent about procedure and focuses instead on the powers of Congress and the electoral relationship between constituency and representative.

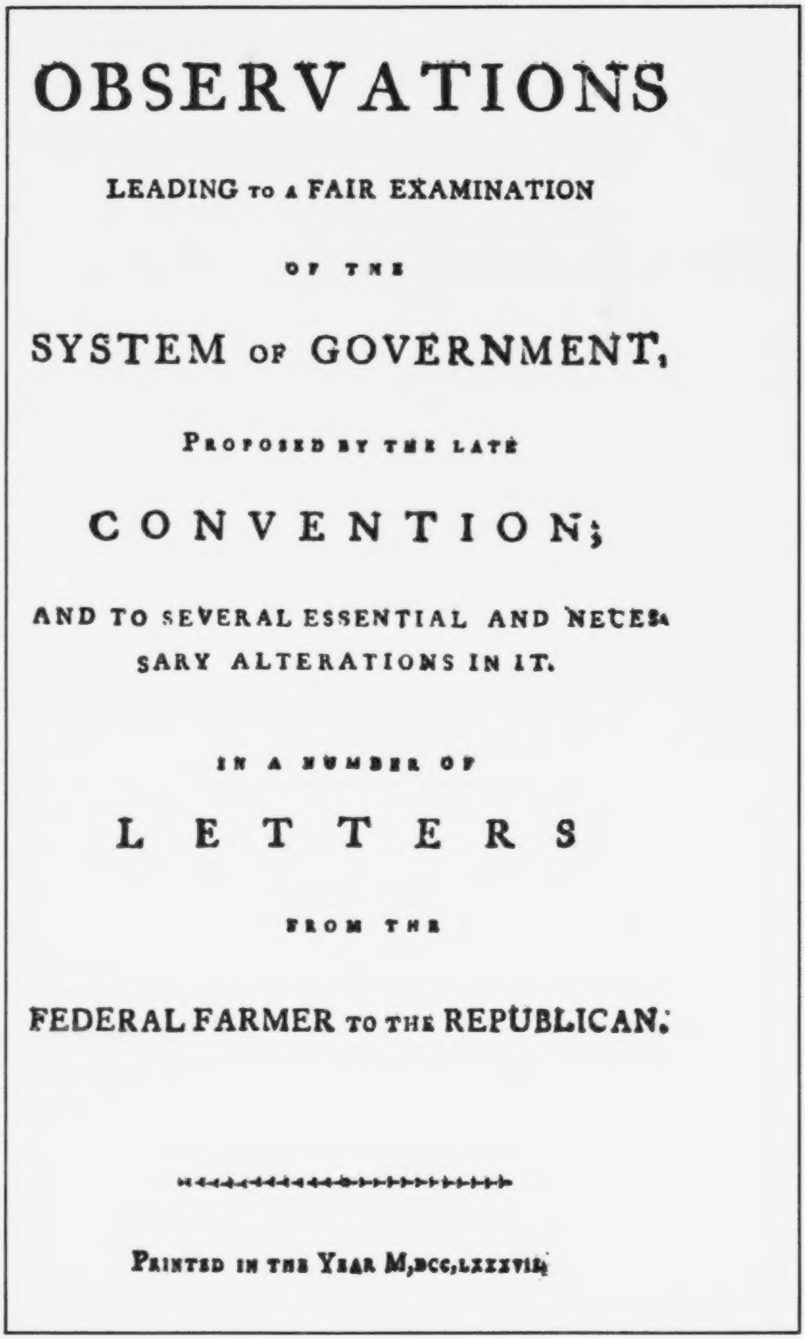
We will not spend much time in this article on the powers of Congress. They are important for defining the scope of the national government and for providing each branch of Congress with the ability to resist domination by another branch of government. Congressional power also does help channel the ambitions and motivations of legislators: it is hard to attract able people to puny offices. But congressional power was not discussed primarily in this context at the convention.

The relationships between legislators and their constituents, in contrast, had the incentives of members as their central focus. This can be seen in discussions in both the convention and the states over how large congressional districts should be and how long senators and representatives should serve. It can also be seen in state ratifying convention disputes over whether constituents should be able to instruct members of Congress how to vote on specific legislative issues, whether voters should be able to recall members in midterm and, finally, whether the Constitution should provide for mandatory rotation in office by limiting the number of consecutive terms a member may serve.

Size of Congressional Districts

The Constitutional Convention placed no upper limit on the size of congressional districts, but did stipulate that they should be no smaller, after each census, than an average of 30,000 people per district, with each state having at least one. The Anti-Federalists objected that there was no telling how large districts might become in the future and, in any case, 30,000 was too large a district to permit effective representation. (After the 1980 census, congressional districts averaged about 500,000 inhabitants.)

The Anti-Federalist position rested on three different concerns. First, they argued that a legislature with so few representatives, and such large districts, could not possibly contain members who would have the detailed knowledge of local conditions necessary to assure representation of the country's full multiplicity of interests. "Our federal representatives," said Virginia's George Mason, in his state's ratifying convention, "must be unacquainted with the situation of their constituents. Sixty-five members cannot possibly know the situation and circumstances of all the inhabitants of this immense continent."



OBSERVATIONS

LEADING TO A FAIR EXAMINATION

OF THE

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PROPOSED BY THE LATE

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IN A NUMBER OF

LETTERS

FROM THE

FEDERAL FARMER TO THE REPUBLICAN.

PRINTED IN THE YEAR M,DCC,LXXXVIII.

Library of Congress.

Even more serious, from the Anti-Federalist perspective, was the fact that the people would not know their own representatives personally. "The number of the House of Representatives [is] too small," said John Smilie in the Pennsylvania ratifying convention. "They will not have the confidence of the people, because the people will not be *known* by them as to their characters."

Finally, a large number of Anti-Federalists mentioned that large districts would result in an aristocratic legislature. People advancing this argument included Mason, Smilie, Patrick Henry of Virginia, the anonymous Pennsylvania pamphleteer Centinel, "Hampden" (probably William Findley) in the *Pittsburgh Gazette*, John Lansing of New York and, especially, New York's Melancton Smith, who argued that large districts would exclude "middling yeomen" from Congress and favor what he called the "natural aristocracy," among whom he included the learned and able as well as the well-born and *nouveau riche*.

The Anti-Federalists' concerns about "aristocracy" reflected their view of representation. The *Letters from a Federal Farmer* (authorship disputed, usually attributed to Richard Henry Lee) put the point this way:

> A full and equal representation is that which possesses the same interests, feelings, *opinions*, and *views* the people themselves would were they all assembled--a fair representation, therefore, should be so regulated that every order of men in the community, according to the common course of elections, can have a share in it.

Thus, for the Federal Farmer, the reason for having a legislature that mirrored the electorate was to make sure it would reflect the electorate's "opinions and views." Since it would be impossible to have a legislature for the whole nation that would be large enough to satisfy these requirements without becoming absurdly unwieldy, the Federal Farmer concluded that "the idea of one consolidated whole, on free principles, is ill-founded."

The Federalists rejected these arguments in all of their parts. Liberty was not well secured, they maintained, by a legislature that simply reflected the electorate's opinions and views—particularly not if the electorate were the relatively undifferentiated one of a small republic. The Framers wanted a leglislature that would also be free to exercise reason to overcome transient passions that may overwhelm public opinion.

Reason presumes knowledge, of course. The Federalists generally

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accepted the criticism that large districts would mean representatives who were less aware of local details. They denied, however, that this would be important for federal legislation. As one anonymous Connecticut pamphleteer put it:

> The federal legislature can take cognizance only of national questions and interests, which in their very nature are general, and for this purpose five or ten honest and wise men chosen from each state, men who have had previous experience in state legislation, will be more competent than an hundred.

Neither did the Federalists believe that a "fair representation" required a legislature that mirrored the social composition of the citizenry. "The idea of an actual representation of all classes of the people by persons of each class is altogether visionary," wrote Hamilton in *The Federalist* No. 35. More importantly, the Federalists flatly rejected the notion that rewarding ability is "aristocratic" (today's code word would be "elitist.") Permitting the voters to choose those who were best able to serve was just the opposite, in their view, from a conventional aristocracy that rewards people without regard to ability. If rewarding merit meant creating a "natural aristocracy" of people who would rise to prominence through careers in public service, so much the better. The whole point of the Framers' concern with ambition was to find a way to encourage its healthy forms and attach it to serving the Constitution.

The discussion of aristocracy still fails to reach the heart of the Framers' response. The Anti-Federalist concerns about the size of legislative districts began, the Framers thought, from the wrong end of the problem. The place to begin was with the purpose of the government's democratic branch, not with its size or structure. The Framers saw the legislature as a forum within which elected representatives accountable to different local constituencies could deliberate together—ideally about what would be good for the nation, but at least about what compromises would be needed to forge majority legislative coalitions from a multifactional constituency base.

The legislature was not supposed to be a place in which a multiplicity of interests simply came together and clashed. Peaceful resolution consistent with the protection of liberty presupposed deliberation—informed, direct discussion among the elected members. For this reason, the Framers' discussions about legislative structure put the requirements of deliberation first. The House had to be large enough to insure "free consultation and discussion," but not so large as to produce the "confusion and intemperence of a multitude" (*The Federalist* No. 55). How large would be too large in their eyes is something we do not know. *The Federalist* confidently predicted a House with 400 members. But at some point, too large a legislature would produce the form of democractic control without the content. (They would have said the same thing about direct initiatives and referendums.) The actual result would be demagogic leadership by a few, "In all very numerous assemblies," Madison continued in *The Federalist* No. 55, "passion never fails to wrest the sceptre from reason. Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob."

Thus, the Framers' concern with the legislature's size reflected their desire to promote deliberation, and that desire in turn grew out of a markedly different view of representation than the one put forward by Anti-Federalists. But controlling the size of Congress can only, at best, make deliberation possible. It cannot by itself make self-interested, ambitious legislators, who owe their jobs to their constituents, *want* to resist their own constituents' momentary passions. To address that issue, we must turn to the length of the congressional term, recall and mandatory rotation.

Length of Terms

The Anti-Federalists, in keeping with their general view that legislators should be checked closely by the people, thought democratic principles should require House members to face reelection every year. Elbridge Gerry expressed what later became a widely-shared Anti-Federalist opinion when he upheld "annual Elections as the only defense of the people against tyranny," during the Constitutional Convention. At the time, Gerry was opposing a three-year term. After a compromise of two years was reached, the conventions's debate on this point cooled off. Nevertheless, the desire for one-year terms continued to surface in many states during the ratification period.

Three different arguments were advanced against one-year terms. In at least four different state ratifying conventions, Federalist speakers said people would need at least two years to become sufficiently knowledgeable to deliberate intelligently about national legislation. Maryland's Daniel of St. Thomas Jenifer also opposed annual elections in the Constitutional Convention because they "made the best men unwilling to engage in so precarious a service," a view echoed by

Anti-Federalists wanted to keep legislators closely tied to their constituents; Federalists wanted some degree of legislative independence to permit a nationally focused process of deliberation.

many others.

But the third and most important argument was that it would take more than a year, according to future House Speaker Thomas Sedgwick of Massachusetts at his state's ratifying convention, for a representative to "divest himself of local concerns." If elections were held too frequently, James Madison said in the Constitutional Convention, "none of those who wished to be reelected would remain at the seat of Government." By staying in the capital instead of constantly returning home, members might be led to think about national issues from at least somewhat of a national vantage point. Two-year terms were *not* meant to divorce members from their constituents' immediate, local concerns, as the Anti-Federalists charged. But they were intended to give members time to live near, talk to and work with their colleagues and thus broaden the perspectives they brought with them from home.

Everything just said about two-year House terms applies even more forcefully to the Senate's six-year term. The Senate is often portrayed in popular writings as if it were intended to be a collection of quasi-ambassadors from the states—the true heir to the Congress of the Articles of Confederation. This view is superficially plausible. Article I does give states equal representation in the Senate, senators were elected by state legislatures, a few people in the convention did speak of senators as the guardians of states' interests, and many more spoke in these terms decades later, after slavery became the overriding political issue.

But the dominant view of the Senate at the convention focused on national, not state interests. One good clue comes from the important but often overlooked fact that senators vote as individuals: in the Congress of 1774-89 and in the Constitutional Convention, votes were cast by state, with each delegation having one vote. Another clue comes from the debate over paying senators from the national instead of the several state treasuries. But the clearest statements came when the convention considered the length of Senate terms.

The Senate, as everybody knows, was expected to have the will to resist temporary fits of popular passion that sweep over the House. Two-year terms might help House members gain somewhat of a national perspective for their deliberations, but electoral uncertainty was expected to keep them tied closely to the people's immediate desires. Longer terms, to use Governor Edmund Randolph's words at the convention, would give senators the firmness to resist the House's "democratic licentiousness." They would do so by giving senators a purely self-interested reason for avoiding a simply short-term view: at any given moment, as the provision was finally worked out, one-third of the Senate would be held accountable for its decisions not in one or two years but in five or six, after the decisions had been in effect for a while.

Recall and Rotation

The value of six-year Senate and two-year House terms would be lost, however, if members could be recalled in the middle of their terms or barred from running for reelection. The original Virginia plan for the Constitution followed the Articles of Confederation (Article V) by including rotation and recall provisions for the House (but not for the Senate). These were dropped later in the convention without controversy, but many Anti-Federalists tried to revive the ideas during the state ratifying debates. The argument in the ratifying conventions over recalling members in mid-term went over ground that should be familiar by now: Anti-Federalists wanted to keep legislators closely tied to their constituents; Federalists wanted some degree of legislative independence to permit a nationally focused process of deliberation.

In contrast with the recall debate, rotation raised some new issues that are important for understanding legislative self-interest and ambition. "Rotation is an absurd species of ostracism," said Robert Livingston in the New York state ratifying convention. "It takes away the strongest stimulus to public virtue—the hopes of honors and rewards." If the legislator's self-interest, or love of honor, is the source of his or her public virtue, how would a legislator faced with a term limitation react? Richard Harrison predicted in the New York ratifying convention that most would simply become lazy, unambitious and "regardless of the public opinion." But Alexander Hamilton warned the same convention that without a constitutional outlet for their ambition, many legislators would greedily use their office to line their pockets, while the most ambitious, feeling thwarted, might well think seriously of usurping power for themselves, or otherwise undermining the Constitution.

The way the Constitution's supporters talked about mandatory term limits helps clear up an important misconception about how they viewed political careers. A number of people today seem to yearn nostalgically for the "good old days," when members of Congress were political amateurs. These people seem to want—and to think the Constitution's Framers wanted—members of Congress to be men or women of the people who would see their legislative service as brief interruptions in a basically private career. It is true that most of the Framers expected the normal congressional career to be short. They expected that large numbers of sitting members would be defeated for reelection, and that others would find travel and life away from home unattractive. But whatever the Framers may have expected, they also wanted to encourage able politicians to satisfy their ambitions through careers in public service. That is why mandatory rotation was such an anathema to them.

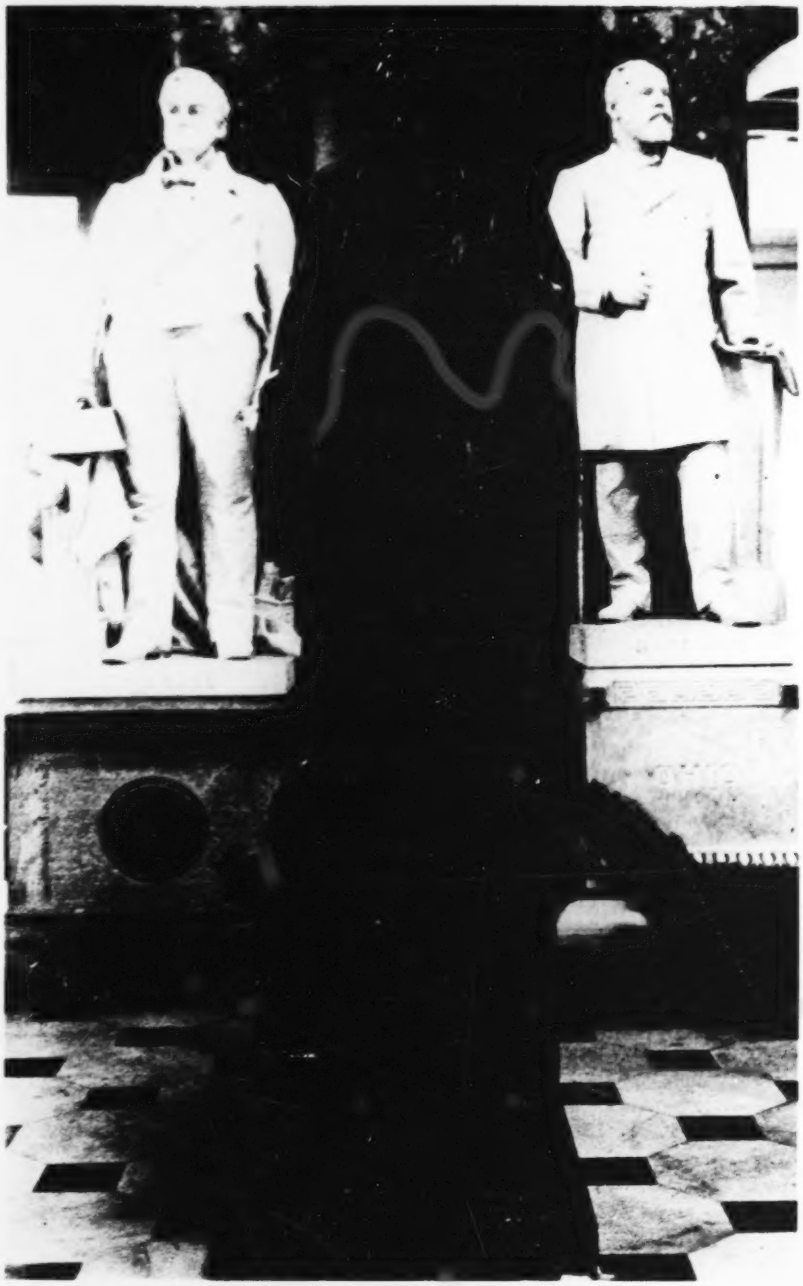
Ambition and the National Perspective

The issue of rotation shows that the Constitution's supporters believed a successful government must provide outlets for, and even encourage, political ambition. But what made the Framers think legislators would satisfy their ambition in a useful way? Specifically, since the people are the source of all honors and rewards in a democracy, what made them think ambitious legislators ever would be willing to act in the name of the national long-term good, instead of the immediate gratification of their own constituents?

There are three answers to these questions. First, by lengthening House and, especially, Senate terms, the Constitution gives representatives a good reason to worry about the long-range implications of their policy choices.

Second, by getting members of Congress to live in the Capital for a substantial portion of every two-year period, the Framers tried to put them in a setting where they would be concerned about their reputations in the eyes of their colleagues as well as about the immediate opinions of their constituents. Along these lines, it is worth noting that the members of the First Congress, many of whom attended the Constitutional Convention, apparently expected congressional leadership on individual issues to be based not on formal positions—the early congresses were relatively undifferentiated bodies formally—but on a member's ability to lead debate and persuade his colleagues of his point of view.

Finally, no position in the government set up by the 1787 Constitution was elected directly by the people except that of representative. To become a senator, president, judge or cabinet officer, a politician had to gain the respect and support of other practicing politicians. And in the case of the presidency—unlike today's situation with its primary-dominated nomination system—there was no way to attain the country's highest



Robert Livingston, *statue by E. D. Palmer. Library of Congress.*

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office without the support of a national cross-section of political leaders. The legislator who wanted to "move up", in other words, would simply have to broaden his vision beyond the immediate constituency to gain the respect of his colleagues.

The Framers' Argument as a Model for Contemporary Understanding

We can distill the Federalist argument still further. Because people are by nature selfish, it would be foolhardy to rely either on watchfulness or virtue for the protection of liberty. Therefore, institutions must be created that will supply people with self-interested reasons for acting in the public interest. Private vice does not equal public virtue, in the Framers' argument. Rather, private interest is a given, and properly shaped institutions can encourage—not guarantee, but encourage—private interest to seek satisfaction through behavior that will benefit the public.

Among the many kinds of institutional features the Framers might have considered for mediating the role of self-interest, two were given prominence. One was not discussed in this article: the checks and balances that make the branches of government powerful enough to protect themselves, and important enough to make capable officeholders want to serve in them. The other set related to constituencies, election, reelection and advancing from one office to the next. By focusing on these two kinds of features, while remaining largely silent about others, the Framers seemed to be saying these were the most crucial. Internal structures and procedures were less important and therefore perhaps not worthy of being in the Constitution for that reason alone. They also were seen, at least to some extent, as being derivative: internal structures and procedures would, after all, be devised by legislators whose characters and interests would be shaped by the incentives the Constitution did address.

The contemporary Congress is very different from the Congress of 1789. The most important changes of the past two centuries are well known: the growth of the government's and, with it, of Congress's agenda, the increased legislative power of the president, the direct election of senators, the growth in the importance of incumbency in House elections, the revolution in communications technology, and the highly differentiated organization of the House and Senate along both party and committee lines. But despite all of this change, the arguments of 1787-89 contain an underlying logical structure that still seems useful for organizing one's thought about Congress.

Many of Congress's internal institutional changes over the past two centuries were brought about directly or indirectly because of prior changes in the two kinds of features the Framers had identified as crucial. The committee system, for example, originally grew out of Congress's desire to assert its independence of the executive branch. The roles that members have been willing to let committee and party leaders play within Congress at different times have related directly to the members' changing views about their own reelection and career objectives.

Over the years, the Congress has departed from many of the Framers' specific intentions. Direct election, for example, has produced a very different Senate from the one originally envisioned. The reelection rate for House incumbents is much higher than originally expected and reflects a changed relationship between constituent and representative. The growth of the government and of the legislative agenda has substantially reduced the opportunity for deliberation by the full membership of either the House or Senate, as committees and their staffs perform tasks members once did themselves in the Committee of the Whole. So, even though the Framer's model for understanding incentives and results seems to remain useful, the contemporary Congress does not, in many ways, live up to their original expectations.

Before we become completely negative, however, we should recognize that at least some of the Framers' more important objectives have been met. The Framers wanted to be sure that members of Congress--in the face of inevitable pressures from their constituencies--would have some incentive for taking unpleasant, but needed actions. That the specific incentives have changed should be obvious. That members have not always taken unpleasant actions is clear, and no surprise. What is more remarkable in a democracy is how often the members have done so. That is no small matter. Congress remains by far the world's most important national legislature; the regime and its fundamentally free character have endured. These two facts, though not cause and effect, seem incontrovertably related.

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What Constitutional Changes Do Americans Want?

by *AUSTIN RANNEY*

Although some forums looked seriously at the heritage of American Independence, many of the activities inspired by the 1976 Bicentenary of the American Revolution fitted Webster's definition of "celebrations": they "held up for public acclaim" and "demonstrated satisfaction by festivities." There were no conferences, articles, or books asking whether American independence has been a good thing, or whether it fits the conditions of the twentieth century, or whether we should rejoin the British Crown.

In sharp contrast, many of the activities now being generated by the approaching Bicentenary of the Constitution are cerebrations. Scholarly undertakings, such as Project '87 and the American Enterprise Institute's Study of the Constitution, are holding conferences and producing books and articles (such as this) asking how and why the constitutional system of today differs from the system designed in 1787. In addition, a number of more activist groups, such as the Committee on the Constitutional System co-chaired by Lloyd Cutler and Douglas Dillon, are considering what changes need to be made in the Constitution to make it better able to cope with today's problems. And at least eleven proposals for amending the Constitution, ranging from equal rights for women to a mandatory balanced federal budget, are now at various levels on the nation's agenda. Indeed, the balanced budget amendment needs the support of only two more state legislatures to require Congress to call the first national constitutional convention since 1787. Accordingly, while we may commit some sins in observing the Constitution's Bicentenary, they are not likely to include smugness or mindlessness.

Most of the current cerebrations focus on what constitutional changes *should* be made, and pay little or no heed to how much popular support particular proposals are likely to attract. Such a focus seems entirely appropriate for scholars who wish only to describe, analyze, and explain the existing constitutional system. But scholars and other citizens who wish to *change* their system cannot escape considerations of how much popular support their proposals have now and how much more can be mobilized. This article is intended to be a modest contribution to discussions of constitutional change by reviewing some relevant data from public opinion polls; for, with all the perils of biased questions, skewed answers, and misleading interpretations that bedevil the polls, they still provide the best evidence we have on how our mass publics feel about proposals for changes in the Constitution.

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A first glance at the poll data quickly shows that survey respondents are receptive to some proposals for constitutional change, divided on others, and resistant to still others. Hence it seems useful to proceed by identifying the main types of current proposals and seeing what the polls reveal about the level of popular support for each.

Proposals to Institute Substantive Policies

Some of the most prominent current proposals for constitutional amendments do not seek fundamental changes in the structure of government or the processes by which public policy is made. Rather, they attempt to change certain policies made by the president, the Congress, and/or the courts; or they seek to institute policies that those policymakers are unwilling to adopt. Until recently the Equal Rights Amendment received far more attention than any other in this category, and the polls have shown consistently that about two-thirds of the public approve the amendment. However, after its passage by Congress in 1972, its proponents were unable to persuade the legislatures of three-fourths of the states to ratify it, falling short by three states. Since the most recent ratification deadline expired in

1982, one effort to get Congress to re-propose it has failed, and it has recently received less attention from the national news media.

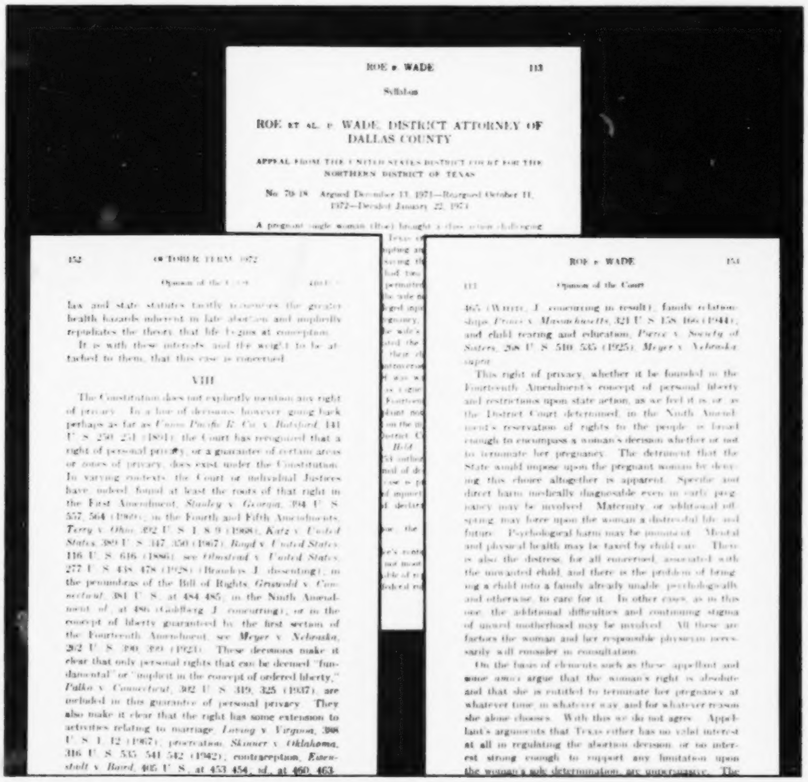
It has been replaced on center stage by the balanced budget amendment. By July of 1984 the legislatures of thirty-two states—just two fewer than the two-thirds required by the Constitution—have submitted petitions to Congress requesting that a constitutional convention be held to propose an amendment requiring the federal government to adopt balanced budgets except in times of national emergencies. It is too early to say whether two more states will join the petitioners, or whether the courts will regard the petitions already submitted as binding on Congress (many of them differ from the others in one respect or another), or whether Congress will respond by calling a convention or by submitting its own amendment to the states, or whether thirty-eight states would ratify such an amendment however proposed. Be that as it may, it is clear that the general idea has strong public support: for example, a 1983 Gallup poll showed 71 percent in favor and only 21 percent opposed, and other polls have produced similar results.

Another amendment in this category that has aroused strong passions is the proposal, which has a number of variants, to reverse a Supreme Court ruling by allowing states to hold organized prayers, on public school property during school hours, for children attending public schools. (Perhaps we should note in passing that Herbert Stein, the well-known economist, has proposed that the two amendments be consolidated into one providing that all school children be required to pray for a balanced budget.) This general idea also has strong public support: an NBC/AP poll in 1982 showed 72 percent in favor of "allowing organized prayers in public schools" and 28 percent opposed. However, in 1984 a proposed amendment to that end received the support of only 56 senators, 11 short of the necessary two-thirds majority, and for the moment the proposal is dormant (as is a related proposal to allow "silent prayers" during school hours).

Another well-publicized amendment intended to reverse a Supreme Court decision is one that would prohibit, or allow the states to prohibit, abortions except when necessary to save the mother's life. This is the only one of the amendments strongly supported by conservative and Moral Majority leaders that is opposed by the general public: a Louis Harris poll in 1982 showed 33 percent in favor and 61 percent opposed. Moreover, perhaps in keeping with this sentiment, an amendment recommended by the Senate Judiciary Committee in 1984 failed to win the necessary two-thirds majority from the whole chamber.

Proposals to Increase Direct Popular Control of Government

In their capacity as scholars if not as citizens, most historians, political scientists, and legal scholars are likely to be more interested in



ROE v. WADE 113

Syllabus

ROE ET AL. v. WADE, DISTRICT ATTORNEY OF DALLAS COUNTY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

No. 70-18. Argued December 13, 1971—Reargued October 11, 1972—Decided January 22, 1973

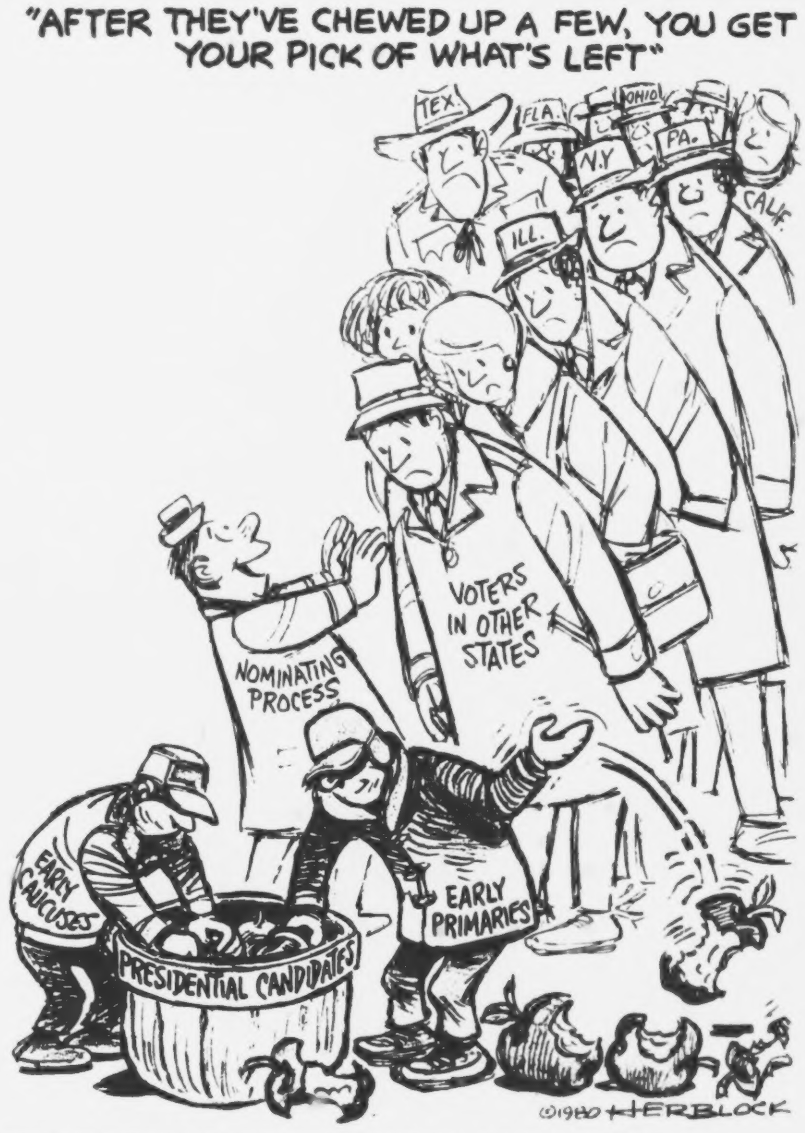
152 OCTOBER TERM, 1972

Opinion of the Court 410 U.S.

VIII

ROE v. WADE 153

113 Opinion of the Court



"After they've chewed up a few, you get your pick of what's left" -- from *Herblock on All Fronts* (New American Library, 1980).

the pending proposals to change one aspect or another of the Constitution's decision-making processes. One group includes proposals that seek to increase direct popular control of the national government in various ways. One of the most familiar items in this category is the perennial proposal to abolish the electoral college and institute direct popular election of the president. A 1981 Louis Harris poll showed 77 percent in favor of such an amendment and 21 percent opposed. Yet when such a proposal, strongly backed by President Jimmy Carter, was voted on by the Senate in 1979, it was supported by only 51 senators—well short of the number needed to submit it to the states.

A number of amendments are also being proposed to "democratize" the presidential nominating process, although none has yet gotten past the committee stage in Congress. Several proposed amendments would replace the present gaggle of state presidential primaries, caucuses, and conventions with a series of regional primaries. A recent Gallup poll reported 66 percent in favor of such a change and 24 percent opposed. Another proposal would go even farther by mandating that both parties choose their presidential nominees in one-day national primaries. This proposal has received less attention recently, but a 1980 Gallup poll showed 66 percent in favor and 24 percent opposed.

Perhaps the most radical of the "democratizing" amendments is one proposed by former senator James Abourezk and representatives Guy Vander Jagt and James Jones in 1977 to establish legislation by popular initiative on the national level comparable to the systems now operating in many of the states. Their amendment failed to get out of committee in either chamber, but a Gallup poll at the time showed 57 percent in favor and 21 percent opposed.

One other proposal that might be placed in this category is the amendment to give the District of Columbia two senators and at least one representative, all with full voting rights, in Congress. This proposal received the necessary two-thirds approval by both houses of Congress in 1978, but by July 1984 it had been ratified by only sixteen states; it requires twenty-two more by the end of August 1985. I have been unable to find a national public poll on the proposal, but the leaders of the "D.C. voting rights" movement have apparently given up on it and have shifted their efforts to getting the District admitted to the union as a full-fledged state.

Proposals to Make Government Less Political and/or More Efficient

While not uninterested in many of the proposals for constitutional change in the first two categories, scholars have generally conferred, lectured, and written considerably more about proposals in a third category—those that seek, in one way or another, to overcome the fragmentation of power, internal

> *A number of eminent reformers believe that the greatest deficiency in our constitutional system is the separation of powers between the president and Congress and the consequent endemic discord in their dealings with each other.*

antagonisms, and weakness of leadership they see in our constitutional structure so as to make it capable of developing, adopting, and implementing truly coherent and consistent policies. These proposals, in turn, can be divided into four main subgroups:

1. *By Limiting Tenure in Office.* A number of people believe that one of the worst aspects of our present constitutional system is the fact that the terms of some or all of our national elected officials are so short that they are forced to spend most of their time and energies in office on running for reelection and thus have too little time to develop and work for long-range programs. Accordingly, one much-discussed proposal, advocated by former president Jimmy Carter among others, would change the president's term of office from four years to six and make him ineligible for reelection. The public, however, is apparently torn between the desire to have a president "above politics" and the desire to have a president they can turn out of office in less than six years if they do not like him: A 1982 Gallup poll showed 49 percent in favor of the single six-year term and 47 percent opposed.

They are less divided about proposals for limiting the terms of members of Congress: a 1982 Gallup poll showed 61 percent in favor and 32 percent opposed to an amendment to limit both representatives and senators to a total of twelve years in office.

2. *By Giving the President an Item-Veto over Appropriations.* Despite the reformed congressional budgetary process adopted in the mid-1970s, the polls show that most people blame Congress more than the president for the soaring expenditures and deficits of recent years. It is therefore not surprising that a proposed amendment to give the president the power to veto individual items in appropriations bills—a power now enjoyed by the governors of forty-four states—was shown by a 1983 Gallup poll to be approved by 67 percent and opposed by 25 percent.

3. *By Bridging the Separation of Powers.* A number of eminent reformers believe that the greatest deficiency in our constitutional system is the separation of powers between the president and Congress and the consequent endemic discord in their dealings with each other. Few reformers propose to remedy this congenital incapacity by the root-and-branch substitution of a British-style parliamentary system, but many advocate the construction of a series of bridges between the two branches comparable to those in Westminster. For example, some urge that cabinet members be given seats and voices in Congress. Others propose that the president be required to choose cabinet members from among members of Congress. Still others advocate giving the president the power to dissolve Congress and call a new election whenever necessary to break a deadlock.

It would be illuminating to know how ordinary Americans feel about the specific proposals and about the general idea of substituting British-style concentration of powers for our traditional separation of powers. Unfortunatley, I am unable to find recent polls that bear directly on these questions, but perhaps public attitudes on the fourth subgroup of proposals can cast at least some indirect light on whether Americans want a more coherent and disciplined constitutional system.

4. *By Establishing Responsible Party Government.* Ever since the 1870s a succession of distinguished American writers—Woodrow Wilson, Frank Goodnow, E. E. Schattschneider, David Broder, and James MacGregor Burns, among others—have argued that America badly needs a more effective and responsible governing system, one that is capable of developing and carrying out coherent programs of public policy and accepting the responsibility for the programs' consequences. Most of them have agreed that formally replacing our presidential system with some version of the Westminster model is not only politically impossible but institutionally unnecessary. They say that we can get the same results much more easily by developing outside the written Constitution a system of "responsible party government." That system has three basic requirements: First, after each election one party must be in control of both the presidency and the Congress. Second, all the majority party's members in both branches must act together cohesively on all policy matters. And third, at each election the governing party must be held fully responsible, *as a party* and not as a collection of independent officeholders, for how well or badly the party has exercised its stewardship. With such responsible parties, these writers say, we can achieve truly coherent and democratic government without changing a word of the written Constitution.

How do the American people feel about responsible party government? I have been able to find only one piece of direct evidence from the public opinion polls, and the circumstances in which the questions were asked are worth recalling. As the 1976 election approached, the United States had had divided party control of the national government (a president of one party and a Congress controlled by the other) for sixteen of the thirty years since World War II. The Louis Harris organization wanted to know whether the public thought that, aside from the individual merits of Gerald Ford and Jimmy Carter, it would be good to have both the presidency and the Congress controlled by the same party. So they asked their respondents a question bearing directly upon the first condition of responsible party government—one-party control:

> In general, do you think it is better for the country to have Congress under the control of one party and the White House under the control of another party so that there is a way for each to keep the other under control, or do you think it is better to have the Congress and the White House under the control of the same political party so that the business of the federal government can be done more effectively?

They asked the question in Au-

British Parliament buildings. ***Library of Congress.***

There is considerably more resistance to constitutional change in the Congress than in the general public.

gust and again in November after the election. On both occasions the respondents divided almost evenly:

	August	*November*
Favor divided control	40%	39%
Favor same-party control	38	45
Not sure	22	16

Harris reported that those who preferred same-party control gave as reasons, "Real problems of the country will be neglected in the stalemate that takes place between the White House and Congress"; and "real reforms to make the federal government more efficient won't be enacted." Respondents favoring divided control commented, "It's a good way to be sure that one party can't get away with corruption and misuse of power in office"; and "the growth of big government and big federal spending can be prevented better."

The voters' choices in national elections since World War II provide additional evidence. From 1946 to 1982 there were a total of nineteen congressional elections and therefore nineteen opportunities to choose Congresses controlled by the president's party. Only nine produced same-party control of both houses of Congress and the White House. So it seems that divided party control, not same-party control, has been the more normal situation in American government.

This state of affairs is possible, of course, only if a good many voters regularly split their tickets, and that is just what they have done. Survey evidence shows that in the 1960 election only 35 percent of the voters voted split tickets, but in 1964 the proportion rose to 57 percent, in 1968 it was 66 percent, and in 1972 it was 67 percent. I estimate that the level remained at about two-thirds in the 1976 and 1980 presidential elections. Evidently, then, achieving same-party control of the national government's three elective agencies is not highly valued by well over half of the American electorate.

Conclusion

Neither the polling nor the voting data provide conclusive evidence about what kinds of constitutional change Americans want, but the survey answers are suggestive. For example, it is clear that survey respondents are considerably more receptive than members of Congress to constitutional change. We have reviewed eleven proposed constitutional amendments that have recently been introduced in Congress. Substantial majorities of the general public have favored nine of the eleven (ERA, balanced budgets, school prayers, direct election of presidents, regional presidential primaries, a national presidential primary, national initiative, limiting terms of senators and representatives, and presidential item veto). Popular majorities have rejected only one proposal (outlawing abortions), and respondents were evenly divided on another (a single six-year presidential term). By contrast, Congress has sent only one of these proposals (ERA) to the states for ratification; it has given two others less than the necessary two-thirds majorities; and it has taken no action on the others. On this showing, then, there is considerably more resistance to constitutional change in the Congress than in the general public.

Be that as it may, is there any common theme underlying the changes survey respondents favor and reject? I believe there is. They approve proposals to require a balanced federal budget and to give the president the power to veto individual items in appropriations bills, both of which are intended to restrain federal spending. They approve leaving it up to each state and locality to decide for itself whether it wishes to have school prayers. They *dis*approve a federally-imposed ban on abortions, evidently preferring to leave the matter to private decision.

They also approve a number of proposals to give the people more direct power over national public officials, by direct nomination and election of the president, by limiting congressmen's tenure in office, and by giving the people the power to bypass Congress and legislate by popular initiative.

These proposals are all intended to limit the reach and power of the national government in one way or another. It should not surprise us that survey respondents favor them, for they are entirely in keeping with what the polls have been telling us is the prevailing popular mood since the late 1960s. It remains to be seen whether that mood will persist and, if so, whether it will become strong enough to overcome the continuing reluctance of Congress to make very many or very drastic constitutional changes of any kind. And that, in turn, will determine whether the United States will celebrate the bicentenary of the Philadelphia convention mainly by celebrating and cerebrating about the Constitution or by changing it.

Austin Ranney, a former president of the American Political Science Association and member of the Joint Committee of Project '87, is a resident scholar of the American Enterprise Institute for Public Policy Research. His recent works include *Channels of Power: The Impact of Television on American Politics*.

Federalists and the Idea of "Virtue"

by THOMAS L. PANGLE

The appeal to "virtue," as an essential foundation of a sound republic, was of no small importance in the thought of the Founding Fathers. This appeal represented a continuation, in some measure, of a very old tradition of republican reliance on virtue, a tradition stemming from the theory and practice of Greco-Roman antiquity. Yet, at the same time, the Founders' political thought was decisively influenced by a radically new conception of human nature drawn from modern political philosophers like Montesquieu, Locke, Hume, and (more indirectly) Machiavelli; and this new conception entailed a dramatic transformation in the meaning and status of virtue in life. To understand what the most insightful of the Founding Fathers saw as the future meaning of morality in America, we need to try to rethink for ourselves this complex and momentus combination of old and new.

In our time, talk about "virtue" tends to have a rather archaic, even a priggish ring. Such was not the case among ordinary Americans in the Founding period. And the leading or most sophisticated Framers, while not given to moralizing, did, on weighty occasions, stress the new constitution's dependence on special moral qualities in both leaders and citizens. *The Federalist* essays (to take the most notable example) begin their defense of the new constitution by reminding readers of the virtues displayed during the Revolution: fraternity, and a valiant capacity for self-sacrifice in the name of liberties conceived as "sacred." The same work moves to its conclusion with Hamilton declaring that "the only solid basis of all our rights" is "public opinion, and the general spirit of the people and the government" (*The Federalist* No. 84).

Madison spoke in a similar vein when he rose on June 20, 1788, to defend the new constitution in the debates at the Virginia ratifying convention: "I go on this great republican principle, that the people will have virtue and intelligence to select men of virtue and wisdom. Is there no virtue among us? To suppose that any form of government will secure liberty or happiness without any virtue in the people is a chimerical idea." Ten days earlier, in the same debates, John Marshall spoke of "certain fundamental principles, from which a free people ought never to depart." These included "the favorite maxims of democracy: a strict observance of justice and public faith, and a steady adherence to virtue."

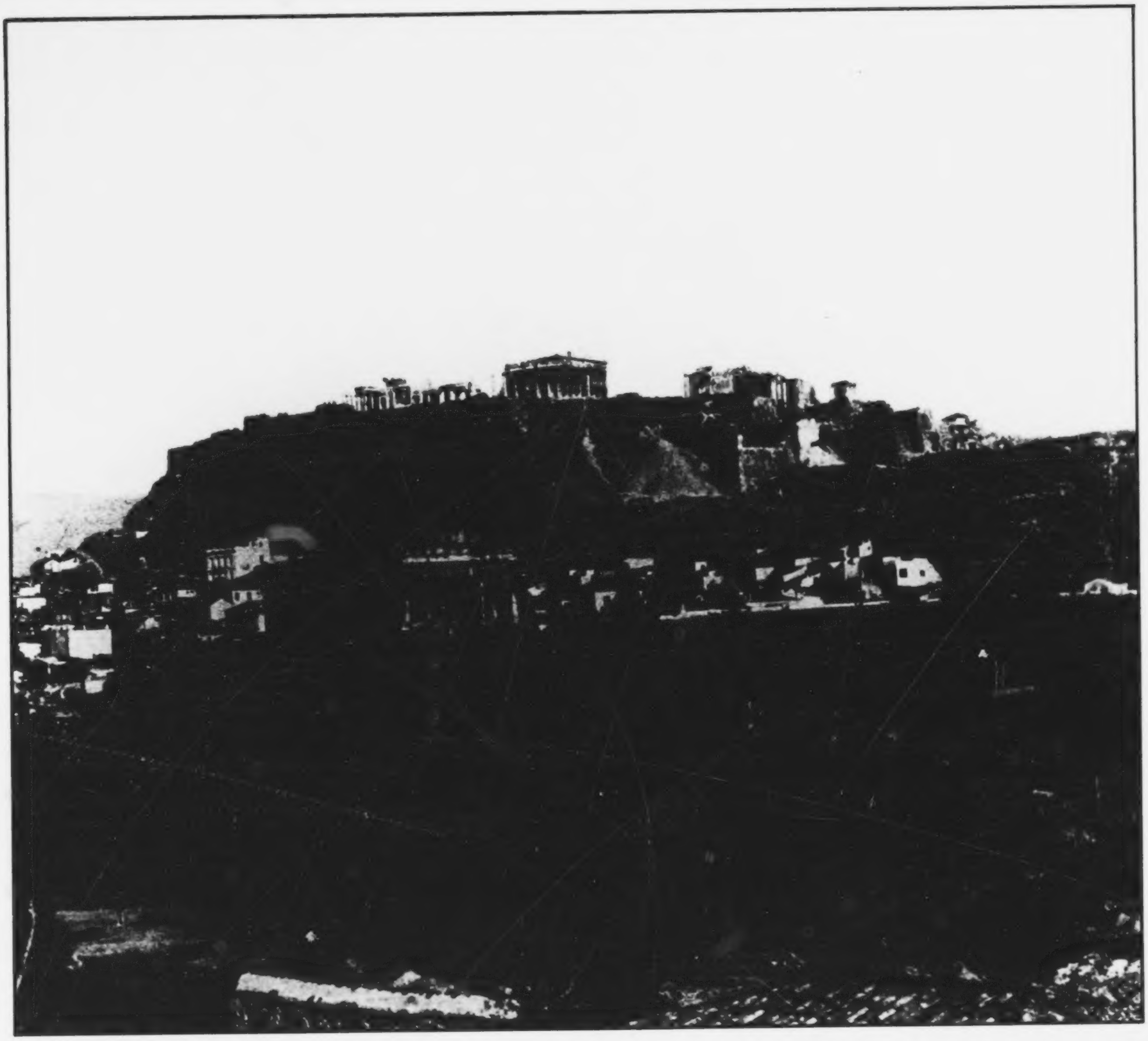
Montesquieu. ***Library of Congress.***

Such appeals to "favorite maxims of democracy" evoke the well-known legacy of classical republicanism, a legacy seen as well in the pen-name the authors of *The Federalist* chose: "*Publius*" (a name intended to recall Plutarch's biography of the heroic founder of the Roman Republic, Publius Valerius Publicola). Evocations of this kind were a salient feature of the rhetorical landscape during the founding debates, and they had a resonance that was more than merely ornamental. This becomes especially clear if one looks beyond *The Federalist* to the lesser pamphlets and journal articles which supported ratification.

The Attack on the Classical Heritage

Still, the most thoughtful of the Federalists temper their expressions of respect for the classics with sharp criticisms and a proud assertion of radical innovation. At the very outset of *The Federalist*, the new "Publius" lends his support to the idea that "it seems to have been reserved to the people of this country . . . to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice." He thus foreshadows the view he will later state more emphatically, that nothing accomplished by the ancients can be said to have resolved the question: "It is impossible to read the history of the petty republics of Greece and Italy without feeling sensations of disgust and horror" *(The Federalist* No. 9). As *The Federalist* essays proceed, they elaborate an attack on the spirit and practice of classical republicanism that comes more and more to the fore and grows in intensity and precision.

In the eyes of the new Publius,



The Acropolis, Athens. *Library of Congress.*

the classics' emphasis on virtue and heroism went together with an unfortunate zeal for direct self-government in small, tightly-packed urban societies. The diminutive size of these ancient republics left them prey to the unceasing danger of foreign invasion, while their fierce and jealous sense of independence rendered them incapable of concerted defense, and prone to fratricidal strife. Thus exposed, they naturally tended to transform their citizens into soldiers, their cities into armed camps; but instead of achieving security by such measures, they spawned in themselves imperialistic capacities and longings. This militarism was a principal source of the pressure towards homogeneity that exerted itself relentlessly on domestic politics within the classical republic; other sources, however, had an even greater significance. Chief among these was the attempt to stifle the internecine factions that were endemic to the small republic by imbuing all citizens with similar tastes, opinions, and property holdings. This effort inevitably failed, because the natural diversity of men cannot be removed or overcome for long. What resulted from the doomed attempt, in practice, was either the tyrannizing of the many by a few or, much more frequently, the tyranny of the majority—led by some "heroic" or much admired dictator-demagogue. The tempestuous, imprudent, and petty politics of such republics endangered the security and property of every minority and, indeed, every individual (*The Federalist* Nos. 6–10, 18, 38).

The Classical Conception of Virtue

This trenchant criticism—a criticism repeated, in abbreviated form, by Jefferson in his attack on the Roman Republic in *Notes on the State of Virginia*, Query 13, end—all but compels the thoughtful reader to turn back to the classical historians and political theorists in order to see more clearly just what the alternative notion of republicanism is against which the American version defines itself. In following this path, we soon see that the new Publius's characterization of the classics is correct in one massive respect. In contrast to the American Founders, classical re-

The classical virtues *are those rarely realized qualities of character by which human beings express in a harmonious, rational way their natural passions.*

publicanism placed much less weight on the need to secure individuals and their "rights"—rights to private and family security, to property, and to the "pursuit of happiness" as each person sees fit. Again, both versions of republicanism praise political rights, or self-government; but the American Founders tend to honor political participation less as an end and more as an essential means to the protection of pre-political, personal rights or claims. Nevertheless, it does not follow that the classical tradition pursued political power and glory with such lack of qualifications and restraint as one might suppose from what Jefferson and *The Federalist* say.

The fact is that the classics were prone to view the nobility of republican self-government in a rather different light from that in which Publius sees it. What Publius regards as a foolish and ultimately tyrannical attempt to homogenize the citizenry in order to prevent faction, the classics tended to conceive as the necessary prerequisite to cultivating a sense of brotherhood—which they saw as a natural and positive, even capital, political good in its own right. Yet the classics assigned to both fraternity and political liberty a rank *below* that of virtue.

The classical understanding of virtue begins by giving full weight to the fact that the goals of politics which first come to sight as lending dignity to men are freedom for one's own people, and rule over others; but the classics contend that the very experience of liberty, and empire, reveals that these shining objects of ambition collapse into negative self-assertion and vulgar prestige unless they are given more precise definition and limitation in terms of the virtues or aspiration to the virtues.

The *virtues* are those rarely realized qualities of character by which human beings express in a harmonious, rational way their natural passions; the four "cardinal" virtues are courage (the capacity to face fear of death on the battlefield), moderation (the proper subordination of sensual appetite and pleasure), justice (reverence for law, unselfish sharing, public-spirited service to the community), and practical wisdom in taking supervisory or paternal care of inferiors. These character traits are valued in part because of their effectiveness in promoting the safety, prosperity, and freedom of society; but according to the classics these virtues cannot continue to exist once they are esteemed merely as "good" (useful): they *are* truly, they exist truly, only when they are treasured as "noble" or beautiful—as ends in themselves, as the purposes of life. The virtues, then, and virtuous men, cannot be adequately understood as instruments for liberty or for the release from danger and necessity; on the contrary, liberty, as something of inherent worth, only makes sense in the final analysis when it is seen as a means to, as an opportunity for the expression of, the virtues and virtuous men.

It thus transpires that for the classics the excellences of the good citizen or statesman bulk large in, but do not exhaust, the excellences to which a healthy society is dedicated. Incorporating but extending beyond the "political" or "civic" virtues are the "moral" virtues, which include such more private excellences as generosity, wit, truthful conversation, friendship, and, at the peak, the intellectual virtues and the contemplative life through which the fullest self-consciousness is attained. The latter necessarily involves piety or at any rate the ceaseless meditation on the challenge of piety, whether by way of scripture or the songs of inspired poets.

The American Reordering of Priorities

Once we have caught even a fleeting glimpse of what classical republicanism, in its pristine form, meant by "virtue," we begin to realize the extent to which there lies at the heart of the American version of republicanism a *new* conception of both the nature and the status of virtue. For the authors of *The Federalist,* as for Jefferson, virtue—when or insofar as it emerges in public life—represents at most an important *instrument* for security, liberty, and fame. Jefferson and Publius could not have reversed, in this way, the rank-ordering of virtue and liberty or self-government without endorsing, simultaneously, a change in the meaning of both. Let us consider first the change in the meaning of self-government.

The New, Egalitarian Basis of 'Legitimate Government'

For the classical tradition, self-government aspires to be a vehicle for the practice, and a means to the promotion, of the moral virtues. It follows that the clearest title to participate in government belongs to those who demonstrate the most virtue or the most potential for virtue or the greatest concern for virtue: republics properly tend away from democracy and toward aristocracy. True aristocrats ought not to serve the people in the sense of obeying them, but ought rather to aim at guiding them toward a better way of life. It may well be that in most actual situations prudence counsels the most virtuous to settle for a regime in which they share

It is enlightened and sober self-interest, more than a reverence for the sanctity of tradition, that Publius counts on to sustain the citizenry's respect for the law.

power with others and ratify their authority by gaining the consent of the governed. Allowing the majority a significant voice in government may be one important instrument of popular moral education; requiring rulers to gain the consent of the ruled is a mighty bulwark against tyranny and can in some circumstances contribute to the wiser selection of those most suited to rule. Nonetheless, the classical historians and philosophers refuse to concede that popular consent is the sole or even the preeminent source of legitimate political authority.

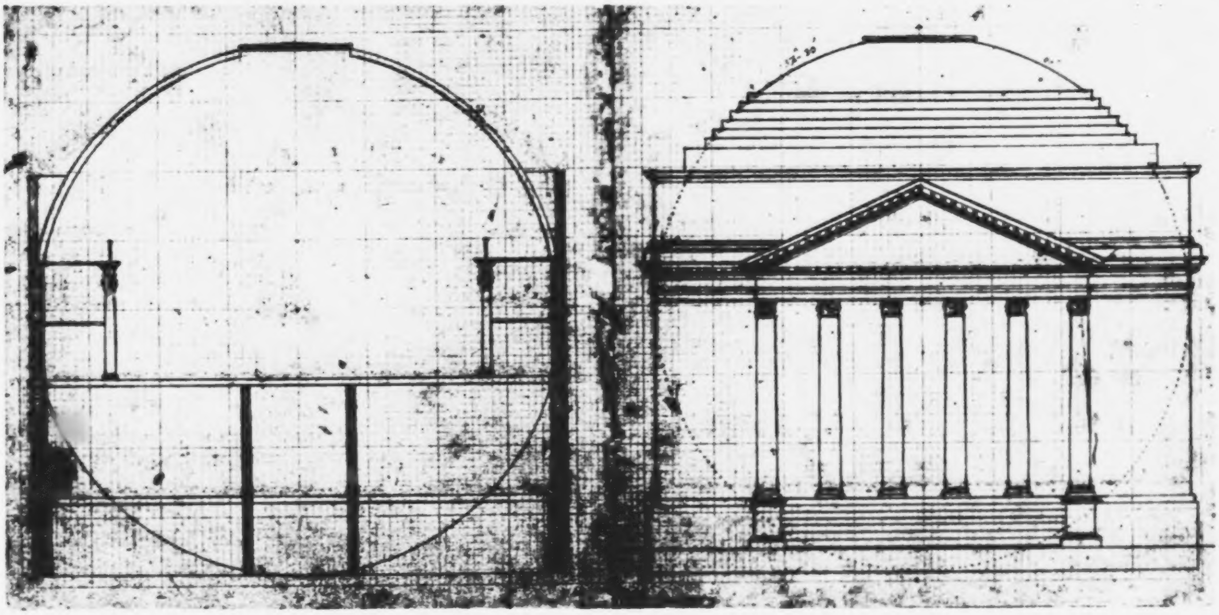
The authors of *The Federalist* assert, on the contrary, that "the people are the only legitimate fountain of power" (*The Federalist* No. 49). What is more, the "genius of republican liberty" (as Publius understands it) demands that government be "strictly" republican—i.e., "a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior" (*The Federalist* Nos. 37, 39). Since, for *The Federalist*, virtue is no longer a *raison d'etre* of the political order, it ceases to bestow on its possessors a primary or indisputable title to rule. Men of outstanding quality gain authority only derivatively, by winning the consent of the people—which they accomplish by demonstrating their efficacy in promoting popular liberties. If virtue, in the classical sense, must be modified or compromised in order to perform this task, then so be it. Once in positions of authority, even rulers who are virtuous are supposed to govern as the servants, the "representatives," in the strict sense, of the people.

In the people's implicit or explicit act of consenting to the Social Compact, all members of the people are to be understood and treated as equals—no matter how unequal they may be in intelligence, experience, morals, and taste. For these latter qualities are of lower rank, politically speaking, then the rights, liberties, and capacities for informed consent which all sane adults are held to share equally. This basic, radical egalitarianism of *The Federalist* is explicitly and directly derived from the "fundamental principles of the Revolution" (*The Federalist* No. 39), e.g., Jefferson's Declaration of Independence (Nos. 40, 48, 49); in the latter, there is to be found hardly any mention of virtue, but instead a ringing proclamation of the equality of man in the most important political respect, in respect to basic liberties or rights.

It is true that this equality of men in the most fundamental respect does not translate into an unqualified equality in the political process. After a people has been established by unanimous consent, or after each adult has accepted or refused the right to emigrate and has therefore signalled such consent, the choice of a form of government and of representatives devolves not on all, but only on "the great body of" the people. All are understood to have consented to limitations on the right to vote which can plausibly be said to help insure the sensible representation of each. Thus the mentally incompetent, convicted criminals, citizens who fail to register, pay their taxes, or meet certain minimal education and property qualifications, children, and adult dependents (including especially women) were generally held, at the time of the Founding, to be reasonably disenfranchised by their imputed consent. The precise determination of eligibility to vote is a matter of prudent policy as well as natural right, and it is left by the Constitution to the state governments. Yet as regards the status of blacks in the southern states (free blacks were voting citizens in northern states at the time of ratification), the authors of *The Federalist* cannot refrain from indicating their revulsion at the compromise with principle they have had to make in order to win the consent of the white majority in the south. They label black slavery a "barbarous" and "unnatural" practice, inflicted on "unfortunates" who can and must be regarded even by slaveholders as "moral persons, not as mere articles of property." (The Constitution itself never refers to the blacks as slaves, but always as persons—as Frederick Douglass was later to stress.) "It is admitted," Publius gravely declares, "that if the laws were to restore the rights which have been taken away, the Negroes could no longer be refused an equal share of representation with the other inhabitants" (*The Federalist* No. 54).

The New Meaning of Virtue

Regarding the new content of virtue or the virtues, one may circumscribe Publius's departure from the classical tradition by saying that in *The Federalist*—as in Jefferson's writings—the image of statesmanship and citizenship has been disencumbered (or disemboweled) of much of the military spirit, aristocractic pride, reverence, and austere self-restraint exhibited by Plutarch's heroes and citizens or by Aristotle's gentlemen. The old cardinal virtues are not jettisoned, but they are infused with a new spirit and expressed in a new practice. The authors of *The Federalist* remain almost totally silent about



Jefferson's plans for the Rotunda, University of Virginia. ***Thomas Jefferson papers, University of Virginia Library.***

awe for the divine, and respect for the contemplative life that claims to be the closest to the divine. We hear them remark repeatedly on the value of "moderation": but what *they* mean by this word is not so much a divine or noble control over selfishness and carnal appetite as it is a calm and prudent calculation of self-interest that serves to temper fanaticism—including excessive zeal for religion and for moral virtue.

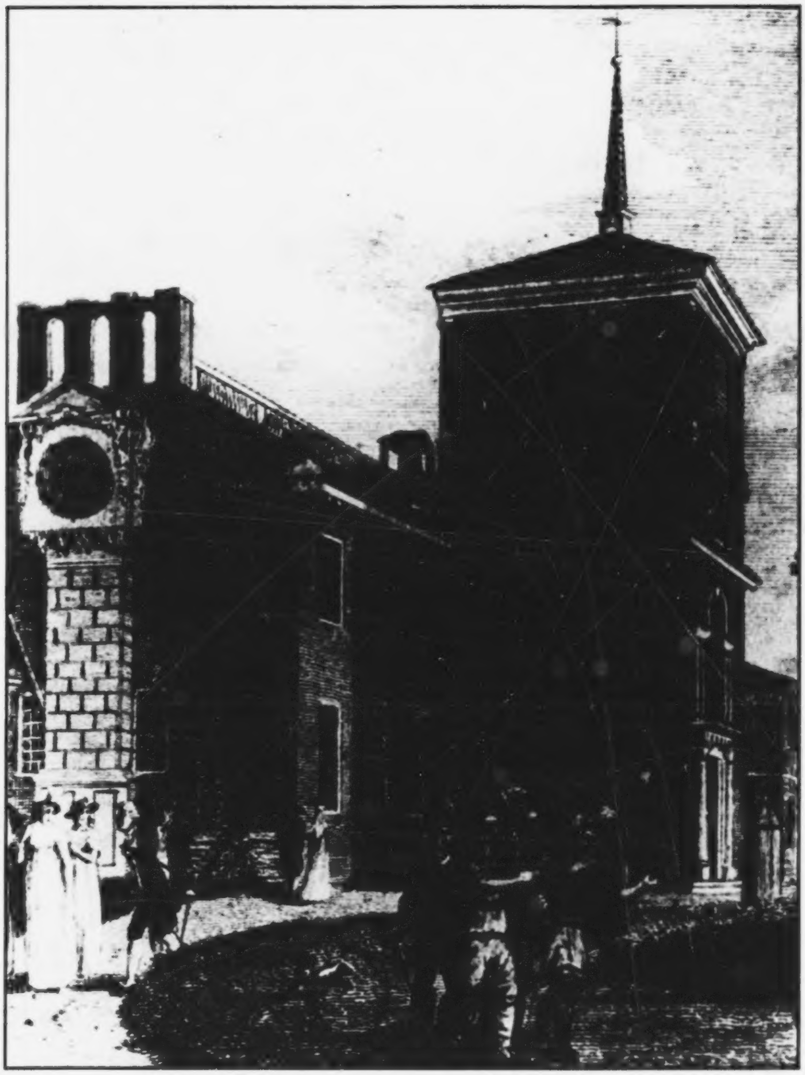
It is this same enlightened and sober self-interest, more than a reverence for the sanctity of tradition, that Publius counts on to sustain the citizenry's respect for the law (though in this key respect Publius departs less radically from classical republicanism than does Jefferson: *The Federalist* Nos. 25, 49). The Founders do indeed rely on "the vigilant and manly spirit which animates the people of America" as the ultimate bulwark against injustice (*The Federalist* No. 57; cf. 28, 55). But the hope and expectation is that for the mass of the citizens intense, public-spirited political involvement will be rare, and aimed at restricted and temporary goals. Publius speaks with gravity of "that honorable determination which animates every votary of freedom to rest all our political experiments on the capacity of mankind for self-government" (*The Federalist* No. 39); but he also locates the distinctive superiority of the American over the classical regime in the American use of *representative* government over a large nation—thereby making possible "the total exclusion of the people in their collective capacity, from any share in" government (No. 63). The vast majority participate only indirectly, through elections, and more often than not act so as to support particular, partisan "factions."

For Publius (departing, in this crucial respect, from Jefferson) refuses to countenance placing any check, in the name of virtue, on a rampant "avarice" and avidity for business, issuing in the unlimited growth of material prosperity and even luxury. The American Constitution is intended to establish a "commercial republic" of unprecedented intensity:

> The prosperity of commerce is now perceived and acknowledged by all enlightened statesmen to be the most useful as well as the most productive source of national wealth, and has accordingly become a primary object of their political cares. By multiplying the means of gratification, by promoting the introduction and circulation of the precious metals, those darling objects of human avarice and enterprise, it serves to vivify and invigorate all the channels of industry and to make them flow with greater activity and copiousness. The assiduous merchant, the laborious husbandman, the active mechanic, and the industrious manufacturer—all orders of men look forward with eager expectations and growing alacrity to this pleasing reward of their toils. (*The Federalist* No. 12).

This means to say that the manly spirit we have observed Publius ascribing to the populace is misunderstood if it is conceived mainly as an attribute of the revolutionary warrior. American manliness naturally expresses itself in an "adventurous" entrepreneurship "which distinguishes the commercial character of America," and "has already excited uneasy sensations in . . . Europe": "the industrious habits of the people of the present day, absorbed in the pursuit of gain and devoted to the improvements of agriculture and commerce, are incompatible with the condition of a nation of soldiers, which was the true condition of the people of those [ancient] republics" (*The Federalist* Nos. 7, 8, 11). Even Jefferson, with his strong fears of non-agrarian commercialism, was relentless in attacking the laws of primogeniture which had in past ages limited the possibilities for speculation, growth, and acquisitiveness on the part of landed proprietors.

The qualities the Founders encourage and allow, or expect to



Independence Hall in the eighteenth century. *Supreme Court Historical Society.*

develop, in the people at large will naturally be reflected in that people's chosen leaders. The classical tradition tended to seek leaders especially among the landed gentry, whose economic base (relatively unchanging family estates) made possible contempt for business and respect for a life of private leisure and public service. *The Federalist*, in contrast, looks to lawyers and merchants, the latter of whom it calls "the natural patrons and friends" of the manufacturers (*The Federalist* No. 35). This does not mean that Publius thinks America can get along without patriotic politicians and at least some statesmen of rare strength—leaders possessed of unusual "fortitude" of spirit, long range ambition, and far-sighted practical "wisdom" (*The Federalist* Nos. 55, 57, 64, 65, 68). On the whole, *The Federalist* seems to be confident that such men will arise spontaneously, without special efforts of cultivation, education, and encouragement.

Yet at the same time Publius warns against counting on the availability of "enlightened statesmen" (*The Federalist* No. 10). What is more, Publius is willing to raise in public some doubts as to whether statesmen can be trusted to work for the common good. To be sure, in this respect the Founders are not nearly as extreme as most of their opponents (the "Anti-Federalists"). Publius acknowledges that "there are men who could neither be distressed nor won into a sacrifice of their duty"; but he immediately adds that "this stern virtue is the growth of few soils" (*The Federalist* No. 72). Yet perhaps the most revealing disclosure of Publius's inner thought on the place of the moral virtues in the human heart comes in No. 72, where Hamilton speaks, in accents that are purely Machiavellian, of "the love of fame" as "the ruling passion of the noblest minds." The noblest men, those who are presumably most familiar with the moral virtues, are not ruled by the love of virtue. Accordingly—given the rarity of the noblest men, and the doubts about even *their* purity—a sound regime as the authors of *The Federalist* envisage it will trust less to the high moral quality of its leaders and more to an institutional system that pits the leaders' competing selfish passions against one another:

> The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust. *(The Federalist* No. 57)

and

> Ambition must be made to counteract ambition.... It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature?... This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs.... (*The Federalist* No. 51)

The Questions

One can imagine the questions concerning virtue that might have been addressed to the Founders by

A sound regime as the authors of The Federalist *envisage it will trust less to the high moral quality of its leaders and more to an institutional system that pits the leaders' competing selfish passions against one another.*

Plato, Aristotle, Cicero, or even Plutarch: "You avow your dependence on some version—however diluted and truncated—of what we called 'the virtues'; but does your new order adequately cultivate even this modified virtue? *Can* virtue in any form be cultivated by a regime which regards virtue as a means rather than an end—or does virtue not begin to die out when it is so conceived?"

A survey of the chief moral-educative devices advocated by the classical republican tradition reveals that almost all are excluded from the American system. The Constitution imposes minimal qualifications for holding high legislative or executive office—and no qualifications whatsoever for holding high judicial office. Titles of nobility, the traditional rewards for and means of recognizing outstanding merit, are prohibited. Benjamin Franklin's attempt, at the Constitutional Convention on June 2, to argue that the executive branch should receive no salaries, but only honor as recompense, "was treated with great respect," Madison reports, "but rather for the author of it, than from any apparent conviction of its expediency or practicability." The citizen army—a crucial moral anchor and training ground of Aristotelian "polity"—is viewed more as an unfortunate necessity than as a vehicle for inculcating habits of service, discipline, and brotherhood (*The Federalist* Nos. 24–29, 46). Similiarly, the institution of the jury trial can be discussed without reference to its educative effects on jury members (*The Federalist* No. 83). George Mason's motion at the Convention on August 20, that Congress be given the power to enact "sumptuary" laws (laws that limit luxury, conspicuous consumption, and public displays of self-indulgence) was immediately voted down eight states to three; then, when Mason stubbornly reintroduced the suggestion on September 13, it was sent to a committee that seems never to have reported. Most revealing of all, the Constitution prohibits the establishment of any civil religion, and thus opens the way to fragmentation of religious belief and disintegration of the shared religious tradition that was held to be the backbone of classical republicanism.

It is sometimes said that the Founders, or at least some of them, were looking to the political and religious life of the several states to provide the requisite civic and moral edification; while there is some truth to this suggestion, a reading of the closed convention debates in fact leaves one surprised at how little reference there is to any such role for state and local government. And the letters of some of the leading Founders (especially Madison's) reveal that, if anything, the Founders were more deeply concerned lest the states bulk too large in the lives of the citizens of the nation.

The Founders, for all their sobriety, were seized by a hope that would have appeared, from the perspective of the previous or classical tradition of republicanism, to be truly extraordinary in its boldness: an acquisitive, and radically permissive or individualistic society, which treats virtue as at most a noble means, is supposed to continue to produce sufficient virtue in the citizenry, and enough leaders of outstanding virtue, to maintain uncorrupted the institutions of a massive, extended republic. The classics surely would not have been surprised by the continuing uneasiness, among some of the principal founders, over the feebleness of civic education in the new order. Jefferson's proposed educational reforms for the state of Virginia; Washington's (and others') proposals for a national university for the training of political leaders, a proposal Jefferson re-focused in his plans for the University of Virginia; the concern among many Federalists for the preservation of some spirit of gentlemanliness in the new administration; the earnest attempt on the part of federal judges to instruct their circuit juries not only about the cases at hand but more generally about the principles of free government; the appending of a Bill of Rights to the Constitution, in part to remind and educate future generations: all these are symptomatic attempts to fill the perceived gap. But whether these measures are or ever could be adequate to the task of producing great statesmen and a virtuous citizenry remains a pressing and a doubtful question—a question which casts a faint shadow over the celebration of our Constitutional Bicentennial.

Suggested additional reading:

The Federalist Papers, esp. nos. 1, 2, 4, 6, 7, 8, 9, 10, 11, 12, 14, 15, 18, 23, 35, 37, 39, 49, 52, 55, 57, 63, 72.

David F. Epstein, *The Political Theory of The Federalist* (Chicago: University of Chicago Press, 1984).

Herbert J. Storing, *What the Anti-Federalists Were For* (Chicago: University of Chicago Press, 1981).

Plutarch, *Lives of the Noble Greeks and Romans,* esp. lives of Lycurgus, Solon, and Publius.

Thomas L. Pangle, *The Laws of Plato,* translated with notes and an Interpretive Essay (New York: Basic Books, 1980).

Thomas L. Pangle is professor of political science at the University of Toronto; he is the author of *Montesquieu's Philosophy of Liberalism* and of a forthcoming study of the philosophic background of the American Founding.

"Public attention is very much fixed on the proceedings of the new Congress:" The First Federal Congress Begins its Work

By CHARLENE N. BICKFORD

All new governments and administrations take symbolic as well as substantive actions at their inception which effectively set the tone of the government and provide the people with a sense of the philosophy and intentions of their governors. The members of the First Federal Congress who gathered in New York's City Hall in March of 1789 were faced with the dual challenge of fleshing out the body of the new federal government under the Constitution and providing a new order, while protecting the rights of individuals. To meet this challenge successfully, they confronted basic issues such as the balance of power between the states and the federal government and the relationships among and within the three branches of the latter. Even before any substantive matters had been decided, early actions by this Congress set the style of the government and gave indications of the direction it would take.

Senators and congressmen who were chosen to represent their states in this critically important Congress were acutely aware of the public expectations and the need to demonstrate the viability of the constitutional system. At the same time most realized that the entire legislative agenda facing them would not be accomplished overnight. Therefore first actions became doubly important because they sent a message to their constituents about the path that the Congress intended to take.

Members considered seriously the nature of the new government and the tasks before it. The following excerpt illustrates one member's thoughts:

Fisher Ames to William Tudor
April 25, 1789
(Massachusetts Historical Society* Collections, *Ser. 2, Vol. VIII, p. 317–18)

> *. . .The federal government is not an Hercules, and if it was, it is yet in the cradle, and might come off second best in a struggle with the serpent. The House of Representatives is composed of men of experience and good intentions, but we have no Foxes or Burkes. They will be inclined to a temperate, guarded policy. In the present situation of America, and perhaps in almost every possible situation, it will be necessary for the government to follow, rather than to controul the general sentiment. The dissemination of just sentiments is not very difficult. The struggle to procure the adoption of the constitution, has sufficiently disposed the most influential men to the belief and propagation of the opinions most favourable to government. If the imprudence of the government should not hurry them, by measures repugnant to these prepossessions, into the opposite system, I am in hopes that we shall think and act as a nation, and in proportion as state prejudices and preferences shall subside, the federal government will gain strength.*

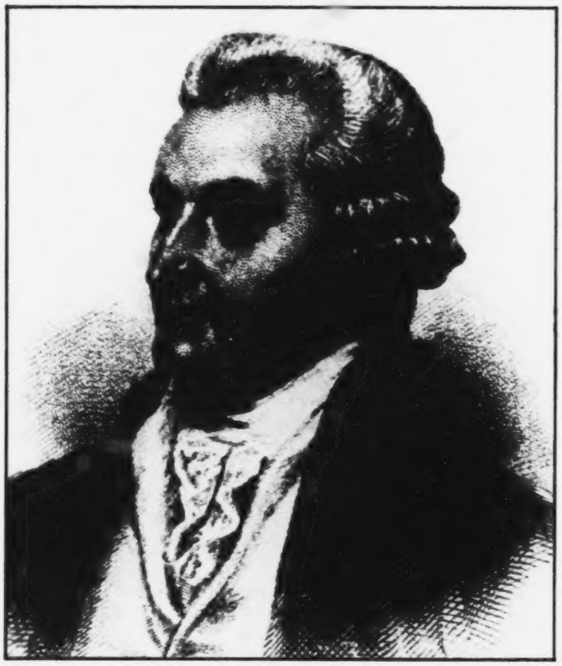
The Massachusetts congressman's letter to his friend clearly indicates the sensible and businesslike attitude that prevailed.

Because absenteeism had dogged the Confederation Congress, lack of a quorum on the appointed first day of the session caused concern for the delegates who had arrived in New York City. These men hoped that the new government could begin its work promptly, conveying an impression of the seriousness of their attention to duty to the public, but only eight senators and thirteen representatives had appeared on March 4, the day set for the first meeting of the nation's new legislative body. Although the attendance of four more senators and seventeen additional representatives was necessary to constitute a quorum, those in New York were optimistic. Senator Robert Morris wrote, ". . .it requires twelve of the first and thirty of the last to make a Quorum, so as to entitle us to count the Votes for President & Vice President—We hope to have a sufficient number for this purpose in a day or two. . . . " (Robert Morris to Gouverneur Morris, March 4, 1789, Rare Book Room, Cornell University Library)

But one week later, a quorum had not yet been attained. Thus, the senators present took their first officially recorded action and wrote to their absent colleagues imploring them to hasten to New York:

John Langdon, Paine Wingate, Caleb Strong, William S. Johnson, Oliver Ellsworth, Robert Morris, William Maclay, and William Few to Tristram Dalton, William Paterson, Jonathan Elmer, George Read, Richard Bassett, Charles Carroll, John Henry, Richard Henry Lee, William Grayson, Ralph Izard, Pierce Butler, and James Gunn
March II, 1789
(Read Collection, Historical Society of Pennsylvania)

> *AGREEABLY to the Constitution of the United States, eight Members of the Senate, & eighteen of the house of Representatives have attended here since the 4th. of*



Benjamin Huntington. Free Library of Philadelphia.

> *March.*[1] *It being of the utmost importance that a Quorum sufficient to proceed to business be assembled as soon as possible, it is the opinion of the Gentlemen of both houses, that information of their situation be immediately communicated to the absent Members.*
>
> *We apprehend that no Arguments are necessary to evince to you the indispensible necessity of putting the Government into immediate operation, and therefore earnestly request, that you will be so obliging as to attend as soon as possible.*

By this action and the second letter sent to eight of the missing senators on March 18, the senators present clearly demonstrated their belief that the nation's business was too important to be delayed.

House members were also growing impatient to proceed with business, particularly the establishment of a system for laying duties on imports and tonnage and the collection of those duties. The following excerpt relates some of the reasons for the lack of a quorum and some consequences:

Congressman Benjamin Huntington to Connecticut Governor Samuel Huntington
March II, 1789
(Samuel Huntington Papers, Connecticut Historical Society)

> *. . .The Gentlemen of the Senate & Representatives from our State were all present in the New City Hall on the first Thursday of March Instant which has not yet been the Case from any other State. There are Eight Senators only and Eighteen Representatives attending & have been the Same Number adjourning from Day to Day for Six days passd. No members from Maryland Delaware nor Jersey have yet appeared. New Jersey have been in Strift between Eastern & Western Counties in Polling for Representatives. The Object of the Western Counties is to gain Strength to Remove Congress to Philadelphia & for that Purpose kept open the Poll untill a Day or two Since in order to bring every body in to Vote and by that Means Carry the Choice. New York have been Electioneering but have at length Closed the Poll which Cannot be Declared untill April. Their Assembly have Chosen no Senators.*
>
> *A very great Loss of Revenue is owning upon us Every Day by means of the Delay of the Members to attend.*

While the representatives in New York took no officially recorded united action to urge the other members to hasten to that city, Representative Abraham Baldwin wrote to Tench Coxe on March 23 (Box 3, Coxe-Incoming, Historical Society of Pennsylvania), ". . .Letters have been sent to the absent members and there is reason to believe there will be a congress this week. . . ."

As the days of March passed, those in New York grew more restive and concerned about the image of powerlessness that was being conveyed. ". . .I am inclined to believe that the languor of the old Confederation is transfused into the members of the New Congress. . . . " Representative Fisher Ames stated to his friend George Richards Minot in a March 25 communication (Ames, Seth [ed.], *Works of Fisher Ames*, I, p. 31). William Maclay, in a letter dated March 26 to Dr. Benjamin Rush (Rush Papers, Library of Congress), expressed his irritation: ". . .It is greatly to be lamented, That Men should pay so little regard to the important appointments that have evolved on them. . . . " Others counted the days and realized that it would be impossible to put any revenue system in place in order to take in the receipts from the spring and summer importations.

Members of Congress feared the loss of the public confidence and the respect of foreign nations that could result from Congress's inability to act. The following excerpt shows that some were receiving communications that served to give validity to this fear:

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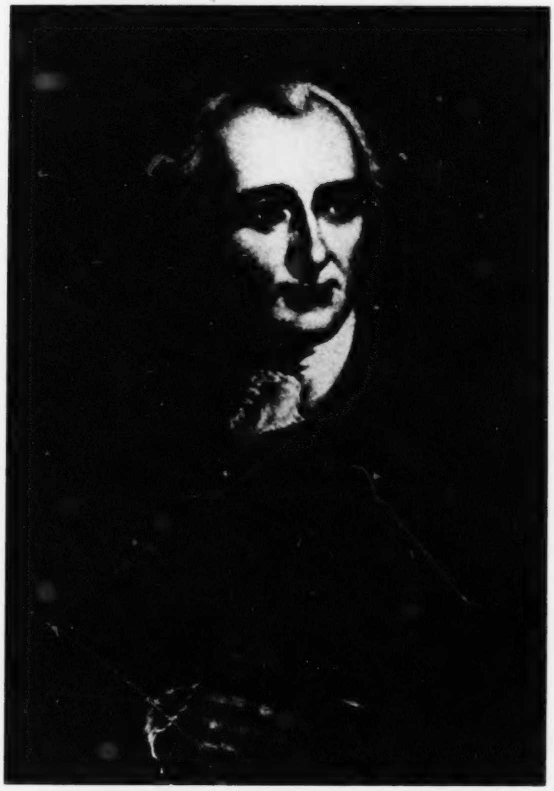
[1] Eighteen members of the House of Representatives were recorded present on the 5th of March.

Connecticut Governor Samuel Huntington to Senators William Samuel Johnson and Oliver Ellsworth
March 30, 1789
(W.S. Johnson Papers, Connecticut Historical Society)

> *. . .Public attention is very much fixed on the proceedings of the new Congress: I am frequently obliged to give one general answer to satisfy enquiries, which is, that Congress are not yet competent in numbers to proceed to business.*
>
> *I know not but that particular embarrassments in some States may be sufficient excuse for delay to this time; but did those States duly consider the consequences: that at this important Crisis earnest expectation may grow into impatience & finally change to loss of Confidence, & distrust by long disappointment, I am sure procrastination must create anxiety in the friends to the Constitution. . . .*

Eventually the attention of senators and others was focused on George Read of Delaware as the senator who should be further prodded to start his journey to New York immediately. His arrival would create a quorum in the Senate, almost three weeks overdue. The following letter from the longtime secretary of the Continental and Confederation Congresses illustrates the concerns of those present in New York, including the fact that the ballots for president and vice president had not been counted:

Charles Thomson to George Read
March 21, 1789
(Judge Richard S. Rodney Collection of Read Papers, Book B., Historical Society of Delaware)



George Read, engraving by Samuel Sartain. Library of Congress.

> *I have received the favour of your letter of the 14th by Mr. Basset, and shall be very happy to shew him all the civilities in my power, but I am extremely mortified that you did not come with him. Those who feel for the honor and are solicitous for the happiness of this country are pained to the heart at the dilatory attendance of the members appointed to form the two houses while those who are averse to the new constitution and those who are unfriendly to the liberty & consequently to the happiness and prosperity of this country, exult at our languor & inattention to public concerns & flatter themselves that we shall continue as we have been for some time past the scoff of our enemies. It is now almost three weeks since the day appointed for the meeting of the two houses and for commencing the operations under the new Constitution, and yet there are not a sufficient number arrived to form either house & to count the ballots, to see who is elected president or vice president. What must the world think of us? But what in particular mortifies me in respect to you is that there is every reason to believe your absence alone will on Monday next prevent the Senators from forming a house and at the same time there is reason to believe there will be a sufficient number to form the house of representatives so that the eyes of the continent will be turned on you, & all the great & important business of the Union be at a stand because you are not here. I must therefore as a friend entreat you to lay aside all lesser concerns & private business, and come on immediately. When the house is full, as your distance from home will not be great and possibly your early attendance might contribute to make it less and as the conveyance by the*

> *stage is easy safe and rapid when the roads are good, you may, I doubt not, obtain leave to return and settle any business you may leave unfinished. . . .*

Despite these intense pleas, Read did not attend the Senate until April 13, one week after a quorum had been realized.

Although the absence of a quorum prevented members in New York from taking any formal action, their letters reveal that they were not idly biding their time. Members met at the hall, paid visits to each others' lodgings, and strolled the streets of New York City and the fields north of present day Ninth Street. During these informal sessions they discussed the form of the new government, including such topics as the organization of the judiciary, and the establishment of a revenue system. But if the extant letters are a valid sample, it appears that most conversations dealt with the issue of the eventual location of the seat of government.

The House of Representatives was finally able to proceed to business on April 1 after the arrival of James Schureman of New Jersey and Thomas Scott of Pennsylvania. It immediately began work on internal House business: the appointment of a Speaker and doorkeepers and the establishment of House rules. Finally, on April 6, upon the arrival of the twelfth senator, Richard Henry Lee, Congress counted the votes for president and vice president, and dispatched Charles Thomson and Sylvanus Bourn to notify George Washington and John Adams of their election.

Fortunately, the inauspicious delay in its formation was not a forewarning of future impotence for the First Federal Congress. Any negative image created by this delay was counteracted by the impressive and substantial legislative output of this Congress: organizing the legislative, executive, and judicial branches of the government; establishing a revenue system based on import and tonnage duties; regulating foreign commerce; starting the Constitutional amendment process to add what has become known as the Bill of Rights; funding the national debt, settling Revolutionary War accounts among the states; selecting the location for the permanent national capital; regulating the military establishment, the territories, and the Indian trade; establishing a census, uniform rules of naturalization, and separate copyright and patent procedures; creating a national bank; admitting Kentucky and Vermont to the Union; and broadening the revenue system by placing an excise on distilled spirits.

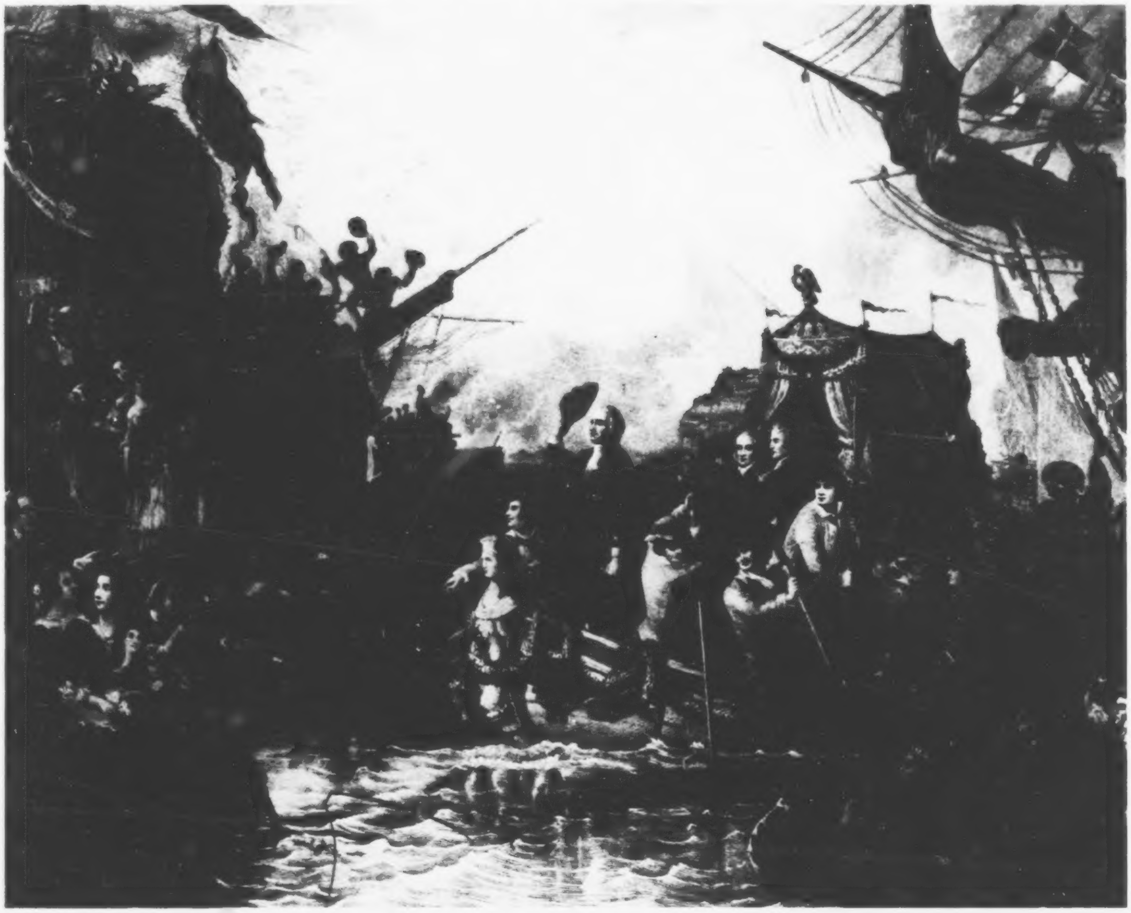
During the two years of its existence, the First Federal Congress did not encounter any repetitions of attendance problems that hindered its ability to conduct business. The letters of members reveal that many of them were torn between the desire to be at home with their families, tending to their business and agricultural affairs, and their sense of duty to their country. But duty almost always won the struggle and attendance set an example for later Congresses to follow.

On April 24th the president-elect, George Washington, arrived in New York City for his inauguration, escorted by a committee of senators and representatives who had crossed to the New Jersey shore to greet him. A grand celebration heralded his entrance into the city as described in the following excerpts from a four-page account by one of the members of the escort committee:

Elias Boudinot to Hannah Boudinot
April 24, 1789
(Elias Boudinot Papers, Princeton University Library)

> *. . .You must have observed, with what a propitious gale we left my beloved Shore (it contained the wife of my Bosom . . . and glided with steady Motion across the New Ark Bay, the very water seeming to rejoice, in bearing the precious Burthen over its placid Bosom—The appearance of the Troops we had left behind & their regular firings added much to our Pleasure.*
>
> *When we drew near to the Mouth of the Kills; a number of Boats with various Flages came up with us & dropped in our wake—Soon after we opened the Bay, General Knox & several Gentn. in a large Barge, presented themselves with their splendid Colours—Boat after Boat & Sloop after Sloop added to our Train gayly dressed in all their naval Ornaments made a most Splendid Appearance—Before we got to Bedler's Island, a large Sloop, came with full Sail on our Starboard Bow when their stood up about 20 Gentlemen & Ladies & with most excellent Voices sang an elegant Ode prepared for the Purpose to the Tune of God Save the King, welcoming their great Chief to*

the Seat of Government—At the conclusion, we gave them our Hats, and then they with the surrounding Boats gave us three Cheers. . .Our worthy President was much affected with these tokens of profound respect—As we approached the Harbour, our Train increased & the huzzaing and Shouts of Joy seemed to add Life to this lively Scene—At this Moment a number of Porpoises came playing amongst us, as if they had risen up to know what was the Cause of all this Joy—We now discovered the Shores crowded with thousands of People—Men women & Children—Nay I may venture to say Tens of Thousands;. . .in the Streets and on Board every Vessel, but Heads standing as thick as Ears of Corn before the Harvest . . .I have omitted the like Compliment from the Battery of 18 Pounders—We soon arrived at the Ferry Stairs, where there were many thousands of the Citizens waiting with all the eagerness of Expectation, to welcome their president & Patriot on that Shore, which he had regained from a Powerful Enemy by his Valour & good Conduct—We found the Stairs covered with Carpeting & and Rail, hung with Crimson—The President being preceded by the Committee was received by the Governor & the Citizens in the most brilliant manner. . .



George Washington's entry into New York, entitled "First in Peace," 1866 engraving by John McRae. Library of Congress.

Although the inauguration of the president took place on April 30, the vice-president was not sworn in until June 3. The Constitution had made no provision for an oath of office for the vice-president or for any member of the government except the president, and the first legislation passed by the first congress addressed this matter. Since the only constitutionally-specified role for the vice-president was to preside over the Senate, Congress directed that Adams take the oath of office with the senators, rather than with the president. Adams assumed his role as president of the Senate on April 21, when that body began its business. By April 23, the Senate had begun the consideration of a symbolic matter which would occupy it intermittently for the next three weeks: the question of titles of address for the president and vice-president.

For a new nation committed to republican government, the decision on whether or not to assign titles to its governors had great meaning. Moreover, the pomp surrounding George Washington's inauguration, which included the strains of "God Save the King," had persuaded some members of Congress that the citizenry had an inclination for royal trappings. Richard H. Lee, seconded by William Paterson, moved for a committee "to consider and report, what Style or Titles it will be proper to annex to the Offices of President and of Vice President of the United States—if any other than those given in the Constitution." (*Senate Legislative Journal*, p. 24) Senator William Maclay of Pennsylvania in his frank and oftentimes caustic journal, states "this base business, had been went into solely Yesterday on the Motion of our President," referring to John Adams. Maclay, believing the subject to be anti-republican, was unsuccessful in stopping the appointment of the committee. Lee, Ralph Izard, and Tristram Dalton, three political allies of the vice president, were the Senate appointees; Egbert Benson, Fisher Ames and James Madison joined them on the part of the House; and on May 7 the joint committee report was presented.

The joint committee recommended simply that no titles should be used; "President of the United States" and "Vice President of the United States" would suffice. But although the House quickly agreed to this report, the Senate, after a lengthy debate in which Lee and Maclay were the chief protagonists, rejected it. The two sides of the debate can be summarized using two statements as reported by Maclay, the first made by Lee:

> *. . .all the World civilized and Savage called for titles, that there must be something in human Nature that occasioned this general Consent, that therefore he conceived it was right. . . .*

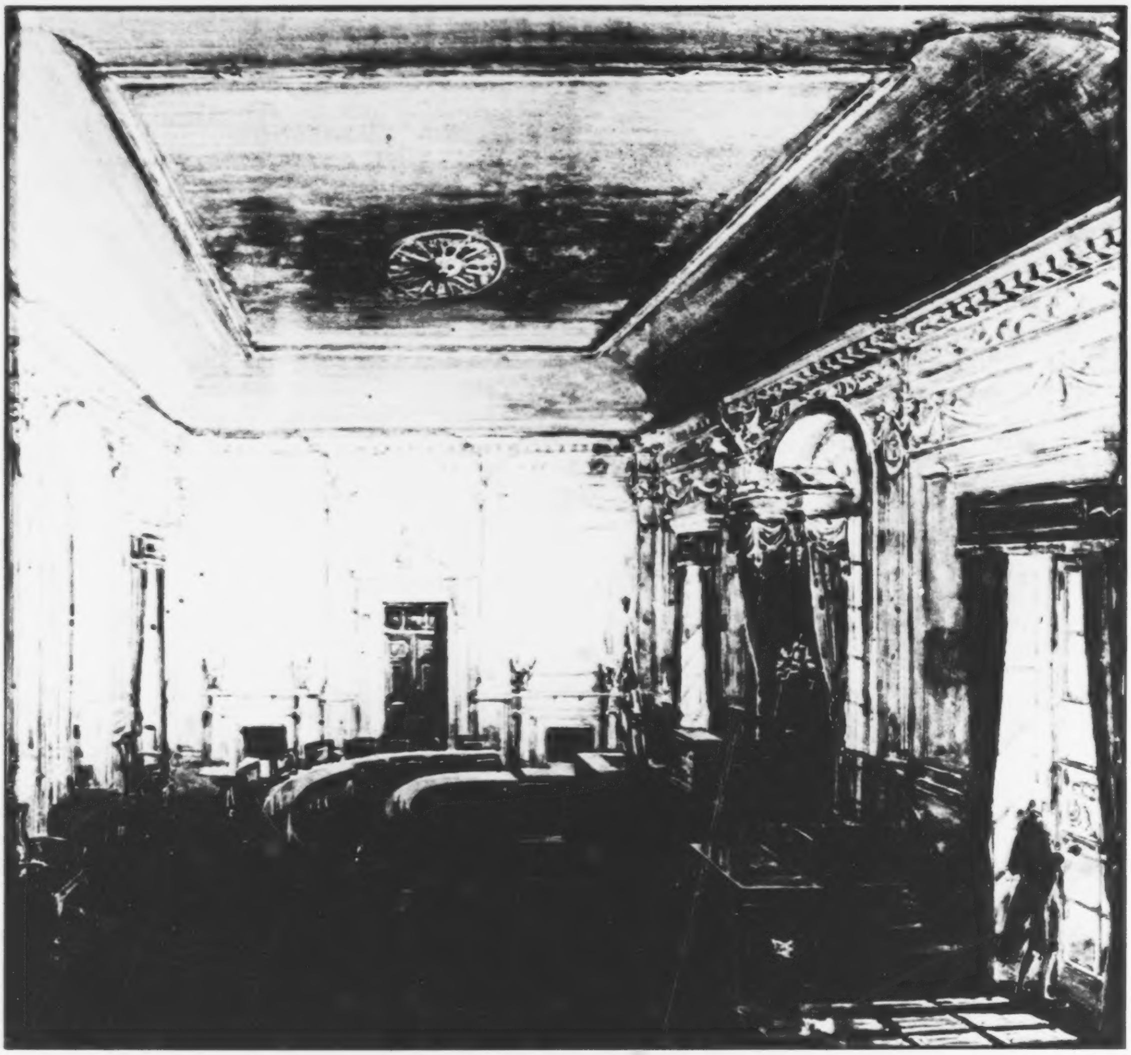
the second, Maclay's response to Lee:

> *. . . Answered . . . with . . . arguments from the Constitution . . . I mentioned that within a Space of 20 Years back, more light had been thrown on the Subject of Government, and on human affairs in General than for several Generations before. That this light of knowledge had diminished the veneration for Titles, and that Mankind now considered themselves as little bound to imitate the follies of civilized Nations, as the Brutality of Savages, that the Abuse of Power, and fear of bloody Masters, had extorted Titles, as well as adoration in some instances from the Trembling crowd. That the impression now on the Minds of the Citizens of these States was that of horror for Kingly Authority. . . .*

While Maclay's distaste for titles was shared by only a minority in the Senate, House members opposed them almost unanimously. Some senators and House members feared that the people were too attracted to monarchical forms and they wanted to stem any tide in that direction. Ames wrote to Minot on May 14 (Ames, *Works*, I, p. 36), relating the House happenings:

> *. . .The House was soon in a ferment. The antispeakers edified all aristocratic hearts by their zeal against titles. They were not warranted by the Constitution; repugnant to republican principles; dangerous, vain, ridiculous, arrogant, and damnable. Not a soul said a word for titles. But the zeal of these folks could not have risen higher in case of contradiction. . . .*

For several days, the Senate's time was consumed by extensive and repetitive debate on this issue, with the pro-title faction in the majority. A second Senate committee on titles was appointed



The chamber of the Senate, Federal Hall, New York City. Library of Congress.

to reconsider the issue and confer with a House committee on the disagreement existing between the two houses. On May 14 they reported that no agreement with the House had been reached and the committee's opinion was that the president should be addressed as "His Highness the President of the United States of America, and Protector of their Liberties." Eventually, in a strongly-worded resolution stating its continued belief in the need for a respectable title for the office of president, the Senate, in the interest of preserving harmony with the House, capitulated and agreed "that the present address be—'To the President of the United States'"—without addition of title.

Although the debate on titles was closed in both houses, John Adams continued to express his opinion that titles were necessary to give prestige to these offices. Unfortunately for Adams, one of the first converts to the cause of American independence, this advocacy of titles and other monarchical embellishments caused some members to lose respect for him and ridicule his position, as the following poem illustrates:

Quis? by Thomas Tudor Tucker and The Answer by John Page enclosed in a letter of Page to St. George Tucker
February 25, 1790
(Swem Library, College of William and Mary)

Quis ?   by T[homas]. T[udor]. T[ucker]. M.D.
In gravity clad,
He has nought in his Head,
But Visions of Nobles & Kings,
With Commons below,
Who respectfully bow,
And worship the dignified Things
The Answer Impromtu' by P[age]
I'll tell in a Trice—
'Tis Old Daddy Vice
Who carries of Pride an Ass-load;
Who turns up his Nose,
Wherever he goes
With Vanity swell'd like a Toad

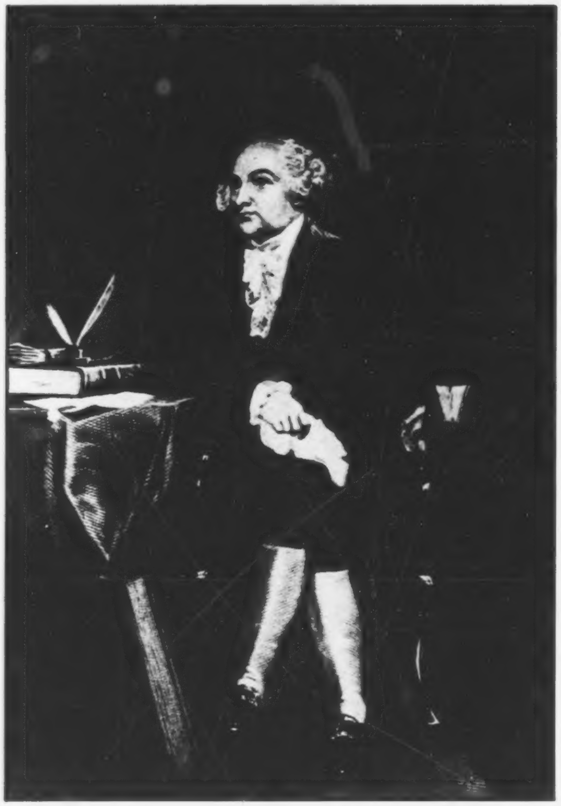
The decision against titles was another real if symbolic step on the road towards breaking with monarchical traditions—a process begun in 1776. The power of the president was not diminished however, and throughout the history of our federal government, the president's authority has been continuously augmented through legislation, constitutional interpretation, and usage.

The conclusion of the titles debate was also a victory for the House of Representatives in a period when the relative position of the two houses was taking shape. The early months of the first session saw several actions centered around questions of protocol which worked against the concept (usually held by senators) that the two Houses of Congress comprised an "upper" and a "lower" chamber.

One procedural dispute illustrates the struggle that occurred as the Senate tried and failed to establish itself as the superior of the two bodies: the conflict over the delivery of messages between the House and the Senate. The original joint committee report on these communications proposed an elaborate system, which stipulated that the Senate would send messages to the House by its Secretary but that House members had to deliver messages to the Senate, as follows:

Report of the Joint Committee on Messages between Houses
April 23, 1789
(RG128, The National Archives)

> *When a Bill or other Message shall be sent from the Senate to the House of Representatives it shall be carried by the Secretary, who shall make one Obeisance to the Chair on entering the door of the House of Representatives, & another on delivering it at the Table, into the hands of the Speaker—After he shall have delivered it, he shall make an Obeisance to the Speaker and repeat it as he retires from the House.*
>
> *When a Bill shall be sent up by the House of Representatives to the Senate, it shall be carried by two Members, who at the bar of the Senate, shall make their Obeisance to the President, and thence advancing to the Chair make a second Obeisance, and deliver it into the hands of the President—After having delivered the Bill, they shall make their obeisance to the President, and repeat it as they retire from the bar; The Senate shall rise on the entrance of the Members within the bar, & continue standing till they retire.*



John Adams, painting by Chappel. Library of Congress.

> *All other Messages from the House of Representatives shall be carried by a single Member, who shall make his Obeisance as above mentioned, but the President of the Senate alone shall rise.*

But the requirement that messages from the House to the Senate be delivered by House members was anathema to the House. Senator Maclay, in his journal for April 24, says: "Mr. Izard [Senator Ralph Izard of South Carolina] had Yesterday, been very anxious to get a report adopted, respectg. the communications between the Houses. it was so, but now we hear the House below laugh at it." After much consideration and reconsideration, the Senate was forced to agree to a system whereby messages were delivered to it by the Clerk of the House.

The members of the First Federal Congress, before enacting a single piece of legislation, took actions serving notice on their constituency of the seriousness of their intentions, their refusal to imitate any royal forms, and their rejection of the theory that either house of Congress was above or superior to the other. In this way they established a republican tone for the government which would endure, with modifications and elaborations to confront changing circumstances, to the present time.

Charlene N. Bickford is the editor of *The Documentary History of the First Federal Congress, 1789-1791* at George Washington University.

For the Classroom

THE NEW HAMPSHIRE CONSTITUTION: YOUR KEY TO LIBERTY

As part of its effort to provide planners of Bicentennial programs with useful models created by others, **this Constitution** *offers the following classroom lesson, developed by the New Hampshire Constitution Bicentennial Education Commission. (The lesson has been edited for inclusion in* **this Constitution**.*)*

Introduction: New Hampshire's State Constitutional Literacy Program

Bicentennials are often a time for bells, whistles and tall ships. New Hampshire decided three years ago to celebrate the two hundredth anniversary of its constitution in a more substantive manner by developing classroom materials for the schools.

The 1981 legislature established the New Hampshire Constitution Bicentennial Education Commission composed of fourteen persons representing state and local education, the three branches of government, the bar and others. The charge of the group was to develop educational materials to teach the state constitution in the schools. A state law has long required such teaching in the schools, but good, useable classroom material was either inadequate or lacking. There was no appropriation given to the Commission.

Supreme Court Justice Charles G. Douglas, III was elected chairman of the commission and, along with Vice Chairman Peter J. Donahue, set out to obtain a grant from the New Hampshire Council on the Humanities. The Council provided $16,000 to match $10,000 to be raised by a non-profit corporation established by members of the Commission. Matching funds came from such contributors as the New Hampshire Bar Foundation, Digital Equipment Corporation and the Wheelabrator-Frye Foundation.

By the beginning of 1983 writers were hired to develop at least ten chapters each for grade levels 4, 8, and 12 dealing with the values and fundamentals of the 1784 New Hampshire Constitution, the second oldest in the nation. The goal was to avoid memory drills and detailed civics lessons by using the case method and allowing the students to come to their own conclusions about matters like a clash of rights, due process, equal rights, etc.

Utilizing a panel of humanists, the two writers were able to draw upon expertise and ideas of those in the academic community. Frances Brown Nankin, a founding editor of *Cobblestone Magazine*, brought her extensive writing background to bear at the eighth grade level. Lorenca Consuelo Rosal, who has written for MacMillan & Co., Houghton-Mifflin and other major publishers, developed the material for fourth and twelfth grades. It is from the latter grade level that the reprint has been extracted.

During the summer of 1983 the three books were edited and 250 copies of each book, with cartoons and graphics developed for them by illustrator R.P. Hale, were printed. The student and teacher material totalled a thousand pages for all three grades.

In October of 1983 twenty teachers that had agreed to field test the material in their classrooms met at the Supreme Court Building in Concord for a workshop and distribution of books for their students. Weekly scoring and evaluation sheets were prepared by the teachers and mailed to the writers. As a result of the actual classroom experience and use of the material by the teachers, numerous changes are currently being made. Final printing money will be sought by the Commission from the 1985 session of the legislature.

The New Hampshire Constitution: Your Key to Liberty

Part I: An Introduction to the N. H. Constitution
Lesson 1: Back to Basics

LOOKING AHEAD

This lesson will introduce the concept of what a constitution is and what it does. It will also give you your first look at the New Hampshire Constitution and how it came to be.

As you read this lesson and do the activities in it, keep these questions in mind:

1. What is a constitution?
2. Why have a constitution?
3. How does a written constitution differ from an oral constitution?
4. What was the intent of the framers of the New Hampshire Constitution?
5. Why is your Constitution a living document?

BRAVE NEW WORDS

FREEDOM.

That word holds so much meaning to everyone. Yet freedom means different things to different people. What does it mean to you?

Take just 60 seconds to write quickly the first word or phrase (not necessarily a definition) that comes to your mind when you think of the following words. Then work in small groups to compare your lists. Are your ideas and impressions similar or dissimilar to those of your classmates?

Freedom__________
Government__________
Equality__________
Sovereign__________
Independence__________
Natural__________
Rules__________
Inherent__________
Safety__________
Life__________
Democratic__________
Liberty__________
Property__________
Happiness__________
Rights__________
Law__________
Power__________

BRAVE NEW WORLDS

Now imagine that you and your friends are on a space shuttle. You are about to land and colonize a new planet. It is very remote, far from any existing settlement or intergalactic government. You're on your own. It's up to you to make of your life in this new world what you choose.

As you orbit the planet, looking for a suitable place to land, someone suggests that you will need guidelines or rules for living in this new place. You decide to write an agreement.

Here are a few questions to consider:

1. How do you feel upon your arrival at the uninhabited planet?
2. What are your concerns?

3a. Do you want to follow the rules and laws of your former planet?
3b. Are all of these rules and laws applicable in your new situation?
3c. How will you decide?
4a. Where will the authority lie?
4b. Who will decide and how?

Now write your agreement or compact.

We the undersigned__________

DEBRIEFING

Have a representative from each small group read its agreement to the class. Then discuss your answers to the following questions:

Process

1. How did your group proceed to create an agreement?
2. Who decided what should be included in the agreement?
3a. Did everyone agree to each point?
3b. If not, how did you come to a final decision?
4a. Who wrote the final agreement?
4b. How was this person(s) chosen?

Points

1. How did your answers to the first activity affect what was included in your agreement?
2. Did differing ideas about basic principles lead to conflicting views about the agreement? If so, what were these conflicts and how were they resolved?
3. How will your agreement be enforced?
4. Who will ensure that it is fairly applied?
5. How will disagreements or conflicts be settled?
6a. Does your agreement mutually benefit everyone in the group?
6b. If not, what reaction did those who felt they were unfairly treated have to the agreement?
7a. Of what value is the agreement without the willingness of the entire group to abide by it?
7b. Why?

Projections

1. Suppose you had made no agreement before colonizing the planet.
1a. How would life on the planet be different without an agreement?
1b. Would it be more free? More chaotic? More organized? More just?
2. Do you think such an agreement was necessary? Why?
3. Suppose you had made only an oral or verbal agreement. Would disputes about the meaning and details of the agreement be more or less likely to occur? Why?
4. Defend your answers to the following question:

Do you think that a written agreement would be more likely to lead to—

arbitrary government
law and order
equality
personal liberty
injustice
dictatorial power
inflexible laws

4a. How important is it to be able to modify or change the agreement?
4b. What would be the advantages of a written, yet flexible, agreement?

CONSTITUTING A GOVERNMENT

You have just had the experience of forming a government based on certain fundamental values through a written agreement or constitution.

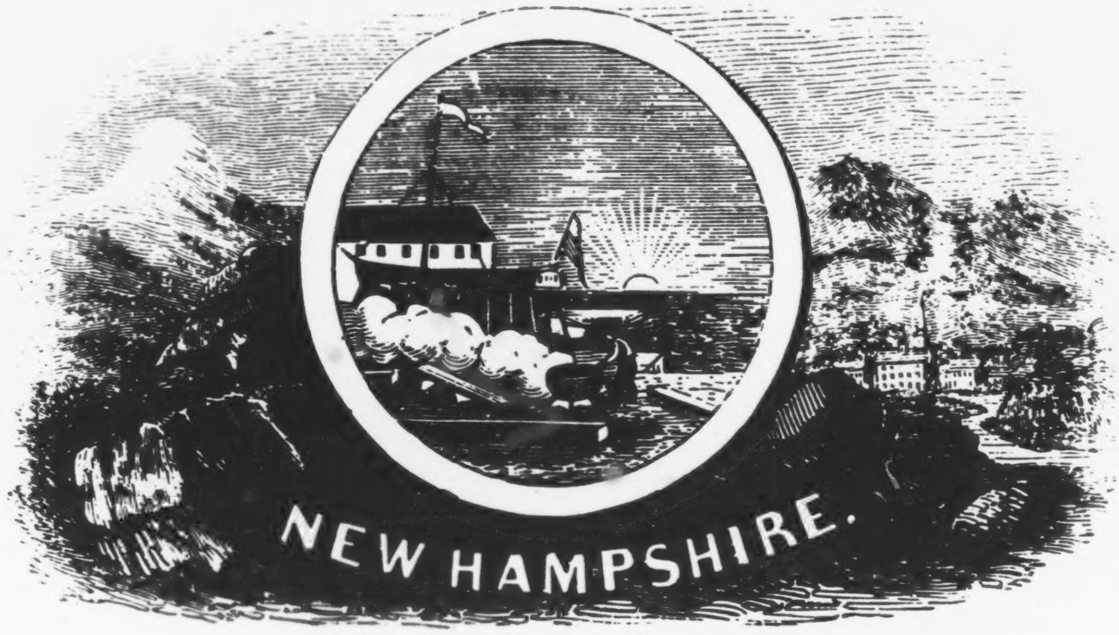
Your federal and state governments are likewise constitutional governments. They have been "constituted" by a written agreement. Such constitutions set up a legal framework within which the government operates. A constitution describes a particular combination of powers used systematically to achieve a certain end. What that end is depends on the beliefs and basic principles of the people who frame the constitution and the people who agree to live by it. A constitutional government may or may not be democratic, just, mutually beneficial to all, etc.

In modern times, the concept of a written constitution was invented in America. Constitutions that existed previously, like the one in Britain, were essentially "gentleman's agreements." A written constitution was the revolutionary answer Americans reached to the problem of creating a social order and, at the same time, protecting personal freedom. Justice Miller of the United States Supreme Court gave this classic definition of an American constitution:

> *A constitution in the American sense of the word is a written instrument by which the fundamental powers of the government are established, limited and defined and by which these powers are distributed among several departments for their more safe and useful exercise for the benefit of the body politic.*

Justice Miller was speaking of the United States Constitution. But what he said also applies to your state Constitution which took effect five years earlier than the federal document.

This program is about that earlier Constitution; about what it says and doesn't say; what it does and doesn't do; about who has the power, how they got it, and how they use it. It is about the rights you enjoy as New Hampshire citizens and the responsibilities these rights entail.


NEW HAMPSHIRE.

The New Hampshire Constitution: A First Look

A political constitution is like "the constitution of a human body —— certain nerves, fibres and muscles and certain qualities of the blood and juices —— the essentials without which life itself cannot be preserved a moment."

—John Adams

The New Hampshire Constitution is more than a skeletal framework of government. It describes the essentials. It reflects the concern revolutionary patriots had that the power of government be limited and that personal rights be protected.

Given historical experience, this concern was well-justified. In constituting a new government, New Hampshire citizens wanted to make sure that a native tyrant did not develop to replace the foreign one.

To achieve this goal, the framers of the New Hampshire Constitution did three things:

1. The Constitution begins with a Bill of Rights. These thirty-nine articles are more inclusive than the federal Bill of Rights. The latter is composed of the first ten amendments which were added to the U.S. Constitution to ensure its ratification. New Hampshire's Bill of Rights clearly defines individual liberties vis-a-vis the government, maintaining the majority of power in the hands of the people.

2. Following the Bill of Rights, the New Hampshire Constitution describes the form of government. This state government derives its limited power from the people and is designed to work on their behalf.

The state government is divided into three branches, each with its own separate powers and duties. The legislative branch, or General Court, consists of the House of Representatives and the Senate, which together make the laws for the state. The executive branch, which includes the Governor and Council, is responsible for carrying out the laws and seeing that they are obeyed. The judicial branch, which consists of the Supreme Court and lower state courts, interprets and applies the laws and provides advisory opinions to the legislature, the Governor and Council.

3. The New Hampshire Constitution provides citizens with amending powers. These powers enable citizens to change the Constitution and the government it forms. While modifying the Constitution is more difficult than amending or repealing statutes, such flexibility assures that the Constitution will remain a "living document", reflective of changing societal needs and values.

THE LAST WORD

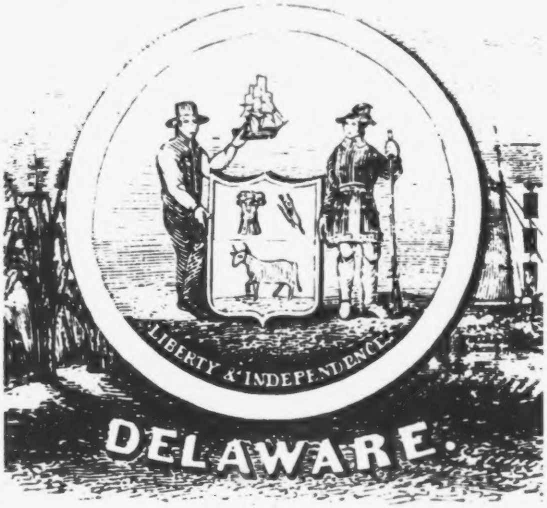
A constitution is a skeletal framework of government that expresses the values and visions of the society for which it was designed. History has shown that written constitutions are less likely to lead to arbitrary government than verbal constitutions.

The New Hampshire Constitution is the second oldest state constitution in the world, written prior to the Federal Constitution. The New Hampshire Constitution guarantees individual rights while limiting government power. The amendment process keeps the New Hampshire Constitution a living document and helps maintain ultimate power in the hands of the people; for they alone can change the Constitution.

Bicentennial Gazette

The Framers of the Constitution: Delaware

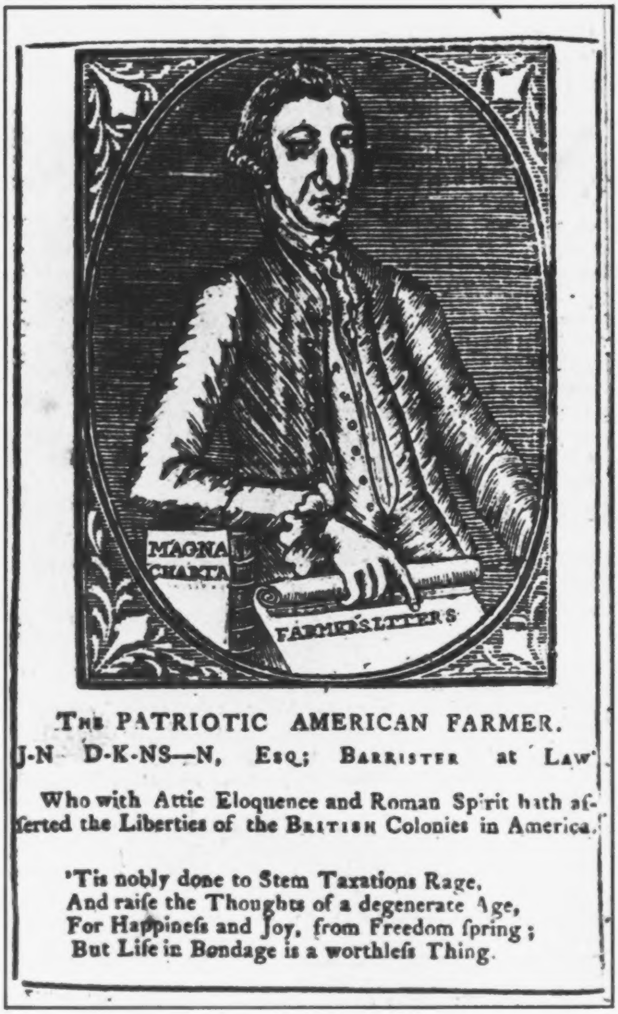
With this description of the Delaware delegation to the Constitutional Convention in 1787, ***this Constitution*** *inaugurates a series of articles on each of the twelve participating states.*



Delaware, the smallest of the states participating in the Constitutional Convention, sent five delegates: John Dickinson, the most prestigious member of the delegation, who had achieved fame in 1767-68 with his *Letters from a Farmer in Pennsylvania* opposing the Townshend Acts; George Read, a well-known attorney and signer of the Declaration of Independence; Gunning Bedford, Jr., Delaware attorney general and ardent small-state advocate; Richard Bassett, a gentleman farmer and attorney; and Jacob Broom, businessman and civic leader.

The Delaware delegation was strongly pronationalist, but at the same time fought tenaciously for small-state rights. At the urging of Read, Delaware's instructions to its delegates prohibited their approval of any measure counter to the one state/one vote rule; the mandate was disregarded, however, after Dickinson and Read helped to engineer the Great Compromise. The Delaware delegates were near perfect in attendance with the exception of Dickinson, who missed some sessions and left early because of illness; the contributions of the respective members, however, were unequal. All the Delaware delegates signed the Constitution, although Dickinson did so by proxy because of his early departure.

The most significant contribution of the Delaware delegates was made by John Dickinson, known as the "penman of the Revolution." Dickinson was born into a prosperous Maryland family in 1732; he and his parents moved to Delaware in 1740. After studying law in Philadelphia and at London's famed Middle Temple, he returned to Philadelphia to become a prominent lawyer and man of affairs. In the 1760s, he served in both the Delaware and Pennsylvania assemblies, and in 1765 he was a delegate to the Stamp Act Congress. Throughout the Revolutionary period Dickinson championed colonial rights while opposing force, a stand which prompted John Adams to say he had "a certain great fortune and piddling genius." In 1775, Dickinson authored the "Olive Branch Petition" and, with Thomas Jefferson, the stirring "Declaration of Causes for Taking Up Arms." He opposed the Declaration of Independence in 1776 but absented himself from the Congress so that the Pennsylvania delegation could vote for independence. As a Delaware member of the Continental Congress, he headed the committee that drafted the Articles of the Confederation. He was president of the Delaware Supreme Executive Council in 1781 and president of the Council of Pennsylvania from 1782-85; he chaired the Annapolis Convention in 1786.



THE PATRIOTIC AMERICAN FARMER.
J-N D-K-NS—N, Esq; Barrister at Law:

Who with Attic Eloquence and Roman Sp'rit hath aſſerted the Liberties of the British Colonies in America.

'Tis nobly done to Stem Taxations Rage,
And raiſe the Thoughts of a degenerate Age,
For Happineſs and Joy, from Freedom ſpring;
But Life in Bondage is a worthleſs Thing.

John Dickinson, relief cut attributed to Paul Revere. National Portrait Gallery, Smithsonian Institution, Washington, D.C.

Dickinson had had first hand experience in dealing with the limitations of the Articles of the Confederation, and he strongly supported a national government modeled on Britain's. At the same time, he was determined to safeguard small-state rights. He supported the dual representational system which became the basis of the Great Compromise, and he worked diligently for its adoption. In addition, he sat on the committee that addressed the issue of importing slaves, and also on the Committee on Postponed Matters, which considered the method of electing the President.

After the Convention, Dickinson helped to mobilize public opinion for the adoption of the Constitution with another series of newspaper articles. However, he never returned to public office and busied himself writing political philosophy. Apparently he missed his role as eloquent spokesman for liberty and national government, for a visitor during Dickinson's later years reported that he became quite carried away and declaimed for thirty minutes as though addressing his peers in the Philadelphia State House once again. He died in 1808 at the age of 75.

George Read, born in 1733, was second only in prestige and experience to Dickinson. One of six sons of a wealthy Dublin-born Maryland planter, he set up a law practice in New Castle and became active in Delaware politics. Although he protested the Stamp Act, like his friend John Dickinson he was wary of extremism. Read attended the Continental Congress where he voted against independence, the only signer of the Declaration to do so. He remained politically active and in 1777-78 filled the office of president of Delaware when the incumbent was captured by the British. Following the Treaty of Paris, he returned to state politics, and in 1786 he attended the Annapolis Convention.

Read, like Dickinson, supported a national government that would be structured so as not to crush the small states. At one point he went so far as to suggest erasing existing state boundaries and redividing the territory into equal segments. Although not a gifted speaker, he used his formidable legal knowledge and practical experience to advantage. Read served on the committee which adjusted representation in the House, and he was one of the few delegates to speak out for popular election of the President. He led the ratification movement in Delaware, and served as a Senator in the first United States Congress. In 1793 he resigned to accept the post of chief justice of Delaware, where he remained until his death in 1798 at the age of 65.

Gunning Bedford, Jr., was born in 1747 in Pennsylvania. He graduated with honors from the College of New Jersey (now Princeton) and set up a law practice in Delaware. During the Revolution he was an aid to General Washington and later served in the state legislature and attended the Continental Congress. From 1784-89 Bedford was attorney general of Delaware.

Contemporaries describe Bedford as "bold and nervous" as a speaker, "commanding and striking in manner," and "warm and impetuous" in temperament. In fact, Bedford was a truculent and irascible man given to violent outbursts during the Convention. In June he lost his temper and threatened that the small states might seek foreign allies if not accommodated by the larger in the matter of representation. Nevertheless, he was useful, and served on the committee that drafted the Great Compromise. Following the Convention, Bedford returned to his post as attorney general and was subsequently named a federal judge for Delaware. His later years were spent chiefly in judicial and philanthropic pursuits, and he died in 1812 at the age of 65.

Richard Bassett, born in Maryland in 1745, was reared by a well-to-do relative after his tavern-keeper father deserted his mother. He inherited substantial property and divided his time between his estate in Maryland and a law practice in Delaware. Bassett was a cavalry officer during the Revolution. He served in both houses of the Delaware legislature, and he represented the state at the Annapolis Convention. At the Constitutional Convention the next year, Bassett attended regularly, but he made no speeches, did no committee work, and cast no deciding votes. Nevertheless, he was known as a nationalist, and he supported Read in his goal of securing equal state representation in the Senate.

Following the Convention, Bassett served as a U.S. senator from 1789-93. In 1793 he was appointed chief justice of the Delaware Court of Common Pleas, and in 1797 he was elected governor of Delaware. In 1801 he was appointed judge of the U.S. Circuit Court, a post that was subsequently abolished by the Jeffersonian Republicans. Almost alone among his wordly and rationalistic fellow-delegates, Bassett was a fiery true believer and held Methodist camp meetings on his country estate. His later years were spent in pious and hospitable activities, and he died in 1815 at the age of 70.

Jacob Broom, born in Wilmington in 1752, rose from humble origins to a position of leadership in his community and state. The eldest son of a blacksmith, he worked at farming and surveying, but he earned his main livelihood from commerce and real estate. Broom did not serve in the Continental Army and was occupied during the Revolution with his business and civil offices. His two moments of glory seem to have been the opportunity to prepare maps for General Washington before the Battle of Brandywine, and his composition of a welcoming address for the General on behalf of the city of Wilmington. Broom served numerous terms as Wilmington burgess, and from 1784-86 he sat in the Delaware legislature.

Although overshadowed in education and social standing by his fellow delegates, Broom never missed a session and spoke several times. Nevertheless, his role was a minor one. After the Convention he returned to Wilmington where he served as the first U.S. postmaster and was active in business and civic affairs for the remainder of his life. He died in 1810 at the age of 58.

Delaware became the first state to ratify the Constitution, on December 7, 1787.

Network of Scholars: Supplement

Project '87 hopes to assist planners of Bicentennial programs to locate specialists on the Constitution who are interested in participating in local events. Toward that end, we asked constitutional specialists to let us know if they would like to be involved in these projects. The initial list of historians, political scientists, lawyers and others who responded to this call was published in the fall issue of ***this Constitution***. Entries received too late to be included in that issue are listed below. Planners should get in touch directly with those whom they would like to have participate in their programs.

ARIZONA

Judith A. Baer, Ph.D.
Department of Political Science
University of Arizona
315 Social Sciences
Tucson, AZ 85721
Fourteenth Amendment; women's rights

John P. Frank, J.S.D.
Lewis and Roca
100 W. Washington
Phoenix, AZ 85003
Supreme Court history

ARKANSAS

James S. Chase, Ph.D.
Department of History
University of Arkansas
Ozark Hall 12
Fayetteville, AR 72701
Political parties

Eldon John Eisenach, Ph.D.
Department of Political Science
University of Arkansas at Little Rock
Little Rock, AR 72204
Colonial constitutions; religion and constitutional ideas

CALIFORNIA

Joyce Appleby, Ph.D.
Department of History
University of California, Los Angeles
Los Angeles, CA 90024
Colonial and early national history; economic and political thought

Morton Borden, Ph.D.
Department of History
University of California, Santa Barbara
Santa Barbara, CA 93106
Early national period

John P. Diggins, Ph.D.
Department of History
University of California, Irvine
Irvine, CA 92717
American political thought

Malcolm M. Feeley, Ph.D.
School of Law
University of California, Berkeley
Berkeley, CA 94720
Civil liberties

Edwin S. Gaustad, Ph.D.
Department of History
University of California, Riverside
Riverside, CA 92521
Religious freedom and the Constitution

Norman Jacobson, Ph.D.
Department of Political Science
University of California, Berkeley
Berkeley, CA 94720
Political and constitutional theory

Gordon Lloyd, Ph.D.
Department of Political Science
University of Redlands
Redlands, CA 92373
Creation of the American Constitution

Paul J. Mishkin, J.D.
School of Law (Boalt Hall)
University of California, Berkeley
Berkeley, CA 94720
Constitutional law; federal courts; civil liberties

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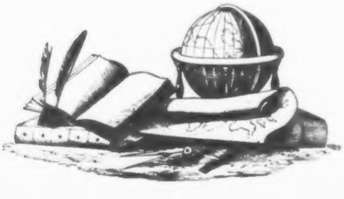

A Parley

Government is Working

by Representative Barber Conable (R., New York)

[reprinted from *Roll Call*, April 19, 1984]

My terminal legislative condition has caused me recently to muse more than usual about the interesting job that has claimed my energies over the past 20 years. To oversimplify my conclusions, I believe that representative government is alive and well here in Washington, that the governmental system conceived by the Founding Fathers was wise and a continuing part of our heritage, that a realistic expectancy of government and an understanding of how it functions are probably more important than any of the specific things government does, and that I am blessed in this skeptical age to have had the experience which brings these conclusions forth.

This optimistic assessment seems to fly in the face of the well-known mess which at any given time clutters up the Washington landscape. Why, you may well ask, are not our problems solved if government is functioning as it should? Why aren't we more secure, happier, and more satisfied that our prospects are brighter than those of our ancestors? Maybe messes result from governments trying to do too much, not too little.

I didn't say representative government was efficient or that the government was dealing well with our problems, only that it is working out the way it was intended and that we are the better for it. Those who want a government that solves everybody's problems efficiently should turn to some other system than representative democracy. When decision rests on the consent of the governed, it comes slowly, only after consensus has built or crisis has focused public attention in some unusual way, the representatives in the meantime hanging back until the signs are unmistakable. Government decision, then, is not the cutting edge of change but a belated reaction to change.

Fortunately, our society has many decision makers outside Washington, in the churches and non-profits, in the other levels of government, in the private sector, in the schools and the community organizations. In short, the involved citizens of America do their own thing, bring about change, and then drag government kicking and screaming into recognizing that change has occurred and that it should be reflected in the way the government does business.

The irony is that the traditional American liberal believes that this conservative, lagging force should be the major instrumentality of change in our society. Liberal thinkers describe the way government ought to be, not the way it is, far behind the curve because accountability makes it so. In effect, they are yearning for philoso-

Barber B. Conable, Jr.

James L. Sundquist, Senior Fellow, The Brookings Institution. *Photograph by Linda Bartlett.*

pher-kings with the power and the will to do for the people what the people are not yet ready for, rather than for representatives.

One of the lessons of history is that people with the power to be philosopher-kings quickly become more kings than philosophers, and not comfortable purveyors of liberalism. It's safer to let the people decide first, even though it's not very inspiring to have a laggard government. Don't expect too much: realism about the way governments function is better in the long run than the disillusionment that follows wishful thinking.

The Founding Fathers didn't want efficient, adventurous governments, fearing they would intrude on our individual liberties. I think they were right, and I offer our freedom, stability and prosperity as evidence. I'm not indicting our government when I describe it in these terms, but I'm saying that its role was properly designed not to damage the dynamics of a free society.

But Not As Well As It Should

by James Sundquist

Representative Conable has a high tolerance level. He acknowledges the "well-known mess" in Washington, admits that inefficiency and delay characterize the government's response to national needs, but then counsels his readers to lower their expectations, stop asking the government to "deal . . . well with our problems," and just accept this best-of-all-possible governmental systems.

He reasons that if we keep our government inefficient enough, it will be incapable of embarking on "adventurous" efforts to change society. True enough. But that is the wrong issue. In these days of neo-conservatism and neo-liberalism, nobody is going to try to remake anything much, whichever party is in power—as anyone following the 1984 campaign must know. The issue is a more fundamental one: whether the government has the institutional capacity to fulfill its *inescapable* responsibilities.

Take the deficit. Running in the $150-200 billion range as far ahead as anyone can see, it is scarcely a matter that can be left to those "decision makers outside Washington"—churches and non-profits, states and cities, the private sector, schools and community organizations—who Mr. Conable tells us should lead the government. The responsibility for coping with the deficit falls squarely on Washington's decision-makers, including the Ways and Means Committee on which the Congressman has served so long with such great distinction.

And on this matter, virtually everyone warns that the "laggard" tendency of our government, which Mr. Conable finds so praiseworthy, is in fact a peril. President Reagan calls the size of the deficit outrageous and demands a balanced budget. Leaders of both parties in both houses of the Congress warn that the country is headed for disaster. Wall Street agrees. So, save for a few ideologues, do economists both in and out of government. Yet no action anywhere near commensurate with the scale of the problem is in sight.

One could go on to list other issues that only the government can deal with: the unchecked flow of illegal aliens, the financial crisis of Medicare, revolutions in Central America, and so on. But the point is clear: A government deliberately stripped of the capacity to be adventurous and to "do too much" also lacks capacity to do that bare minimum of things that it cannot escape doing and that are crucial to the country's security and well-being.

So, even as we praise the genuine merits of the constitutional system the Framers gave us, it is surely timely during these Bicentennial years to ask whether some greater degree of efficiency, dispatch, responsibility, and accountability might be achieved without jeopardizing the conservative ideal of limited government that Mr. Conable ably espouses.

I suggest, among other questions to be asked as we approach the Bicentennial celebration, these:

Would an electoral system that encouraged, rather than discouraged, unified party control of the three centers of decision-making—Presidency, Senate, and House—make for more effective and responsible government?

Would longer terms for the President and for House members enable them to rise to a higher level of statesmanship in confronting crucial issues?

Would a span longer than two years between national elections, and a life of more than two years for a Congress, enable decision-makers to come to grips with issues now left unresolved each two years for lack of time?

Whenever deadlock and quarreling between the President and the Congress reduce the government to immobility, could a better solution be devised than simply waiting helplessly until the next presidential election comes around?

Such questions do not challenge the fundamental structure of the government. They simply suggest that, perhaps, the constitutional structure is not beyond improvement. The Founding Fathers who, after all, scrapped the Articles of Confederation and wrote a wholly new instrument of government, were among the most "adventurous" of all our forebears. They would be the last to understand how, two hundred years later, anyone could regard complacency as the highest civic virtue.

ORGANIZATIONS and INSTITUTIONS

THE CLAREMONT INSTITUTE FOR THE STUDY OF STATESMANSHIP AND POLITICAL PHILOSOPHY

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"Democracy in America: Alexis de Tocqueville Observes the New Order" is a four-day conference celebrating the sesquicentennial of the publication of *Democracy in America*. To be held in Claremont, California, from January 23-26, 1985, this convocation of over thirty scholars from throughout the world features Henry Steele Commager and Richard Rodriguez as keynote speakers. Other participants include George Anastaplo, Robert Bellah, Roger Boesche, Eva Brann, Wilhelm Hennis, Jean-Claude Lamberti, Wilson Carey McWilliams, J.P. Mayer, James Schleifer, Cushing Strout, Marvin Zetterbaum, and Catherine Zuckert.

Panel topics are "Statesmanship in the Age of Equality," "Morality and Politics," "The American Mind," "Equality in America: The Three Races and Women," "The American Commercial Character," "Democracy Outside America," and "Citizen Participation versus Centralization of Administration."

This conference is the second in *Novus Ordo Seclorum*, the Bicentennial of the Constitution Project of the Claremont Institute for the Study of Statesmanship and Political Philosophy. This National Endowment for the Humanities-supported endeavor is part of a year-long program of public education on the importance of Tocqueville's work for the American constitutional heritage.

There is no registration fee. For more information contact Dr. Ken Masugi.

INSTITUTE OF GOVERNMENT

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The Institute of Government of the University of Virginia has conducted five forums in 1984 as part of its series "The Virginia Court Days Forums" which will continue through 1986.

The five forums, held at various sites throughout the Commonwealth, addressed the following topics: "The Constitution as Symbol and Substance: What Does Constitutionalism Mean?" "Religion and the Constitution: How High is the Wall of Separation?" "Democratic Representation Under the Constitution: Where Do Political Parties Fit In?" "Courts and Constitution: Toward an Imperial Judiciary?" and "Conflicting Rights Under the Constitution: A Free Press Versus a Fair Trial." Each forum dealt with both the historical background and the contemporary debate.

The series is intended to promote a broader public understanding of current issues of constitutional governance, to foster a greater appreciation of the Constitution and of Virginia's contribution to its creation and evolution, and to encourage citizen participation in the discussion of public affairs. Ten of the twenty forums will be videotaped for later broadcast on Virginia stations. The series is supported in part by a grant from the National Endowment for the Humanities.

FEBRUARY CONFERENCE AT INDEPENDENCE NATIONAL HISTORICAL PARK

On February 8 and 9, Independence National Historical Park will present a conference entitled "A Meeting Among Friends: Delegates to the Constitutional Convention of 1787." Panels will address the following topics: the delegates' views of the state of the nation and of their regions; the background, interests and political views of the delegates and how they interacted within the delegations; the confrontation and compromise over regional interests and representation. The registration fee for the conference is $10 ($5 for students). For further information, call (215) 597-7919.

COMMITTEE ON THE CONSTITUTIONAL SYSTEM

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The Committee on the Constitutional System has been set up to examine the present state of the political structure of the United States and to evaluate suggestions on possible changes in political party rules, congressional organization and the distribution of executive and legislative power under the Constitution.

The bipartisan committee which has held four preliminary meetings in Washington and one in California is chaired by Senator Nancy Landon Kassebaum (R., Kansas), C. Douglas Dillon, former secretary of the Treasury and Lloyd N. Cutler, partner in Wilmer, Cutler and Pickering and former counsel to President Carter. Others on the committee include founding member James MacGregor Burns, Woodrow Wilson professor of political science at Williams College and author of the new book *The Power to Lead: The Crisis of the Presidency*.

Analysis of possible changes that might require legislation or constitutional amendment is being conducted by James Sundquist, senior fellow, The Brookings Institution. A comprehensive workbook bringing together the basic papers on the subject, ranging from the original constitutional debates and *The Federalist* papers to the views of current scholars and experiences of other countries, is being edited by Professor Donald Robinson of Smith College.

The committee, now open to general membership, comprises present and former members of Congress, former cabinet officers and officials of the executive branch, constitutional scholars and others from business, labor and journalism.

The group is not now committed to any specific recommendations for constitutional amendment or legislation, but the purpose of any changes that may be proposed will be to enable the government to implement coherent and timely programs developed by an elected majority which can be held accountable for the success or failure of its policy. Initial funding for the analysis and review work has been provided by the Dillon Fund, the American Express, Ford, Hewlett and Rockefeller Foundations. The committee will issue a report and recommendations late next year and, depending on its conclusions, may continue its efforts until the 1987 Bicentennial of the Constitution.

THE JEFFERSON FOUNDATION

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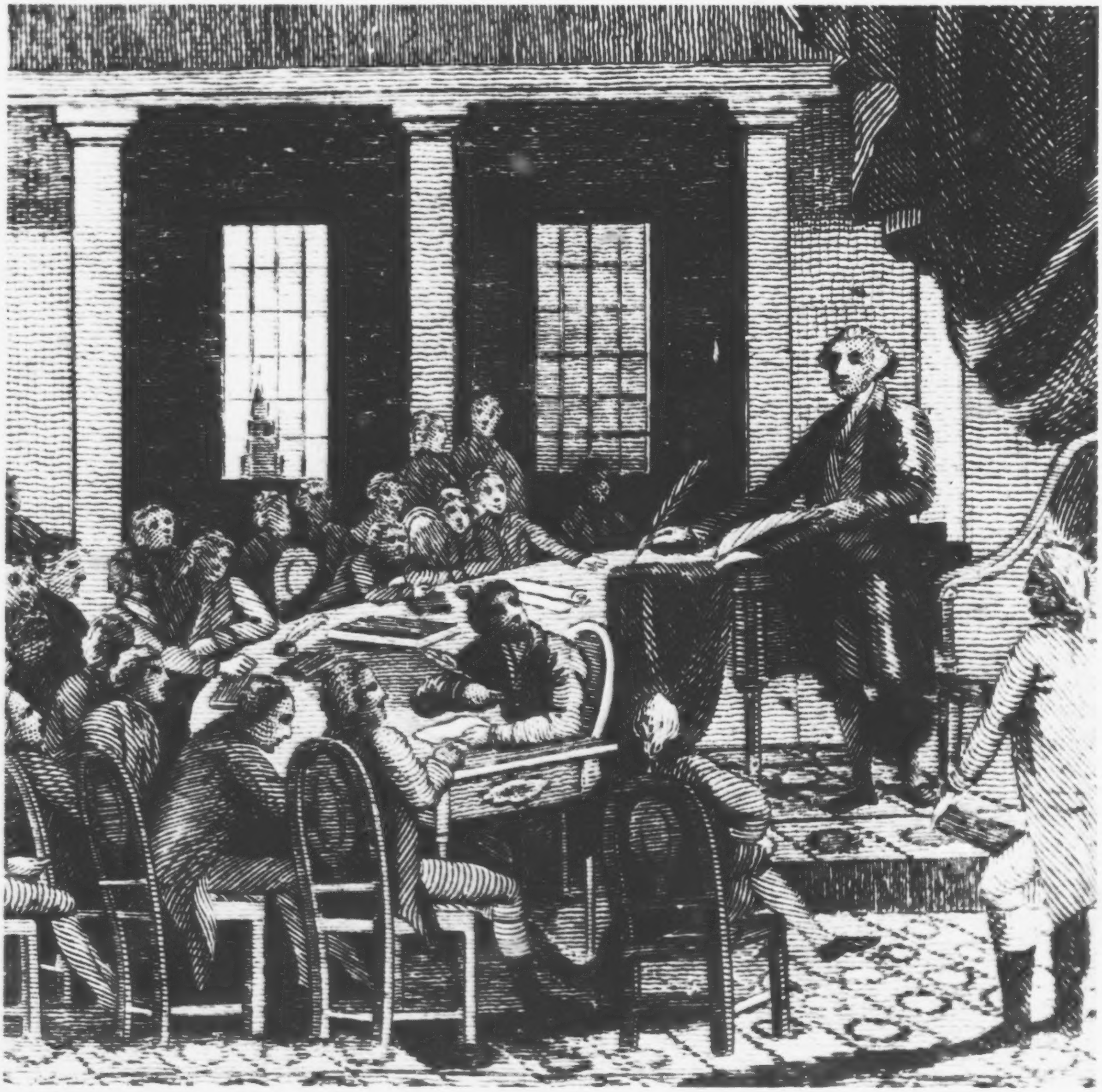
The Jefferson Foundation, a nonpartisan organization devoted to the study of the Constitution and of contemporary constitutional reform proposals, has developed an educational program to follow up the Virginia Jefferson Meeting on the Constitution which the group sponsored in Williamsburg last March. The meeting, which included 165 delegates from all parts of the state, consisted of a series of planned debates on issues such as abolition of the electoral college, changes in the lengths of presidential terms of office, and constitutional ways to limit campaign contributions.

The foundation has designed a teacher-training program and curriculum guide which will equip Virginia secondary teachers to conduct their own debates with high school students as delegates. The guide, which is being prepared from existing background material from the Williamsburg meeting, will give teachers an idea of how to use current structural reform proposals to teach the Constitution and the philosophy of American government in an interesting and thought-provoking way. A general workshop coordinated with the Virginia Department of Education was held in October to orient educators in the use of the new curriculum. Jefferson Foundation staff will be available throughout the year to offer advice on the use of guides, as will the teachers who participated in the Williamsburg meeting.

The Jefferson Foundation, with the Roosevelt Center for American Policy Studies, is also sponsoring a second Jefferson meeting December 7-9 in Chicago. The agenda will be restricted to issues relating to the structure of the federal government and the question of whether the nation has really achieved representational government. One hundred fifty delegates will be selected from among applicants; all Illinois citizens are eligible to apply. Materials from the Illinois Jefferson Meeting will be used as an educational resource for distribution to schools, civic organizations, and interested groups throughout the state. The proceedings will also be recorded and communicated to the already existing network of people who have participated in the previous sessions.

Thomas Jefferson's eyeglasses. ***Division of Political History, Smithsonian Institution, Washington, D.C.***



George Washington presiding over the Constitutional Convention. *Free Library of Philadelphia.*

THE CREATION OF THE AMERICAN CONSTITUTION

On October 18, 19, and 20, 1984, the Philadelphia Center for Early American Studies, the American Philosophical Society and the Institute of Early American History and Culture sponsored a conference on "The Creation of the American Constitution."

The conference brought together a distinguished group of specialists in eighteenth-century American and European history to present new research and fresh insights on the social, intellectual, political and legal origins of the American constitutional system. The conference explored these aspects in a series of eleven sessions held at Independence National Historical Park, the First and Second Banks of the United States, the American Philosophical Society, and the Philadelphia Athenaeum.

Speakers included Garry Wills, who gave the opening address on "Popular Sovreignty and the Constitution," Ralph Lerner, Sheldon Wolin, Barbara Black, Stephen Botein, Richard Buel, Janet Riesman, Joyce Appleby, Drew McCoy, Lance Banning, James Hutson, James Henretta, Elizabeth McCaughey, Richard D. Brown, Thomas Slaughter, J. R. Howe, Jack Rakove, Richard Ellis, and John Murrin. Gordon Wood presented the closing talk, on "Interests and Disinterestedness in the Making of the Constitution."

The sponsors of the conference on "The Creation of the American Constitution" acknowledge with gratitude the generous support of the National Endowment for the Humanities.

PHI KAPPA PHI
AMERICAN BAR ASSOCIATION

The Honor Society of Phi Kappa Phi and the American Bar Association have cosponored a special fall issue of *National Forum* devoted to the theme of American constitutionalism. Entitled "Toward the Bicentennial of the Constitution," the issue is intended to promote greater public awareness of the meaning and enduring significance of America's Founding document.

Guest edited by Mark W. Cannon, the issue contains seventeen articles by prominent scholars and public leaders on the historical background and consequences of the Constitution, the institutional roles of the three branches of government, and the importance of constitutional issues to contemporary American politics and society.

Authors include Warren Burger on the origins of judicial review, Gordon Wood on the intellectual origins of the Constitution, Richard Morris on the drafting and ratifying process, Walter Berns on the notion of a "living Constitution," Wade McCree on civil liberties and limited government, and A. E. Dick Howard on constitutional protections of freedom of expression.

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The Vermont Council sponsored a conference, held on November 10-11, titled "The Constitution and the American Political Order." The conference was inspired by the Council's "Constitutional Era" reading and discussion programs and is part of its effort to prepare for the Bicentennial of the Constitution in 1987 and of Vermont statehood in 1991 by encouraging serious study of the founding era of the Constitution. The conference examined issues of citizenship, democracy, racial equality, equality of the sexes, freedom of speech and freedom of religion in light of the premises of the founding era and of contemporary political thought. The core of the conference was formed by three sets of readings, in addition to the Declaration of Independence and the Constitution. These readings served as the basis of three main lectures and of the discussion which followed each talk: Murray Dry on "The Constitution, Democracy and Citizenship," Mary Beth Norton on "The Constitution and Equality of the Sexes," and James R. Stoner, Jr., on "The Constitution, Religion and Freedom of Speech." Professor Murray Dry, Chairman of the Department of Political Science at Middlebury College and specialist in the political thought of the founding era, served as chief consultant in conference planning and delivered the opening talk.

THE NATIONAL ENDOWMENT FOR THE HUMANITIES SPECIAL INITIATIVE FOR THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION

During April and May of 1984, the National Endowment for the Humanities sponsored four national conferences on the drafting, ratification and legacy of the Constitution. The meetings brought together constitutional scholars, teachers, the media, government officials, and the general public as part of the NEH special initiative aimed at renewing vigorous debate on and study of the document.

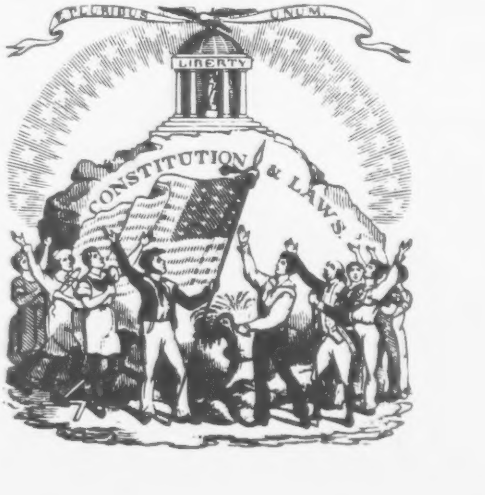
The first conference, the Tocqueville Forum National Colloquium, was held at Wake Forest University, North Carolina, April 9-12. The keynote speech was delivered by NEH chairman William Bennett, who spoke on the importance of bringing the Constitution to the center of civic education. Several panels focused on topics which included the founding principles, the implications of the ratification debate, and separation of powers.

The second meeting was held at Boston College on April 26-28. NEH assistant chairman John Agresto introduced the meeting, reminding the audience that the Constitution is not an abstract document, but embodies the principles which guide our everyday life and relations. Sessions included topics on the nature of judicial review, First Amendment rights, and the Fourteenth Amendment.

The third conference, held at San Jose University, California, on May 1-3, was organized around the theme of natural law and the Constitution. The keynote address by Harry V. Jaffa posed the question of whether the Constitution is based on assumptions of higher principles. Sessions explored the philosophical connection between the Declaration of Independence and the Constitution, and the implications of the Fourteenth Amendment.

The final meeting was held at Brigham Young University in Provo, Utah, on May 16-18. Six speakers discussed various developments in the two-hundred-year history of the Constitution, including the meaning of statesmanship and its application to specific problems.

The conference papers will be published by the colleges which sponsored the meetings. The National Endowment for the Humanities will hold a new series of conferences on the Constitution in 1985.



Federal Bicentennial Agenda

SENATE HISTORICAL OFFICE PLANS BIBLIOGRAPHY

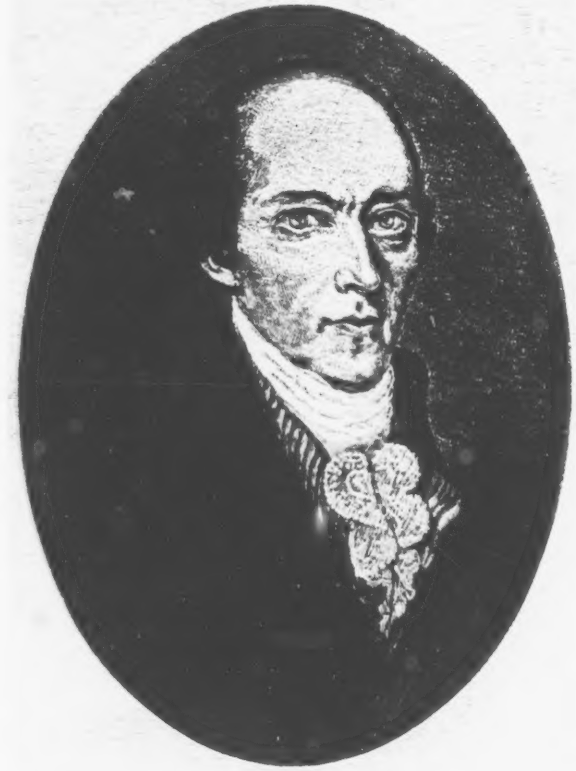
As part of its series of Bicentennial publications, the Senate Historical Office is currently laying plans for an annotated bibliography of first person accounts of the Senate since its first meeting in 1789. The file of citations to books, articles, published diaries and journals, and dissertations that might contain such material is growing rapidly, but the aid of those working in Senate history is requested to help insure that even the most obscure stone does not go unturned.

Senators' autobiographies and well-known published diaries and journals such as William Maclay's account of the first Congress have already been identified, as have the widely quoted descriptions of the Senate by journalists and prominent foreign visitors. But, while the net has been cast broadly, what will remain elusive is the brief but illuminating observation hidden in the unsuspected source. During the mid-1800s, for example, a visit to the nation's capital was an obligatory stop on nearly every traveler's itinerary. Hundreds of visitors, foreign and domestic, prominent and anonymous, filed in and out of the Senate galleries and many wrote lively accounts of what they witnessed. Other unlikely sources, stumbled upon only by chance, such as the letters of Henry James, who visited Washington and dined with the leading senators in the 1880s, and Louisa May Alcott's *Hospital Sketches*, written while she was in Washington to nurse the wounded during the Civil War, yield unexpected, delightful vignettes.

It is with the search for just such unusual and unlikely material that researchers and historians can help. Please keep the project in mind—the criteria for inclusion are that the first person account be published and in English—and if such a reference comes to light, forward it to the United States Senate Historical Office, Washington, D. C. 20510.

UPDATE ON FEDERAL BICENTENNIAL COMMISSION

Project '87 has received many inquiries on the status of the Federal Bicentennial Commission, which was established by P.L. 98-101, signed by the President on September 29, 1983. As of September 17, 1984, no appointments had been made. The list of members will be published in ***this Constitution*** as soon as possible after they are named.



William Maclay. U. S. Senate Historical Office.

The journal kept by William Maclay, one of Pennsylvania's first two Senators, is an outstanding example of the type of first-person account for which the Senate Historical Office is searching. Beginning on April 24, 1789, just eighteen days after the Senate had established its first quorum in New York and ending on March 3, 1791 when Maclay's term ended (much to his annoyance he had drawn the short term), Maclay's almost daily entries deal with the period which witnessed the inauguration of the federal government under the Constitution. In one burst of illumination after another, the journal shoots fire-flares into the congressional workshop, showing us the great founders of the republic in their shirt sleeves, planning, caucusing, cutting, fitting, compromising, and squabbling. Maclay's journal is of particular value, since historians must rely on it and other accounts like it for news of the earliest Senate—during its first five years, the Senate sat behind closed doors, keeping from its constituents the sights and sounds that accompanied the birth pains of the national government.

Maclay was hardly a detached witness to the scenes he described. A Scotsman from the interior of Pennsylvania, he felt awkward in the presence of the Virginia and Boston gentlemen. An apostle of agrarian simplicity, he feared and disliked excessive ceremony, high tone and strong government, and he especially disliked John Adams, the Vice President and President of the Senate, who he judged embodied all three, in addition to enormous arrogance. What follows is an excerpt from Maclay's journal entry for April 30, 1789, an excellent example of his fine and biting form, describing in intimate detail the Senate as it prepared for the first inauguration of an American President:

30th April, Thursday.—*This is a great, important day. Goddess of etiquette, assist me while I describe it. The Senate stood adjourned to half after eleven o'clock. About ten dressed in my best clothes; went for Mr. [Robert] Morris' lodgings, but met his son, who told me that his father would not be in town until Saturday. Turned into the Hall. The crowd already great. The Senate met. The Vice-President [John Adams] rose in the most solemn manner. This son of* Adam *seemed impressed with deeper gravity, yet what shall I think of him? He often, in the midst of his most important airs—I believe when he is at loss for expressions (and this he often is, wrapped up, I suppose, in the contemplation of his own importance)—suffers an unmeaning kind of vacant laugh to escape him. This was the case to-day, and really to me bore the air of ridiculing the farce he was acting. "Gentlemen, I wish for the direction of the Senate. The President will, I suppose, address the Congress. How shall I behave? How shall we receive it? Shall it be standing or sitting?"*

Here followed a considerable deal of talk from him which I could make nothing of. Mr. [Richard Henry] Lee began with the House of Commons (as is usual with him), then the House of Lords, then the King, and then back again. The result of his information was, that the Lords sat and the Commons stood on the delivery of the King's speech. Mr. [Ralph] Izard got up and told how often he had been in the Houses of Parliament. He said a great deal of what he had seen there. [He] made, however, this sagacious discovery, that the Commons stood because they had no seats to sit on, being arrived at the bar of the House of Lords. It was discovered after some time that the King sat, too, and had his robes and crown on.

Mr. Adams got up again and said he had been very often indeed at the Parliament on those occasions, but there always was such a crowd, and ladies along, *that for his part he could not say how it was. Mr. [Charles] Carrol got up to declare that he thought it of no consequence how it was in Great Britain; they were no rule to us, etc. . . .*

. . . Repeated accounts came [that] the Speaker and Representatives were at the door. Confusion ensued; the members left their seats. Mr. [George] Read rose and called the attention of the Senate to the neglect that had been shown Mr. [Charles] Thompson, late Secretary. Mr. Lee rose to answer him, but I could not hear one word he said. The Speaker was introduced, followed by the Representatives. Here we sat an hour and ten minutes before the President arrived—this delay was owing to Lee, Izard, and [Tristram] Dalton, who had stayed with us while the Speaker came in, instead of going to attend the President. The President advanced between the Senate and Representatives, bowing to each. He was placed in the chair by the Vice-President; the Senate with their president on the right, the Speaker and the Representatives on his left. The Vice-President rose and addressed a short sentence to him. The import of it was that he should now take the oath of office as President. He seemed to have forgot half what he was to say, for he made a dead pause and stood for some time, to appearance, in a vacant mood. He finished with a formal bow, and the President was conducted out of the middle window into the gallery, and the oath was administered by the Chancellor. Notice that the business done was communicated to the crowd by proclamation, etc., who gave three cheers, and repeated it on the President's bowing to them.

As the company returned into the Senate chamber, the President took the chair and the Senators and Representatives their seats. He rose, and all arose also, and addressed them (see the address). This great man was agitated and embarrassed more than ever he was by the leveled cannon or pointed musket. He trembled, and several times could scarce make out to read, though it must be supposed he had often read it before. He put part of the fingers of his left hand into the side of what I think the tailors call the fall of the breeches [corresponding to the modern side-pocket], changing the paper into his left [right] hand. After some time he then did the same with some of the fingers of his right hand. When he came to the words all the world, *he made a flourish with his right hand, which left rather an ungainly impression. I sincerely, for my part, wished all set ceremony in the hands of the dancing-masters, and that this first of men had read off his address in the plainest manner, without ever taking his eyes from the paper, for I felt hurt that he was not first in everything. He was dressed in deep brown, with metal buttons, with an eagle on them, white stockings, a bag, and sword.*

From the hall there was a grand procession to Saint Paul's Church, where prayers were said by the Bishop. The procession was well conducted and without accident, as far as I have heard. The militia were all under arms, lined the street near the church, made a good figure, and behaved well.

Source: ***The Journal of William Maclay*** **(New York: Albert & Charles Boni, 1927).**

THE UNION AND THE CONSTITUTION FOREVER.

SUBSCRIPTION INFORMATION

The National Endowment for the Humanities is underwriting the publication of ***this Constitution*** as a quarterly magazine so that it may be distributed free to institutions planning Bicentennial programs. Such institutions may write and ask to be placed on the free mailing list. Institutions wishing to receive more than one copy may do so by subscribing for additional copies. Individuals also must subscribe. Subscription rates are listed below. Each issue of the magazine will be available for purchase at bulk rate.

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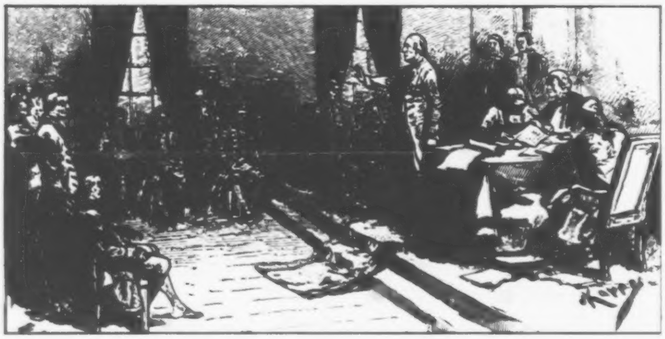
Chronology

continued from inside front cover



August 7, 1786: The Congress of the Confederation considers a motion offered by Charles Pinckney of South Carolina to amend the Articles of Confederation in order to give Congress more control over foreign affairs and interstate commerce. Because amendments to the Articles require the unanimous consent of the states, an unlikely eventuality, Congress declines to recommend the changes.

September 11-14, 1786: ANNAPOLIS CONVENTION. New York, New Jersey, Delaware, Pennsylvania and Virginia send a total of twelve delegates to the conference which had been proposed by Virginia in January to discuss commercial matters. (New Hampshire, Massachusetts, Rhode Island and North Carolina send delegates but they fail to arrive in time.) The small attendance makes discussion of commercial matters fruitless. On September 14, the convention adopts a resolution drafted by Alexander Hamilton asking all the states to send representatives to a new convention to be held in Philadelphia in May of 1787. This meeting will not be limited to commercial matters but will address all issues necessary "to render the constitution of the Federal Government adequate to the exigencies of the Union."

February 4, 1787: THE END OF SHAYS' REBELLION. General Benjamin Lincoln, leading a contingent of 4,400 soldiers enlisted by the Massachusetts governor, routs the forces of Daniel Shays. A destitute farmer, Shays had organized a rebellion against the Massachusetts government, which had failed to take action to assist the state's depressed farm population. The uprisings, which had begun in the summer of 1786, are completely crushed by the end of February. The Massachusetts legislature, however, enacts some statutes to assist debt-ridden farmers.

February 21, 1787: The Congress of the Confederation cautiously endorses the plan adopted at the Annapolis Convention for a new meeting of delegates from the states "for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein."

May 25, 1787: OPENING OF THE CONSTITUTIONAL CONVENTION. On May 25, a quorum of delegates from seven states arrives in Philadelphia in response to the call from the Annapolis Convention, and the meeting convenes. Ultimately, representatives from all the states but Rhode Island attend. Of the 55 participants, over half are lawyers, and 29 have attended college. The distinguished public figures include George Washington, James Madison, Benjamin Franklin, George Mason, Gouverneur Morris, James Wilson, Roger Sherman and Elbridge Gerry.

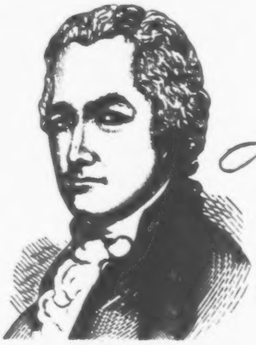
May 29, 1787: VIRGINIA PLAN PROPOSED. On the fifth day of the meeting, Edmund Randolph, a delegate from Virginia, offers 15 resolutions comprising the "Virginia Plan" of Union. Rather than amending the Articles of Confederation, the proposal describes a completely new organization of government, including a bicameral legislature which represents the states proportionately, with the lower house elected by the people and the upper house chosen by the lower body from nominees proposed by the state legislatures; an executive chosen by the legislature; a judiciary branch; and a council comprised of the executive and members of the judiciary branch with a veto over legislative enactments.

June 15, 1787: NEW JERSEY PLAN PROPOSED. Displeased by Randolph's plan which placed the smaller states in a disadvantaged position, William Patterson proposes instead only to modify the Articles of Confederation. The New Jersey plan gives Congress power to tax and to regulate foreign and interstate commerce, and establishes a plural executive (without veto power) and a supreme court.

June 19, 1787: After debating all the proposals, the Convention decides not merely to amend the Articles of Confederation, but to conceive a new national government. The question of equal versus proportional representation by states in the legislature now becomes the focus of the debate.

July 12, 1787: THE CONNECTICUT COMPROMISE(I). Based upon a proposal made by Roger Sherman of Connecticut, the Constitutional Convention agrees that representation in the lower house should be proportional to a state's population (the total of white residents, and three-fifths of the black).

July 13, 1787: NORTHWEST ORDINANCE. While the Constitutional Convention meets in Philadelphia, the Congress of the Confederation crafts another governing instrument for the territory north of the Ohio River. The Northwest Ordinance, written largely by Nathan Dane of Massachusetts, provides for interim governance of the territory by Congressional appointees (a governor, secretary and three judges), the creation of a bicameral leg-



A Hamilton

islature when there are 5,000 free males in the territory, and, ultimately, the establishment of three to five states on an equal footing with the states already in existence. Freedom of worship, right to trial by jury, and public education are guaranteed, and slavery prohibited.

July 16, 1787: THE CONNECTICUT COMPROMISE (II). The Convention agrees that each state should be represented equally in the upper chamber.

August 6, 1787: The five-man committee appointed to draft a constitution based upon 23 "fundamental resolutions" drawn up by the convention between July 19 and July 26 submits its document which contains 23 articles.

August 6-September 10, 1787: THE GREAT DEBATE. The Convention debates the draft constitution, and agrees to prohibit Congress from banning the foreign slave trade for twenty years.

August 8, 1787: The Convention adopts a two-year term for representatives.

August 9, 1787: The Convention adopts a six-year term for Senators.

August 16, 1787: The Convention grants to Congress the right to regulate foreign trade and interstate commerce.

September 6, 1787: The Convention adopts a four-year term for the President.

September 8, 1787: A five-man committee, comprised of William Samuel Johnson (chair), Alexander Hamilton, James Madison, Rufus King and Gouverneur Morris, is appointed to prepare the final draft.

September 12, 1787: The committee submits the draft, written primarily by Gouverneur Morris, to the Convention.

September 13-15, 1787: The Convention examines the draft clause by clause, and makes a few changes.

September 17, 1787: All twelve state delegations vote approval of the document. Thirty-nine of the forty-two delegates present sign the engrossed copy, and a letter of transmittal to Congress is drafted. The Convention formally adjourns.

September 20, 1787: Congress receives the proposed Constitution.

September 26-27, 1787: Some representatives seek to have Congress censure the Convention for failing to abide by Congress' instruction only to revise the Articles of Confederation.

September 28, 1787: Congress resolves to submit the Constitution to special state ratifying conventions. Article VII of the document stipulates that it will become effective when ratified by nine states.

October 27, 1787: The first "Federalist" paper appears in New York City newspapers, one of 85 to argue in favor of the adoption of the new frame of government. Written by Alexander Hamilton, James Madison and John Jay, the essays attempt to counter the arguments of anti-Federalists, who fear a strong centralized national government.

December 7, 1787: Delaware ratifies the Constitution, the first state to do so, by unanimous vote.

December 12, 1787: Pennsylvania ratifies the Constitution in the face of considerable opposition. The vote in convention is 46 to 23.

December 18, 1787: New Jersey ratifies unanimously.

January 2, 1788: Georgia ratifies unanimously.

January 9, 1788: Connecticut ratifies by a vote of 128 to 40.

February 6, 1788: The Massachusetts convention ratifies by a close vote of 187 to 168, after vigorous debate. Many anti-Federalists, including Sam Adams, change sides after Federalists propose nine amendments, including one which would reserve to the states all powers not "expressly delegated" to the national government by the Constitution.

March 24, 1788: Rhode Island, which had refused to send delegates to the Constitutional Convention, declines to call a state convention and holds a popular referendum instead. Federalists do not participate, and the voters reject the Constitution, 2708 to 237.

April 28, 1788: Maryland ratifies by a vote of 63 to 11.

May 23, 1788: South Carolina ratifies by a vote of 149 to 73.

June 21, 1788: New Hampshire becomes the ninth state to ratify, by vote of 57 to 47. The convention proposes twelve amendments.

June 25, 1788: Despite strong opposition led by Patrick Henry, Virginia ratifies the Constitution by 89 to 79. James Madison leads the fight in favor. The convention recommends a bill of rights, comprised of twenty articles, in addition to twenty further changes.

July 2, 1788: The President of Congress, Cyrus Griffin of Virginia, announces that the Constitution has been ratified by the requisite nine states. A committee is appointed to prepare for the change in government.

WASHINGTON PRESIDENT
1791

July 26, 1788: New York ratifies by vote of 30 to 27 after Alexander Hamilton delays action, hoping that news of ratification from New Hampshire and Virginia would influence anti-Federalist sentiment.
August 2, 1788: North Carolina declines to ratify until the addition to the Constitution of a bill of rights.
September 13, 1788: Congress selects New York as the site of the new government and chooses dates for the appointment of and balloting by presidential electors, and for the meeting of the first Congress under the Constitution.
October 10, 1788: The Congress of the Confederation transacts its last official business.
December 23, 1788: The State of Maryland cedes ten square miles to Congress for a federal city.
January 7, 1789: Presidential electors are chosen by ten of the states that have ratified the Constitution (all but New York).
February 4, 1789: Presidential electors vote; George Washington is chosen as President, and John Adams as Vice-President. Elections of senators and representatives take place in the states.
March 4, 1789: The first Congress convenes in New York, with eight senators and thirteen representatives in attendance, and the remainder en route.
April 1, 1789: The House of Representatives, with 30 of its 59 members present, elects Frederick A. Muhlenberg of Pennsylvania to be its speaker.
April 6, 1789: The Senate, with 9 of 22 senators in attendance, chooses John Langdon of New Hampshire as temporary presiding officer.
April 30, 1789: George Washington is inaugurated as the nation's first President under the Constitution. The oath of office is administered by Robert R. Livingston, chancellor of the State of New York, on the balcony of Federal Hall, at the corner of Wall and Broad Streets.
July 27, 1789: Congress establishes the Department of Foreign Affairs (later changed to Department of State).
August 7, 1789: Congress establishes the War Department.
September 2, 1789: Congress establishes the Treasury Department.
September 22, 1789: Congress creates the office of Postmaster General.
September 24, 1789: Congress passes the Federal Judiciary Act, which establishes a Supreme Court, 13 district courts and 3 circuit courts, and creates the office of the Attorney General.
September 25, 1789: Congress submits to the states twelve amendments to the Constitution, in response to the five state ratifying conventions that had emphasized the need for immediate changes.
November 20, 1789: New Jersey ratifies ten of the twelve amendments, The Bill of Rights, the first state to do so.
November 21, 1789: As a result of Congressional action to amend the Constitution, North Carolina ratifies the original document, by a vote of 194 to 77.
December 19, 1789: Maryland ratifies the Bill of Rights.
December 22, 1789: North Carolina ratifies the Bill of Rights.
January 25, 1790: New Hampshire ratifies the Bill of Rights.
January 28, 1790: Delaware ratifies the Bill of Rights.
February 24, 1790: New York ratifies the Bill of Rights.
March 10, 1790: Pennsylvania ratifies the Bill of Rights.
May 29, 1790: Rhode Island ratifies the Constitution, by a vote of 34 to 32.
June 7, 1790: Rhode Island ratifies the Bill of Rights.
January 10, 1791: Vermont ratifies the Constitution.
March 4, 1791: Vermont is admitted to the Union as the fourteenth state.
November 3, 1791: Vermont ratifies the Bill of Rights.
December 15, 1791: Virginia ratifies the Bill of Rights, making it part of the United States Constitution.

Three of the original thirteen states did not ratify the Bill of Rights until the 150th anniversary of its submission to the states. Massachusetts ratified on March 2, 1939; Georgia on March 18, 1939; and Connecticut on April 19, 1939.

...do ordain and establish this Constitution for the United States of America.

A Bicentennial Chronicle Spring 1985, No.6

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Project '87

IN CONGRESS, JULY 4, 1776.

A DECLARATION

BY THE REPRESENTATIVES OF THE

UNITED STATES OF AMERICA,

IN GENERAL CONGRESS ASSEMBLED.

WHEN in the Course of human Events, it becomes necessary for one People to dissolve the Political Bands which have connected them with another, and to assume among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and of Nature's God entitle them, a decent Respect to the Opinions of Mankind requires that they should declare the causes which impel them to the Separation.

WE hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient Causes; and accordingly all Experience hath shewn, that Mankind are more disposed to suffer, while Evils are sufferable, than to right themselves by abolishing the Forms to which they are accustomed. But when a long Train of Abuses and Usurpations, pursuing invariably the same Object, evinces a Design to reduce them under absolute Despotism, it is their Right, it is their Duty, to throw off such Government, and to provide new Guards for their future Security. Such has been the patient Sufferance of these Colonies; and such is now the Necessity which constrains them to alter their former Systems of

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Source: U.S. Congress. House. *The Declaration of Independence and the Constitution of the United States of America.* H. Doc. 96-143, 96th Cong., 1st sess., 1979.

...do ordain and establish

this Constitution

for the United States of America.

A Bicentennial Chronicle

No. 6 Spring, 1985

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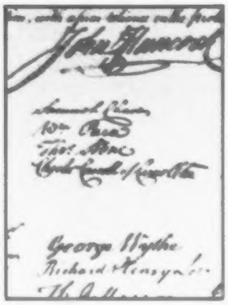

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this Constitution is published with the assistance of a grant from the National Endowment for the Humanities as part of its special initiative on the Bicentennial of the United States Constitution. Editorial offices are located at 1527 New Hampshire Avenue, N.W., Washington, D.C. 20036. All material in this publication may be photocopied if attributed as follows: "Reprinted from *this Constitution: A Bicentennial Chronicle*, Spring, 1985, published by Project '87 of the American Historical Association and the American Political Science Association." Project '87 would appreciate notification from those who photocopy material in this issue for use in presentations to other groups. Articles appearing in this magazine are annotated and indexed in *Historical Abstracts* and *America: History and Life*. © Copyright 1985 by the American Historical Association and the American Political Science Association

this Constitution

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Go: Washington

From the Editor:

March 28, 1985, marks the Bicentennial of the first of the meetings that led ultimately to the Constitutional Convention. From March 25 to March 28, 1785, George Washington hosted a gathering at Mount Vernon of delegates from Virginia and Maryland to talk about problems of navigation on their common waterways—an event we now refer to as the Mount Vernon Conference. As a result of this meeting, the Virginia legislature invited all the states to come to Annapolis in 1786 to discuss commercial matters. The small group of delegates who attended the Annapolis Convention decided that the states needed to talk about all the problems with the Articles of Confederation, not just commercial concerns. And so they recommended that Congress call the meeting that was held in September, 1787, in Philadelphia. In keeping with our mission to observe the coming anniversaries by learning and thinking about the events—and their implications—of the founding period, in this issue Richard B. Morris describes the genesis of the Mount Vernon Conference and how it began the march to Philadelphia.

Stepping back even farther, we devote attention in this issue to the revolutionary roots of the Constitution. The first of our documents as an independent nation, the Declaration of Independence, begins on the inside front cover. A companion article by George Athan Billias suggests that the relationship between the Declaration and the Constitution is philosophical as well as historical. Lance Banning takes us forward from the Declaration and explores the revolutionary impetus that brought us from independence through the Articles of Confederation and led ultimately to the Constitutional Convention.

One of the most innovative aspects of governance that came out of the Constitutional Convention was the American system of federalism, one of our "Enduring Constitutional Issues." Jack P. Greene demonstrates that in this area, as in others, Americans found in the British system a model on which they could build. Linda K. Kerber looks at yet another "Enduring Constitutional Issue"—that of women's rights under the Constitution. In an article that features original documents of eighteenth- and nineteenth-century American women, she illuminates the thinking of these women on the Constitution and the impact of the document on women in the nation's first century. Some of these same documents appear in a format suitable for instructional use in a lesson produced by the New Mexico Law-Related Education project; it is featured in the "For the Classroom" section.

An article by William Wiecek focuses on the evolution of the Constitution as he examines the Supreme Court under the guidance of Chief Justice Roger B. Taney. That Court saw in the Constitution the flexibility to encourage national economic development but resisted a similar perspective when it came to the rights of black Americans, a tarnished record that has brought both praise and condemnation.

Just a year ago, ***this Constitution*** began its life as a quarterly magazine devoted to providing its readers with articles about the Constitution and news about Bicentennial programs. Since that time we have welcomed many new readers, including more than 14,000 members of the National Council for the Social Studies, who are responsible for teaching about the Constitution in elementary and high schools. We start this second year with enthusiasm and with pleasure at the response we have gotten from our readers. Many of you read ***this Constitution*** closely (as we know from your letters catching us when we slip!) and you have told us that you have found it helpful. We look forward to receiving your comments and suggestions in the months ahead.

Thirteen Enduring Constitutional Issues

THE UNION AND THE CONSTITUTION FOREVER.

- National Power—limits and potential
- **Federalism—the balance between nation and state**
- The Judiciary—interpreter of the Constitution or shaper of public policy
- Civil Liberties—the balance between government and the individual
- Criminal Penalties—rights of the accused and protection of the community
- Equality—its definition as a Constitutional value
- The Rights of Women Under the Constitution
- The Rights of Ethnic and Racial Groups Under the Constitution
- Presidential Power in Wartime and in Foreign Affairs
- The Separation of Powers and the Capacity to Govern
- Avenues of Representation
- Property Rights and Economic Policy
- Constitutional Change and Flexibility

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The Imperial Roots of American Federalism

by JACK P. GREENE

"This government is so new, it wants a name." Thus complained Patrick Henry, one of the most articulate, prominent, and formidable opponents of the new Constitution in June 1788 during the Virginia ratifying convention. Scholars have since argued over whether the government formed under the Constitution was democratic. But virtually all of them—of whatever ideological hues or methodological orientations—have agreed that Henry was correct, that the new federal political system created by the Constitution was an entirely new, even quite a radical, departure in political institutions.

Mislabeled by its opponents as a *consolidated* government, it was, in response to hostile critics like Henry, called by its supporters first a *confederal* and then a *federal* government, a name that has stuck with it ever since. Whether this creation was in fact entirely new and, if so, whence it derived and what precisely was new about it are the principal questions that will be taken up in this article.

Precedents

We can perhaps best begin this discussion with a brief definition of the term *federalism*. Federalism is a political arrangement in which the basic powers of sovereignty are distributed among several governments, each of which has its own distinct share of those powers. A federal state differs from a *unitary*, or *consolidated* or *centralized*, state such as those that have existed throughout most of western Europe since the Renaissance. A unitary state concentrates sovereign authority in a single government.

A federal system can be further distinguished from a *confederation*, like the Holy Roman Empire or the United States between 1776 and 1788. Merely an association or league of sovereign governments organized for some designated purposes of mutual interest, a confederation places ultimate authority in the several member states, which delegate a few carefully limited powers to the general government. Whether a government is unitary, confederal, or federal depends primarily on the location of the basic powers of sovereignty.

Opponents of the Constitution in 1787–88 charged, and its supporters freely admitted, that there were no other examples in the contemporary world of a federal state. As James Madison pointed out in *The Federalist*, numbers 19 and 20, those few European states that were not unitary in structure—Poland, the Swiss Cantons, and the Netherlands—were all loose confederations.

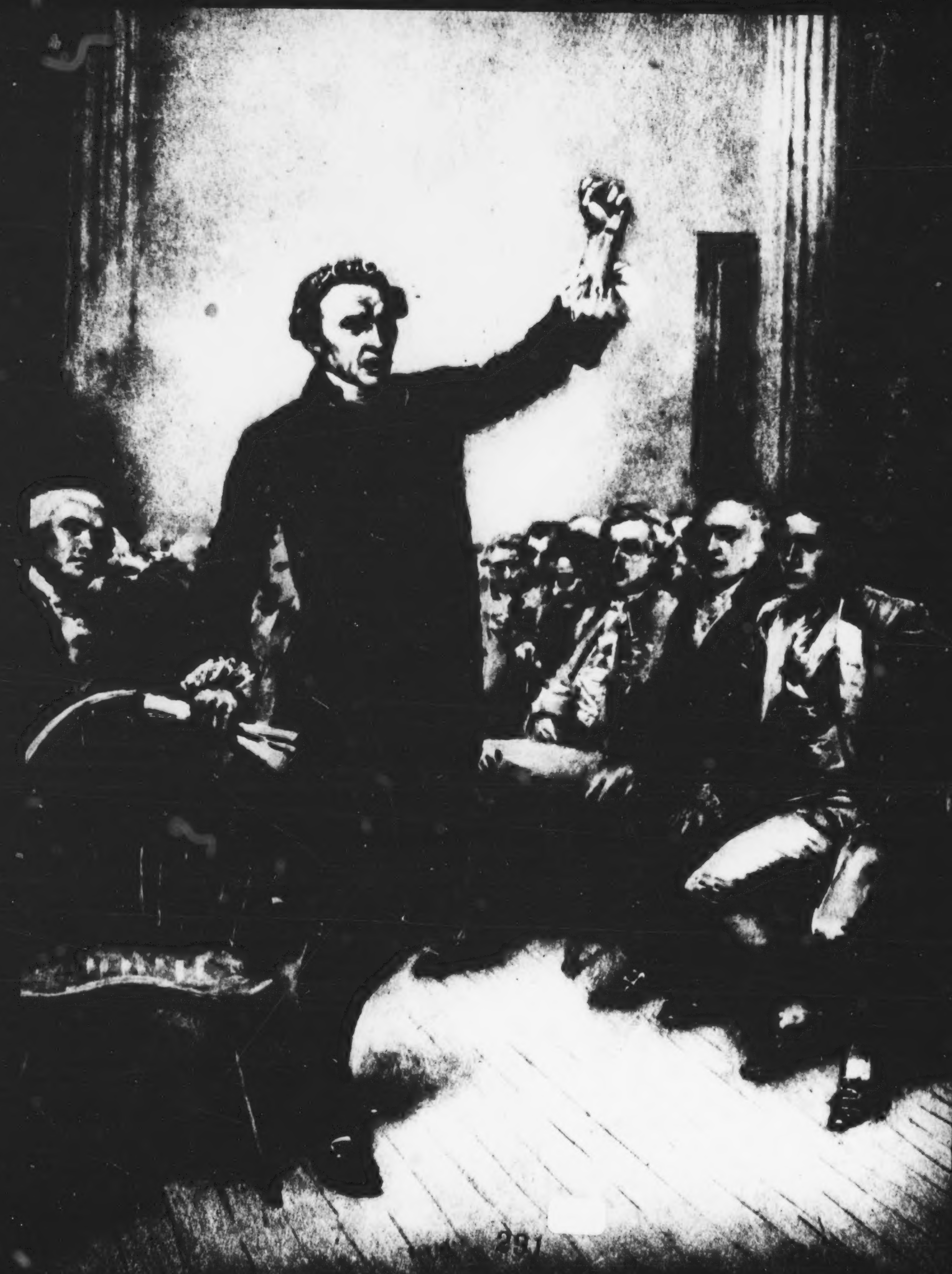
The ancient world also included several non-unitary polities that were familiar to the men who framed the United States Constitution. The "most considerable" of these, Madison wrote in *The Federalist* No. 18, was "that of the Grecian republics, associated under the Amphictyonic council." According to "the best accounts transmitted of this celebrated institution," it bore "a very instructive analogy" to the Articles of Confederation, the government the Philadelphia Convention was proposing to replace. But it in no sense corresponded to the new federal scheme of government devised by the convention.

By contrast, two other unions of Grecian republics, the Archaen League and the Lycian Confederacy, seem to have resembled the American federal government somewhat more closely. In each, Madison noted in *The Federalist*, "it is probable that the federal head had a degree and species of power, which gave it a considerable likeness to the government framed" at Philadelphia. As Madison admitted, however, "such imperfect monuments" remained of those "curious political fabric[s]" that they threw much less "light . . . on the science of federal government" than the founding fathers would have liked.

As the great American constitutional historian Andrew C. McLaughlin pointed out over fifty years ago, however, another precedent existed much closer to home and much more familiar to the framers of the American constitution. That precedent was to be found in the structure of the British Empire as it had functioned in fact, if not in theory, over much of the period from its founding in 1607 until its partial dissolution as a result of the American Revolution.

"Anyone even slightly familiar with the American constitutional system," wrote McLaughlin, "will see at once the similarity between the general scheme of the old empire and the American political system of federalism." In theory, the central, or metropolitan, government in Britain had unqualified authority. In practice, however, power was distributed between the metropolitan government and the several colonial governments. Each colonist, McLaughlin noted, obviously lived "under two governments." One was imperial in scope and exercised full authority over foreign affairs, war, peace, and intercolonial and foreign trade. The other was a colonial government that exercised *de facto* and virtually exclusive jurisdiction over almost all matters of local concern. Far from being "a thoroughly consolidated and centralized" political entity, the early British Empire thus actually

Patrick Henry. ***Library of Congress.***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Notwithstanding the absence of theoretical agreement about the distribution of power within the empire, the empire continued to function in practice with a rather clear demarcation of authority; the colonial governments handled virtually all internal matters and the metropolitan government in London oversaw most external affairs.

embodied the most basic principles of federalism.

Theory and Practice in the Early Modern British Empire

But if such a *de facto* division of power characterized the early modern British Empire, it certainly had no firm *de jure* status. Indeed, the question of how authority was distributed between the metropolitan government at the center and the several colonial governments in the periphery of the empire in America was the principal source of political contention within the old empire. As the debate over this question gradually took shape during the last four decades of the seventeenth century, the central underlying issue was to what extent—and in what cases—the authority of the metropolitan government in London limited the scope of the powers of the colonial legislatures.

Colonial assemblies could neither pass laws nor, in most colonies, even meet without the consent of the governor. Like the British monarch, governors continued to play an influential role in the legislative process. Nevertheless, the assemblies early claimed full legislative authority over their respective jurisdictions. They based these claims upon two foundations. First, they stood upon the inherited right of their constituents not to be subject to any laws passed without the consent of their representatives, a right that for most colonies seemed to have been confirmed by their early charters from the Crown. Second, they relied upon precedent. By the middle of the eighteenth century, they had actually exercised such authority for many decades and in some cases for well over a century.

Even though they had been so long in possession of such extensive authority over local affairs, the colonial assemblies never managed to persuade the metropolitan government to admit in theory what they had achieved in fact. As a result, their authority in relation to that of the Crown and Parliament in London remained in an extremely uncertain state. To have eliminated that uncertainty would have required, as the English economic writer Charles Davenant recognized as early as the 1690s, a clear delineation of the "bounds between the chief power [in Britain] and the people" in the colonies in a way acceptable to both. No matter how much power they actually exerted within their respective spheres, in the absence of such an arrangement, the colonial legislatures could never be entirely secure from the overwhelming might of the metropolitan government. They could never be sure that their constituents would enjoy the same degree of protection of their liberties and properties as did their fellow Englishmen in Britain.

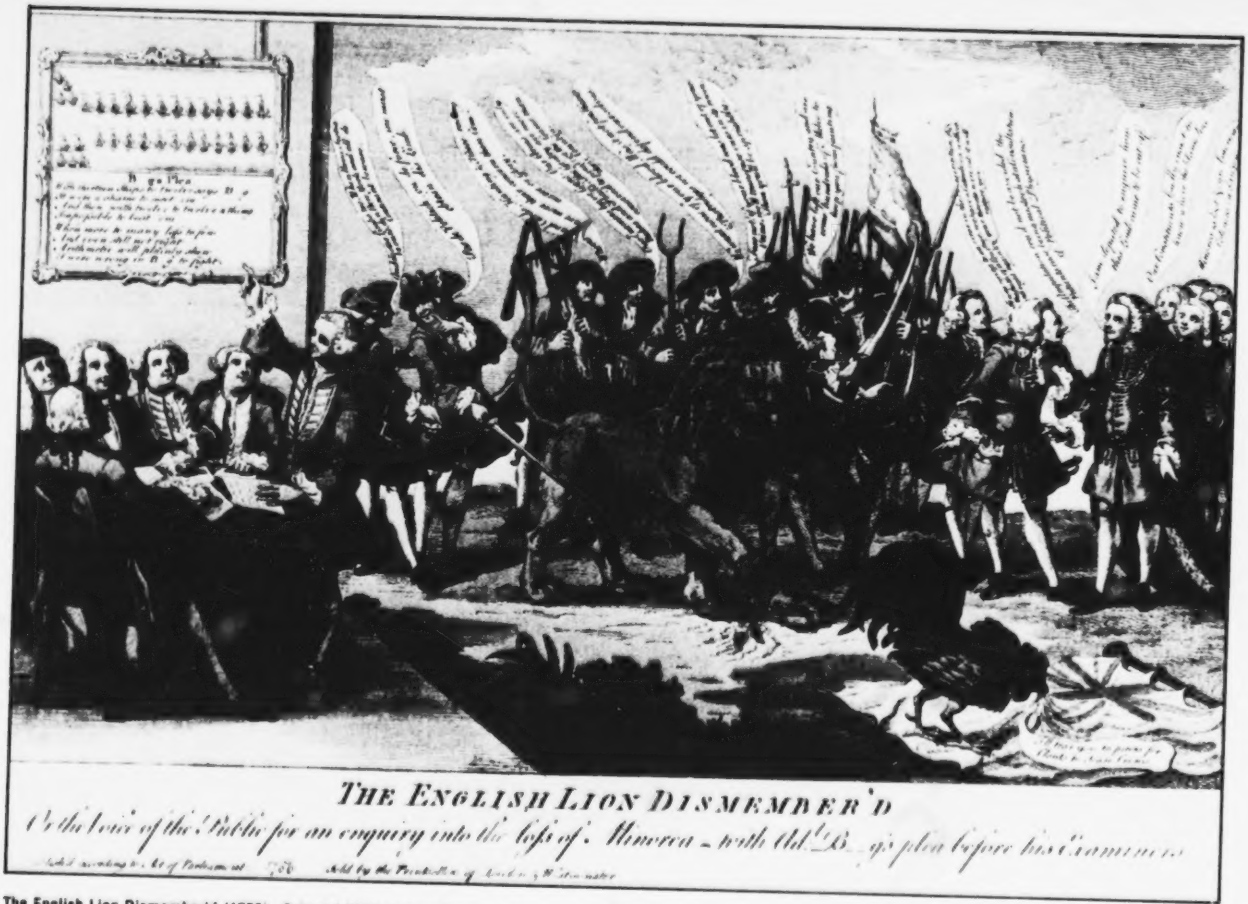
Before the 1760s, the recurrent debates over this subject focused on whether Crown orders to colonial governors—they were called royal instructions—actually had the force of law within the colonies. In 1757, Lord Granville, president of the King's Privy Council, elaborated the official metropolitan view during an interview with Benjamin Franklin. Because the royal instructions were drawn up by the Privy Council and because the "King in Council is THE LEGISLATOR of the Colonies," Granville insisted, such instructions constituted "the LAW OF THE LAND" in the colonies "and as such *ought to be* OBEYED."

In reply, Franklin admitted that the colonial legislatures could not "make permanent laws" without the King's consent: all legislation in most colonies required the royal approval. But, he argued, instructions were not laws because, by both charters and longstanding custom, colonial "laws were to be made by [the colonial] . . . Assemblies," and the King could not "make a law for [the colonists] without" their consent.

Although the subject was never fully explored and certainly never resolved, the fundamental issue in this debate was the location of the basic powers of sovereignty within the British Empire. According to the logic of Granville's position, those powers were concentrated solely in the King-in-Council which had total authority over the colonies. By contrast, Franklin's reply assumed that at the time of initial settlement the King had delegated some of that authority to the colonial governments and could not subsequently act in the areas so delegated without the consent of the colonial legislatures.

This running dispute elicited almost no discussion of the role of Parliament in relation to the colonies, the issue that would eventually stir so much controversy during the 1760s and 1770s. Prior to the 1760s, Parliament exerted its legislative authority over the colonies only in very limited spheres, primarily involving defense, trade, and other matters of strategic and economic concern to the empire as a whole. Nevertheless, to the extent that they considered Parliament's relationship to the colonies at all, people on both sides of the Atlantic seem to have regarded its authority as being unlimited.

The many contemporary references to Parliament as the ultimate protector of colonial, as well as metropolitan, rights and privileges strongly suggest that the colonists did not yet think of Parliament as a threat to the authority of their own legislatures. "There was no Doubt," Franklin wrote in 1756, "but the


THE ENGLISH LION DISMEMBER'D
Or the Voice of the Public for an enquiry into the loss of Minorca – with Adl. B—g's plea before his Examiners

The English Lion Dismember'd (1756). *Colonial Williamsburg Foundation.*

Parliament understand the Rights of Government" and, he implied, could be trusted to protect them, in the colonies quite as much as in Britain itself.

Everybody knew of instances in which Crown officials, acting in their executive capacity, had, through either ignorance or malice, taken oppressive measures against the colonists. But no one could trace a single such action to Parliament. Indeed, when the Crown's ministers in 1744 and 1749 had proposed that Parliament pass a statute "to make the King's instructions laws in the colonies," Parliament voted it down, an action, Franklin later recalled, "for which we adored them as our friends and [as] friends of liberty."

Because they regarded Parliament as a potential ally in the efforts of their legislatures to hold on to their authority over local affairs, colonial political thinkers made no systematic attempt prior to the 1760s to argue that Parliament's colonial authority had any limits. Nevertheless, in response to proposals in the early 1750s that Parliament might tax the colonies for defense, some colonists did suggest that, because "the Colonies have no Representatives in Parliament" and because it was "suppos'd an undoubted Right of Englishmen not to be taxed but by their Consent given thro' their [own] Representatives," Parliament had no authority to tax the colonies.

Again, this suggestion implied that, far from being concentrated entirely in the metropolitan government, the essential powers of sovereignty were distributed between it and the several colonial governments and that each colonial government had exclusive power to tax the inhabitants in the area for which it had responsibility. Meanwhile, notwithstanding the absence of theoretical agreement about the distribution of power within the empire, the empire continued to function in practice with a rather clear demarcation of authority; the colonial governments handled virtually all internal matters and the metropolitan government in London oversaw most external affairs.

Searching for a Principle

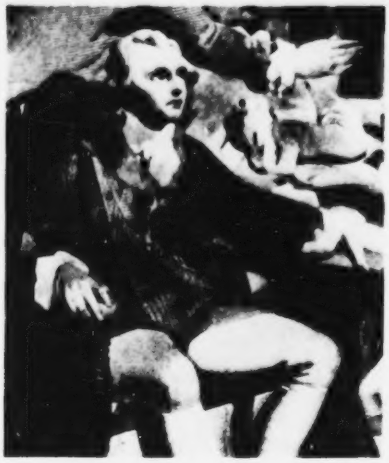
Parliament's explicit effort to impose taxes on the colonies in the mid-1760s, in particular through the Stamp Act of 1765, prompted a fuller exploration of the distribution of power within the British Empire. In response to that measure, the colonists took the position that they could not be taxed except by their own legislatures and that Parliament had no authority to tax them for revenue. This position implied that Parliament could legislate for the colonies and levy duties for purposes of regulating trade as opposed to raising a revenue.

But in a significant number of instances, colonists denied not only Parliament's authority to tax but also its right to pass laws relating to the "internal polity" of the colonies. Thus did the Virginia Assembly in a petition to the King in December 1764 protesting against the proposed Stamp Act claim for Virginians the "ancient and inestimable

Right of being governed by such Laws respecting their internal Polity and Taxation as are derived from their own Consent." The Virginia House of Burgesses reiterated this claim in resolutions in May 1765, and the legislatures of Rhode Island, Maryland, and Connecticut repeated it in one form or another later that year.

To discover precisely what Virginians and others were claiming in 1764-66 when they denied Parliament's right to pass laws respecting the internal polity of the colonies, we can turn to the writings of the Virginia lawyer and antiquarian Richard Bland. In two pamphlets, *The Colonel Dismounted*, published in 1764 just a few weeks before the Virginia legislature prepared the petition to the King referred to above, and *An Inquiry Into the Rights of the British Colonies*, published early in 1766 after Parliament had enacted the Stamp Act, Bland claimed for the colonists the "right ... of directing their *internal* government by laws made with their own consent." In addition, he argued that each colony was "a distinct State, independent, as to their *internal* Government, of the original Kingdom, but united with her, as to their *external* Polity, in the closest and most intimate LEAGUE AND AMITY, under the same Allegiance, and enjoying the Benefits of a reciprocal intercourse."

Bland did not make clear exactly what specific matters were subsumed under the term *internal* and what under *external*. But he clearly implied that Parliament's authority over the colonies stopped somewhere short of the Atlantic coast and did not extend over any affairs relating exclusively to their internal life. Although he acknowledged that the colonies were subordinate to Parliament, he denied that they were "absolutely so." He contended that Parliament could not constitutionally pass tax measures or any other laws that violated the colonists' essential rights as Englishmen, especially their right to be governed in their internal affairs by laws made with their own consent as expressed through their elected representatives.



Richard Bland, from "Patrick Henry Before the Virginia House of Burgesses," ***painting by Peter F. Rothermel. Patrick Henry Memorial Foundation, Brookneal, Va.***

Most of the colonial protests against the Stamp Act, especially the official protests of the Stamp Act Congress in the fall of 1765, did not go so far as the Virginians in excluding Parliament from all jurisdiction over the internal affairs of the colonies. Rather, they mostly tended to exclude Parliament only from any authority to tax the colonies for revenue. Probably, as Edmund S. Morgan has remarked, because "the issue of the day was taxation" and "Parliament at this time was not attempting to interfere" with other aspects of the internal affairs of the colonies, few saw the need to consider explicitly the larger question of the general limits of Parliament's colonial authority. But the Virginia protests suggest the existence of a strong impulse in the colonies to deny Parliament's jurisdiction over all internal colonial matters.

Whether they drew the lines between taxation and legislation or between internal and external spheres of government, *all* colonial protests displayed a common concern to specify the jurisdictional boundaries between Parliament and the colonial assemblies. This concern clearly implied a conception of empire in which the essential powers of sovereignty were not, as most metropolitan political writers and officials maintained, concentrated in Parliament but were distributed among several distinct polities within the empire, much in the manner of the American federal system contrived in 1787. This concern also underlined the fact that in practice the essential powers of sovereignty were already distributed among those polities and pointed to the need for some explicit definition of exactly how and by what underlying principles those powers were distributed.

The metropolitan response to colonial protests against the Stamp Act revealed that no one in Britain shared the colonial conception of empire, except for a few Americans like Benjamin Franklin. Although a few British political leaders accepted the colonial claim of no taxation without representation and denied Parliament's right to tax the colonies for revenue, Sir William Blackstone, the eminent professor of English law at Oxford, sounded the predominant opinion.

In his influential *Commentaries on the Laws of England*, the first volume of which was published in 1765 during the Stamp Act crisis, Blackstone argued that the King-in-Parliament had absolute and indivisible authority over all matters relating to all Britons everywhere. "What the Parliament doth" with reference to any of the British dominions, he declared, "no authority upon earth can undo." The colonies were perforce subject to its jurisdiction. In the British view, the basic powers of sovereignty were not distributed among the metropolitan and colonial governments but were concentrated in the hands of the King-in-Parliament.

William Blackstone. *Library of Congress.*

To most Britons in the home islands, in fact, the colonial position appeared incomprehensible because it seemed to suggest the existence of more than one sovereign power in a single political entity. Sovereignty, they believed in common with virtually all contemporary political thinkers in Britain and Europe, could not be divided. *Imperium in imperio*, a sovereign authority within a sovereign authority, seemed to them a contradiction in terms. The colonies were either part of the British Empire and therefore under the sovereign authority of the King-in-Parliament or entirely separate states, each of which was sovereign over its own territory and inhabitants. According to British theory and in total disregard of the experience of a century and a half of imperial governance, no half-way ground between these two positions could exist.

For the next eight years, the controversy over the question of the respective jurisdictions of Parliament and the colonial legislatures, what McLaughlin has referred to as "the problem of imperial organization," lay at the heart of the deepening conflict between Britain and the colonies. While British political and constitutional theorists continued to deny that "powers could be distinguished one from the other" and to assert that Parliament either had "all powers or none," a long line of colonial thinkers persisted in their efforts to try to draw a line between the jurisdiction of Parliament and that of the colonial legislatures.

As writers such as John Dickinson followed out the logic of the line drawn by the Stamp Act Congress, most colonists from 1767 to 1774 seem to have held that Parliament could legislate for the colonies but could not tax them for revenue. But an increasing number of Americans, looking at the problem with a more penetrating eye, began to view it in terms closer to those of Bland and the Virginia legislature. For instance, as early as 1766 Franklin had begun to think of the colonies as "so many separate little States, subject to the same Prince, but each with its own Parliament." "The Sovereignty of the King is therefore easily understood," he wrote the Scottish philosopher Lord Kames from London in early 1767. But, he complained, "nothing is more common here than to talk of the *Sovereignty of Parliament*, and the *Sovereignty of this Nation* over the Colonies," and these kinds of sovereignties he found difficult to reconcile with the *de facto* situation of government as it had existed within the empire for the previous century. Franklin did admit, however, that it seemed "necessary for the common Good of the Empire, that a Power be lodg'd somewhere to regulate its general Commerce" and other matters of broad concern.

Over the next several years, one thinker after another came to similar conclusions. Two lawyers, James Wilson of Pennsylvania and Thomas Jefferson of Virginia, both published pamphlets in 1774 in which they argued that the colonies were distinct and independent governments bound to Britain only through their mutual allegiance to a common monarch, that the British Parliament had no authority to exercise any jurisdiction over them, and, as Wilson put it, that "the only dependency, which [the colonists] . . . ought to acknowledge, is a dependency on the Crown."

The First Continental Congress endorsed this position in its Declaration and Resolves in October 1774. In that document, Congress explicitly denied that Parliament had any authority to legislate for the colonies, albeit it did commit the colonists to abide by such Parliamentary statutes for regulating the external commerce of the colonies as were genuinely designed to secure "the commercial advantages of the whole empire to the mother country, and the commercial benefits of its respective members." But this offer, Congress emphasized, did not constitute an admission of Parliament's right to institute such regulations but was made only because of "the necessity of the case."

Congress thus drew a line very similar both to existing practice within the empire and to the boundary suggested by Bland and the Virginia legislature at the very beginning of the great constitutional debate over the problem of imperial organization. According to Congress, the colonial governments, acting in conjunction with the King, had clear title to all of the essential powers of sovereignty relating to matters concerning the internal affairs of the colonies, just as the King-in-Parliament had similar title for those matters relating to the internal affairs of Britain. That much now seemed obvious, at least to the leaders of American resistance.

But other areas did not obviously belong within the jurisdiction of any one of the several governments within the British Empire. Constitutionally, it was not clear that those areas belonged to the government of any one of the individual states any more than to that of one of the others. But because the metropolitan government had conventionally exercised such authority for the whole empire, the colonies agreed, for the time being, to obey all Parliamentary measures that seemed to them to be for the general welfare of the whole.

The First Continental Congress thus not only asserted the possibility of distinguishing among various categories of the essential powers of sovereignty in a political association of distinct states like, according to their conception, the British Empire. It also specified the crucial line of demarcation between those powers relating to the purely internal and local affairs of each member state and those concerning matters in which all of the states had some common interest.

More important, perhaps, in terms of the history of the development of the idea of federalism, Congress had identified—without clearly recognizing that it had done so—the need within such an association for one central authority with the power to deal with all matters of mutual concern. This need could not be constitutionally met within the existing structure of the empire.

The Principle Defined

In many respects, much of the constitutional history of the next twelve years, from the Declaration and Resolves of the First Continental Congress in 1774 to the Federal Convention in 1787, revolved around the search for some way to meet the need for a central authority without destroying the sovereignty of the individual states. The new United States had, in a sense, merely inherited the problem of imperial organization from the British Empire.

Though it scarcely articulated the problem so succinctly, one of the main questions of the first decade of independence was, in the words of McLaughlin, "whether federalism was possible as a theory of political organization." The early modern British Empier might indeed have been characterized by a *de facto* distribution rather than by a concentration of authority. But could the founders devise any theory or set of constitutional principles by which to divide the essential powers of sovereignty?

The Articles of Confederation, the first national government, obviously did not solve this problem. The Articles clearly distinguished those powers that should belong to the national government from those that should be left to the states. In general, it drew the line precisely where the First Continental Congress had decided it had been drawn in the empire: between matters of purely local concern, which remained entirely in the hands of the states, and matters of common concern to all the states, which came within the jurisdiction of the Confederation Congress.

In effect, however, the Articles of Confederation established no more than a league of sovereign states, each of which had agreed that the general government should have authority over certain concerns of general interest, including war, peace, and disputes among states. But the Articles did not provide the general government with power sufficient to carry its authority into existence. As John Adams remarked, Congress under the Articles was "not a legislative assembly, nor a representative assembly, but only a diplomatic assembly." All of the essential powers of sovereignty remained in the hands of the states. They did not relinquish any of them because they had not yet devised a theory that would permit them to resolve the problem that had brought the empire to grief, the problem of whether the essential powers of sovereignty could be divided. Prior to 1787, no one had yet found a way to disprove Blackstone's maxim that sovereignty, "the Summa imperii," was indivisible.

By 1787, the weakness of the national government under the Articles of Confederation had caused many to fear for the future of the American union. Called together for the explicit purpose of strengthening the national government, the Philadelphia Convention of that year quickly found itself confronted with the old problem, as McLaughlin has phrased it, of imperial order, the problem of how to create a strong "national government without destroying the states as integral, and, in many respects, autonomous parts of" the political system.

The members of the Convention soon, in McLaughlin's words, "found themselves engaged in the task of constructing a new kind of body politic," one that was "neither a centralized system on the one hand nor a league or confederation on the other." They had relatively little difficulty in allocating powers between the national and the state governments. Their experience with both the empire and the Articles of Confederation provided clear guidance in that. But they confronted a vastly more difficult task in devising a system through which the basic powers of sovereignty could not only be divided between the national and state governments but divided in such a way as to keep one level of government from encroaching upon the other.

The old and as yet unresolved question of by what principles the essential powers of sovereignty could be distributed still constitut-

In contriving the Constitution, the framers clearly drew, if in many ways only half consciously, upon the experience and precedents of the empire.

ed the main difficulty in this enterprise. As McLaughlin has said, the Convention's solution to this question was both its "signal contribution... to the political life of the modern world" and the most important American contribution to political theory and practice. So original was the Convention's solution that its members did not fully understand what they had done until after the Constitution had been completed and they had—in the crucible of debate—to explain the principles behind the new government and how it would operate.

As Gordon S. Wood has shown in *The Creation of the American Republic*, a crucial intellectual breakthrough made the contrivance of an acceptable federal system possible: the idea that sovereignty lay not in governments (and hence not in the governments of individual states) but in the people themselves. If, as the new Constitution assumed, sovereignty resided in the people, the "state governments could never lose their sovereignty because they had never possessed it." In addition, the sovereign people could delegate the basic powers of sovereignty to any government or governments they wished, and they could divide up those powers in any way they saw fit, delegating some to one level of government and others to another, while retaining still others in their own hands.

Thus, as Madison wrote in *The Federalist*, both the state governments and the national government were equally creatures of the people: "both [were] possessed of our equal confidence—both [were] chosen in the same manner, and [both were] equally responsible to us." "The federal and state governments," said Madison, "are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes." Although the supremacy clause in Article VI of the Constitution ensured that federal laws would take precedence over state laws whenever the two came into conflict, both the national government and the state governments were to have full authority within their respective spheres.

The Framers had thus fashioned a government that was neither a consolidated government nor a mere confederation of sovereign states. In the words of Alexander Hamilton in *The Federalist*, the former implied "an entire consolidation of the States into one complete national sovereignty with an entire subordination of the parts" to that national sovereignty, while the latter suggested simply "an association of two or more states" into one polity with all sovereignty remaining in the states. The new federal government was something in between. It aimed, said Alexander Hamilton in *The Federalist* No. 32, "only at a partial ... consolidation" in which the states clearly retained all those rights of sovereignty that they had traditionally exercised, except for those that through the Constitution had been reallocated by the people to the federal government.

Something Old and Something New

As McLaughlin argued, the American federal state was indeed "the child of the old British empire." In contriving the Constitution, the framers clearly drew, if in many ways only half consciously, upon the experience and precedents of the empire. Like the empire, the American federal system did not concentrate power in a single government but distributed it among different levels of government. It thus "gave legal and institutional reality to the principle of diversification of powers and ... crystallized a system much like that under which the colonists had grown to maturity."

But if the American federal system was not so radical in form, it was fundamentally so in principle. By locating sovereignty in the people rather than in the government or in some branch thereof, the framers of the Constitution had contrived a radical new scheme of governance whereby the basic powers of sovereignty could be divided without dividing sovereignty itself. This intellectual—and political—invention not only finally made possible the solution of the imperial problem of the relationship between local and national authority in its American context. It also provided a structure that was—and, in principle, still is—capable of a variety of permutations and combinations as sovereign groups of people seek to work out forms peculiarly appropriate for governing themselves.

Suggested additional reading:

Bernard Bailyn, *The Ideological Origins of the American Revolution* (1967).

Jack P. Greene, *The Quest for Power: The Lower Houses of Assembly, 1689–1776* (1963).

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From Confederation to Constitution: The Revolutionary Context of the Great Convention

by LANCE BANNING

Most Americans recall our Revolution in decidedly selective ways. As a people, we are not as eager as we used to be to recollect how truly revolutionary are our roots. Our Bicentennial celebration, for example, focused overwhelmingly on independence and the war with Britain, not on the genuinely revolutionary facets of the struggle. Too often, we commemorated even independence with hoary myths about tyrannical King George and clever minutemen who used the woods and fences to defeat the British regulars. Perhaps, then, it is not so inexcusable as it would first appear for some Americans to think that Thomas Jefferson wrote the Constitution as well as the Declaration of Independence in 1776. If we think of the American Revolution as no more than a sudden, brave attempt to shake off English rule, perverse consistency leads easily to a mistake that lumps together all the documents and incidents connected with the Founding. For a better understanding, as another Bicentennial approaches, we would do well to fit the Constitution back into the revolutionary process from which it emerged.

As John Adams said, the American Revolution was not the war against Great Britain; it should not be confused with independence. The Revolution started in the people's minds at least ten years before the famous shots at Lexington and Concord. It was well advanced before the colonies declared their independence. It continued for perhaps a quarter of a century after the fighting came to an end. It dominated the entire life experience of America's greatest generation of public men. And it was fully revolutionary in many of the strictest definitions of that term. The men who made it wanted not just independence, but a change that would transform their own societies and set a new example for mankind. They wanted to create, as they put it on the Great Seal of the United States, "a new order of the ages" which would become a foundation for the happiness of all of their descendents and a model for the other peoples of the world. To their minds, the federal Constitution was a Revolutionary act, an episode in their experimental quest for such an order.

A Republican Experiment

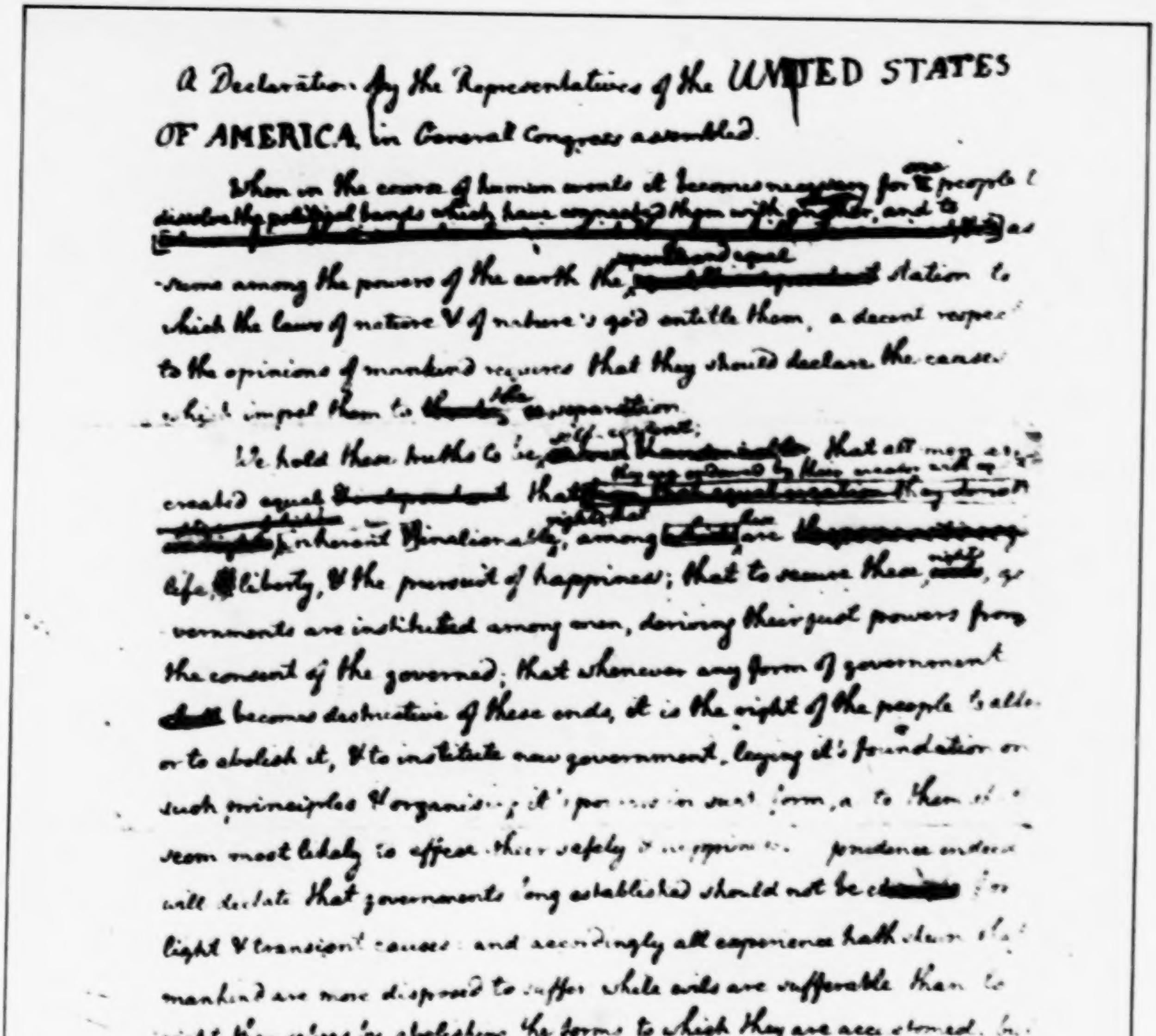
From a twentieth-century perspective, the American Revolution may appear conservative and relatively tame. There were no mass executions. Social relationships and political arrangements were not turned upside down in an upheaval of shattering violence, as they would be later on in France or Russia or any of a dozen other countries we might name. To people living through it, nonetheless—or watching it from overseas—the American Revolution seemed very radical indeed. It was not self-evident in 1776 that all men are created equal, that governments derive their just authority from popular consent, or that good governments exist in order to protect God-given rights. These concepts are not undeniable in any age. From the point of view of eighteenth-century Europeans, they contradicted common sense. The notions that a sound society could operate without the natural subordination customary where men were either commoners or nobles or that a stable government could be based entirely on elections seemed both frightening and ridiculously at odds with the obvious lessons of the past. A republican experiment had been attempted once before on something like this scale—in England during the 1640s and 1650s—and the ultimate result had been a Cromwellian dictatorship and a quick return to the ancient constitution of King, Lords, and Commons.

Nevertheless, the Americans dreamed revolutionary visions of perfection, comparable in many ways to revolutionary visions of later times. They sought a new beginning, a rebirth, in which hereditary privilege would disappear and all political authority would derive exclusively from talent, public service, and the people's choice. And their commitment to the principles of liberty and equal rights did touch and change most aspects of their common life.

No essay of this length can possibly describe all of the ways in which the Revolution altered American society. To understand the Constitution, though, we have to realize, at minimum, that as they fought the War for Independence, Americans were equally involved in a fundamental transformation of political beliefs and thus of political institutions. The decision to separate from England was also a decision that Americans were a people different from the English, a separate nation with a special mission in the world. This people had no way to understand their new identity except in terms of their historical mission, no way to define or perfect their national character except by building their new order. To be an American, by 1776, was to be a republican, and to become consistently republican required a thorough reconstruction of existing institutions.

A republican experiment, in fact, required rebuilding governments

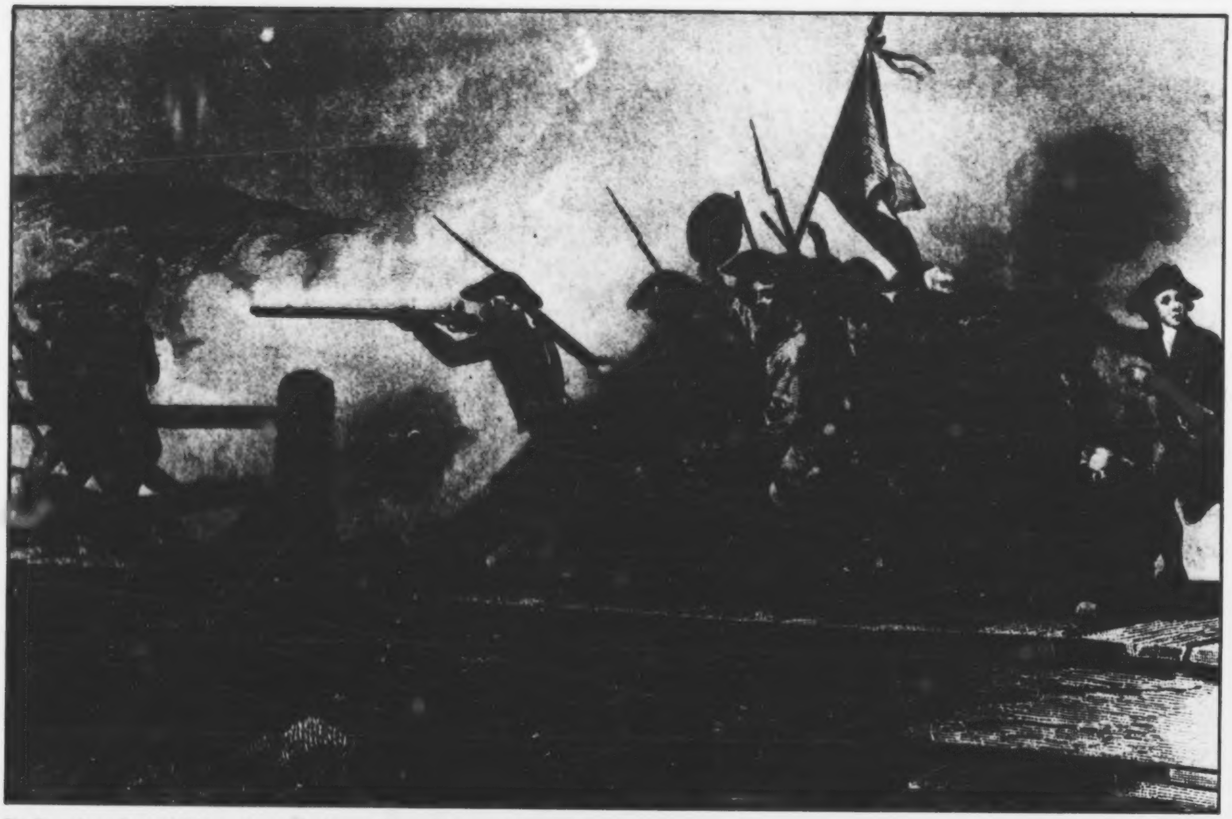
Draft copy of the Declaration of Independence in Thomas Jefferson's handwriting, with insertions by John Adams and Benjamin Franklin. ***Library of Congress.***



A Declaration by the Representatives of the UNITED STATES OF AMERICA, in General Congress assembled.

When in the course of human events it becomes necessary for ~~a~~ one people to dissolve the political bands which have connected them with another, and to [illegible] assume among the powers of the earth the ~~equal & independant~~ separate and equal station to which the laws of nature & of nature's god entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to ~~the change~~ the separation.

We hold these truths to be ~~sacred & undeniable~~ self-evident; that all men are created equal ~~& independant~~; that ~~from that equal creation they derive~~ they are endowed by their creator with ~~in~~ equal rights, some of which are inherent & inalienable, among ~~which~~ these are ~~the preservation of~~ life, & liberty, & the pursuit of happiness; that to secure these ~~ends~~ rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government ~~shall~~ becomes destructive of these ends, it is the right of the people to alter or to abolish it, & to institute new government, laying it's foundation on such principles & organising it's powers in such form, as to them shall seem most likely to effect their safety & happiness. prudence indeed will dictate that governments long established should not be changed for light & transient causes: and accordingly all experience hath shewn that mankind are more disposed to suffer while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. but when a long train of abuses & usurpations [begun at a distinguished period &]pursuing invariably the same object, evinces a design to ~~subject~~ reduce them ~~to arbitrary power~~ under absolute Despotism, it is their right, it is their duty, to throw off such government, & to provide new guards for their future security. such has been the patient sufferance of these colonies; & such is now the necessity which constrains them to [expunge] their former systems of government. the history of ~~his~~ the present ~~majesty~~ King of Great Britain is a history of [unremitting] repeated injuries and usurpations, [among which, appears no solitary fact to contradict the uniform tenor of the rest, ~~all of which~~ but all have] in direct object the establishment of an absolute tyranny over these states. to prove this, let facts be submitted to a candid world [for the truth of which we pledge a faith yet unsullied by falsehood]



The Struggle on Concord Bridge, *drawing by Alonzo Chappel. Library of Congress.*

afresh. For in the months between the clash at Lexington and the Declaration of Independence, formal governments dissolved in one American colony after another. The people, who had ordinarily elected only one branch of their local governments, simply transferred their allegiance from their legal governmental institutions to extra-legal revolutionary committees, state conventions, and the Continental Congress. Through the first months of the fighting, the conventions and committees managed very well. Power rested with the people in a wholly literal sense, the people followed the directives of these revolutionary bodies, and those bodies turned the popular determination into armies and materials of war.

Some revolutionaries might have been content to see their states continue indefinitely under governmental bodies of this sort. Many patriots were intensely localistic, and they had learned a fierce distrust of any power much beyond the people's easy reach. Other patriots, however, many more of those who exercised great influence, never saw the revolutionary agencies as anything but temporary. A structure that depended so immediately on the people was good enough for an emergency, but hardly suitable for the longer term. For permanence, most patriots admired a governmental structure that balanced and divided power between different and independent parts, not one that concentrated it in single bodies which performed both legislative and executive functions.

The revolutionaries had been reared as Englishmen, in a tradition that instructed them that liberty was incompatible with the unchecked rule of the majority or with a government composed of only a single branch. Proper constitutions, they believed, depended on consent, but governments existed in order to protect the liberties of all. The revolutionaries had decided that good governments should have no place for aristocrats or kings, but they continued to believe that immediate and undiluted rule by the majority could not provide the wisdom and stability that governments require, nor could it offer proper safeguards for the rights of all. Thus, as they moved toward independence, the revolutionaries started a long search for a governmental structure in which liberty and representative democracy could be combined. This was what they meant by a "republic."

Most of the revolutionary states established written constitutions before the end of 1776. Although they differed greatly in details, these constitutions tended to be similar in broader lines. The colonial experience, together with the quarrel with Great Britain, had taught a powerful fear of the executive and of the executive's ability to undermine the independence of the other parts of government by use of patronage or "influence." Accordingly, most states created governors too weak to do such harm. Most stripped the governors of the majority of their traditional powers of appointment and deprived them of the traditional right to veto legislation. Most provided for election of the governors by the legislative branch. Most confined the chief executives, in short, to the job of enforcing the legislatures' wills.

According to these constitutions, the legislative power would remain within the people's hardy grip. The concept of a balance required two legislative houses, but hostility to

The experiences that had led to independence made Americans powerfully suspicious of any central government.

privilege was far too sharp to let the second house become a bastion for any special group, in imitation of the English House of Lords. Moreover, in societies without hereditary ranks, it was difficult to reach agreement on a genuinely republican method for selecting the few men of talent and leisure whose superior wisdom, lodged in an upper house, was traditionally supposed to check the passions of the multitude. The revolutionary senates differed relatively little in their makeup from the lower houses of assembly. Democratic Pennsylvania did without an upper house at all and placed executive authority in the hands of a council, rather than a single man, though this was such a radical departure from general ideas that it quickly created an anti-constitutional party in that state.

Nearly all the revolutionaries would have failed a modern test of loyalty to democratic standards. Even the most dedicated patriots were eighteenth-century men, and eighteenth-century thinking normally excluded many portions of the people from participation in the politics of a republic: adherents to unpopular religions, women, blacks, and even very poor white males.

Accordingly, not even Pennsylvania departed so far from tradition as to give the vote to every male adult. And yet most states moved noticeably in that direction. Most lowered the amount of property one had to own in order to possess the franchise. Several gave the vote to every man who paid a tax. All the states provided for annual elections of the lower house of legislature and, often, for annual elections of the senate and governor as well. Every part of these new governments would be chosen by the people or by those the people had elected. And the legislatures in particular were filled with men whose modest means and ordinary social rank would have excluded them from higher office in colonial times. In a variety of ways, these governments were far more responsive to the people than the old colonial governments had been. They were also far more closely watched. The revolutionary air was full of popular awareness of the people's rights.

The revolutionary movement disestablished churches, altered attitudes toward slavery, and partly redefined the role of women in American society. Eventually, of course, revolutionary concepts paved the way for an extension of the rights of citizens to all the groups that eighteenth-century patriots excluded. But whatever else the Revolution was or would become, its essence lay originally in these thirteen problematic experiments in constructing republican regimes. It would succeed or fail, in revolutionary minds, according to the success of these regimes in raising the new order and fulfilling expectations that republicanism would defend and perfect this special people and the democratic social structure that they hoped would become the envy of the world.

A Permanent Confederation

Americans did not intend, at the beginning, to extend the revolutionary experiment in republican government from the states to the nation as a whole. Republics were expected to be small. The Revolution had begun as an attempt to protect the old colonial governments from external interference by a distant Parliament and king. Traditional loyalties and revolutionary ideas were both keyed to the states.

Still, the argument with Britain taught Americans to think that they were a single people, and the War for Independence built a growing sense of nationhood. There was a Continental Congress before there were any independent states. *Congress* declared American independence and recommended that new state governments be formed. *Congress* assumed the direction of the war.

The Continental Congress was an extra-legal body. It had simply emerged in the course of the imperial quarrel and continued to exert authority with the approval of the people and the states, all of which sent an unspecified number of delegates to help take care of common concerns. As early as June 12, 1776, these delegates initiated consideration of a plan to place their authority on formal grounds. But the experiences that had led to independence made Americans powerfully suspicious of any central government, and there were many disagreements in the Congress. Meanwhile, there was also the necessity of managing a war.

Not until November 17, 1777 did Congress finally present a formal proposal to the states. This plan, the Articles of Confederation, called upon the sovereign states to join in a permanent confederation presided over by a Congress whose authority would be confined to matters of interest to all: war and peace; foreign relations; trade with the Indians; disputes between states; and other common concerns. Each state would continue to have a single vote in Congress. In matters of extreme importance, such as war and peace, Congress would act only when nine of the thirteen states agreed. Since Congress would not directly represent the people, troops or money could be raised only by requisitioning the

A people who had hoped to be a model for the world was fragmented into thirteen petty, squabbling states.

states.

The Articles of Confederation did not issue from a systematic, theoretical consideration of the problems of confederation government. For the most part, they only codified the structure and procedures that had emerged in practice in the years since 1774. Most of the country scarcely noticed when they finally went into effect, which was not until February, 1781—three years after they were first proposed. Maryland, which had a definite western border, refused its consent until Virginia and the other giant states, whose colonial charters gave them boundaries which might stretch from coast to coast, agreed to cede their lands beyond the mountains to the Confederation as a whole. Then, for most of the rest of the 1780s, Americans lived in a confederation of this sort.

Historians have long since given up the old idea that the Confederation years were a period of governmental folly and unmixed disaster. The Articles established a genuine federal government, not merely a league of states. The union was to be permanent, and Congress was granted many of the usual attributes of sovereign authority. Great things were accomplished. The states secured their independence and won a generous treaty of peace, which placed their western border at the Mississippi River. The country weathered a severe post-war depression. Congress organized the area northwest of the Ohio for settlement and eventual statehood. In fact, the Northwest Ordinance of 1787 established the pattern for all the rest of the continental expansion of the United States, providing that new territories would eventually enter the union on terms of full equality with its original members and thus assuring that America would manage to escape most of the problems usually confronted by an expanding empire. It was not an unimpressive record.

Thirteen Squabbling States

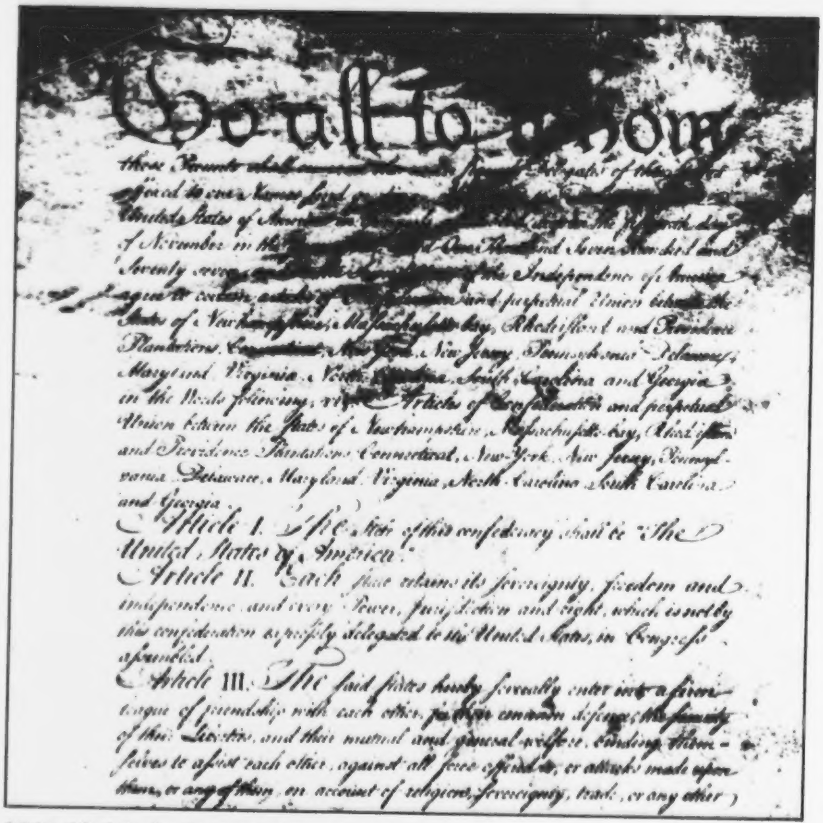
Nevertheless, the Articles of Confederation came under increasing criticism from an influential minority even before they formally went into practice. This minority was centered in the Congress itself and around the powerful executive officials created by the Congress, especially Robert Morris, a Philadelphia merchant who was appointed Superintendent of Finance in 1781. Morris and his allies were necessarily concerned with the Confederation as a whole, and they found it almost impossible to meet their responsibilities under this kind of government. By the time the war was over, the Confederation's paper money was entirely worthless—"not worth a Continental," as the phrase still goes. The Confederation owed huge debts to army veterans, to citizens who had lent supplies or money during the war, and to foreign governments and foreign subjects who had purchased American bonds. Dependent on the states for revenues, Congress could not even pay the interest on these obligations. All the states had war debts of their own, and in the midst of a depression, their citizens were seldom willing or even able to pay taxes high enough to make it possible for the republics to handle their own needs and meet their congressional requisitions as well. By 1783, Morris, Alexander Hamilton, James Madison, and many other continental-minded men were insisting on reform. They demanded, at the very least, that Congress be granted the authority to levy a tax on foreign imports, which might provide it with a steady, independent source of revenue.

The need for revenue, however, was only the most urgent of several concerns. Lacking a direct connection with the people, Congress had to work through and depend on the states for nearly everything. Unable to compel cooperation, its members watched in futile anger as the sovereign republics went their separate ways. Some states quarreled over boundaries. Troubled by the depression, others passed competitive duties on foreign imports. The states ignored Confederation treaties, fought separate wars with Indians, and generally neglected congressional pleas for money.

As this happened, American ambassadors in foreign lands—John Adams in England and Thomas Jefferson in France—discovered that the European nations treated the American confederation with contempt. The European powers refused to make commercial treaties that would lower their barriers to freer trade and ease America's commercial problems. England refused to remove her soldiers from forts in the American northwest, insisting that she would abide by the treaty of peace only when the states began to meet their own obligations to cease persecuting returning loyalists and to open their courts to British creditors who wanted to collect their debts.

Nevertheless, the nationalists in Congress were frustrated in their desire for reform. The Articles of Confederation could be amended only by unanimous consent, but when Congress recommended an amendment that would give it the authority to levy a five percent duty on imports, little Rhode Island refused to agree. When Congress asked for power to retaliate against Great Britain's navigation laws, the states again could not concur.

Repeatedly defeated in their efforts at reform, increasingly



To all to [illegible]hom

these Presents shall come [illegible] Delegates of the [illegible]

affixed to our Names [illegible]

United States of America [illegible] the fifteenth day

of November in the [illegible] One Thousand Seven Hundred and

Seventy seven [illegible] the Independence of America

agree to certain articles of [illegible] and perpetual Union between the

States of Newhampſhire, Maſsachuſetts-bay, Rhodeiſland and Providence

Plantations, [illegible], New York, New Jersey, Pennſylvania, Delaware,

Maryland, Virginia, North [illegible], South Carolina and Georgia

in the Words following, viz. "Articles of Confederation and perpetual

Union between the States of Newhampſhire, Maſsachuſetts-bay, Rhodeiſland

and Providence Plantations, Connecticut, New-York, New Jersey, Pennſyl-

vania, Delaware, Maryland, Virginia, North Carolina, South Carolina

and Georgia.

Article I. The Stile of this confederacy shall be "The

United States of America".

Article II. Each state retains its sovereignty, freedom and

independence, and every Power, Juriſdiction and right, which is not by

this confederation expreſsly delegated to the United States, in Congreſs

aſsembled.

Article III. The said states hereby severally enter into a firm

league of friendship with each other, for their common defence, the security

of their Liberties, and their mutual and general welfare, binding them-

selves to aſsist each other, against all force offered to, or attacks made upon

them, or any of them, on account of religion, sovereignty, trade, or any other

Articles of Confederation (first page). *National Archives.*

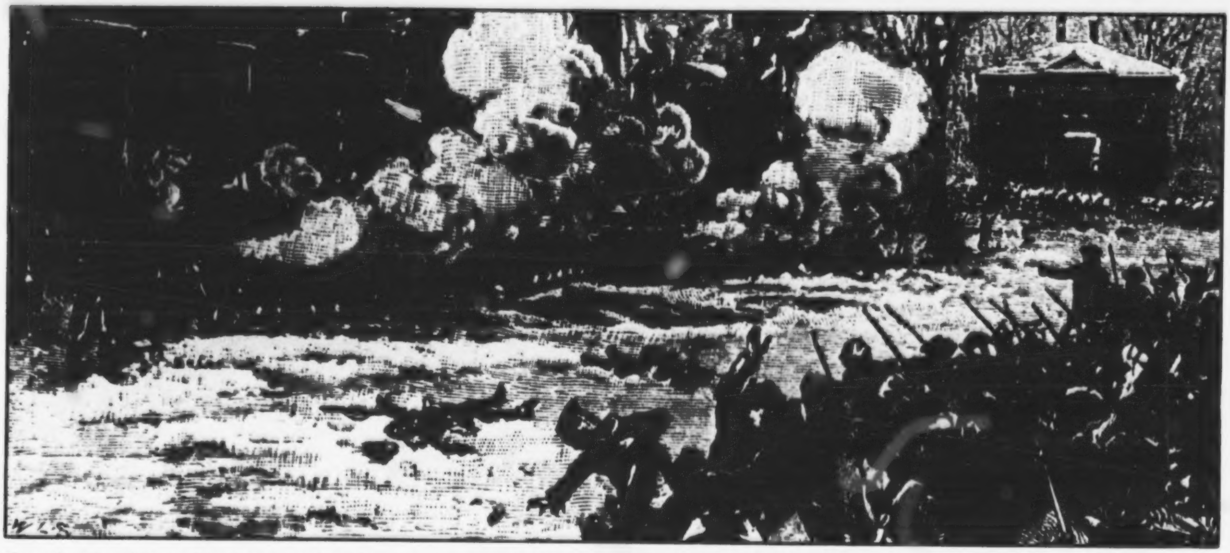
alarmed by mutual antagonisms between the states, which had grown serious enough by 1786 to threaten an immediate fragmentation of the union into several smaller confederacies, the men of continental vision turned their thoughts to fundamentals. A much more sweeping change, they now suspected, might be necessary to resolve the pressing problems of the current central government. And if the change went far enough, a few of them began to think, it might accomplish something more. It might restore the Revolution to its proper course.

The Revolution, after all, involved a dream of national greatness; and the dream was going wrong. A people who had hoped to be a model for the world was fragmented into thirteen petty, squabbling states. The states would not—or could not—subordinate their separate interests to the good of the Confederation as a whole. Even worse, too many of the states fell short of fulfilling revolutionary expectations within their individual bounds. The early revolutionary constitutions had delivered overwhelming power to the people's immediate representatives in the lower houses of assembly. As these lower houses struggled to protect the people from hard times, they frequently neglected private rights and seldom seemed to give a due consideration to the long-term good. As clashing groups in different states competed to control their house of representatives, nobody could feel certain what the law might be next year, when one majority replaced another. The lower houses of assembly were essentially unchecked by the other parts of government, and to many revolutionaries it appeared that the assemblies proceeded on their ways with slight regard for justice and little thought about tomorrow. The rule of law appeared to be collapsing into a kind of anarchy in which the liberty and property of everyone might depend on the good will of whichever temporary majority happened to control his state. No one could feel secure in the enjoyment of his rights.

Liberty in Peril

During the 1780s, in other words, the feeling grew that liberty was once again in peril. Alarm was most intense among the men whose duties, education, or experience encouraged them to pin their patriotic feelings on the continent as a whole: certain members of Congress; most of the best-known revolutionary thinkers; most of the former officers of the continental army; many merchants, public creditors, and other men of wealth. Men of social standing were distressed with the way in which the revolutionary principles of liberty and equality seemed to shade into a popular contempt for talent or distinction. Too often, to their minds, the best men lost elections in the states to self-serving, scrambling demagogues, and the revolutionary constitutions made it far too easy for these demagogues to set an ill-considered course or even to oppress the propertied minority in order to secure the people's favor. Continued confiscations of the property of people who had sympathized with Britain and continued use of paper money, which threatened men's investments and their right to hold their property secure, were grievances of particular importance to those who had investments and positions to defend.

And yet the sense of fading hopes and failing visions was not exclusively confined to men of wealth. Anyone whose life had been immersed in revolutionary expectations might share in the concern. Every state seemed full of quarrels. Every individual seemed to be on the scrape for himself. No one seemed to have a real regard for common interests, a willingness to recognize that selfish interests must be limited by some consideration for the good of all. Public virtue, to use the phrase the revolutionaries used, seemed to be in danger of completely disappearing as every man and every social group sought private goods at the expense



Massachusetts militiamen firing into the ranks of Shays' rebels, *engraving from Richard Devens,* **Our First Century** *(1878).*

of harmony and other people's rights. But virtue, revolutionaries thought, was the indispensable foundation for republics, without which they could not survive. If public virtue was collapsing, then the Revolution was about to fail. It would degenerate into a kind of chaos, from which a tyrant might emerge, or else the people, in disgust, might eventually prefer to return to hereditary rule.

So, at least, did many fear. Guided by the same ideas that had impelled them into independence, they saw a second crisis, as dangerous to liberty as the crisis that had led them into Revolution. As they had done in 1776, they blamed their discontents on governments that lacked the character to mold a virtuous people and fit them for their special role. Once more, they turned to constitutional reform. They saw in the problems of the Confederation government not merely difficulties that would have to be corrected, but an opportunity that might be seized for even greater ends, an opportunity to rescue revolutionary hopes from their decay.

The constitutional reformers of the 1780s had several different motives and several different goals. Some had an economic interest in a constitutional reform that would enable the central government to pay its debts and act to spur the economic revival. All wanted to make the government adequate to its tasks and able to command more respect from the rest of the world. Some wanted more: to reconstruct the central government in such a way that its virtues might override the mistakes that had been made in some of the states. They wanted to redeem the reputation of democracy and save the republican experiment from a process of degeneration which threatened to destroy all that they had struggled for.

Shays' Rebellion handed them their chance. Out in western Massachusetts, hard times, large debts, and the high taxes prompted by the state's attempt to handle its revolutionary debt drove many farmers to distress. They first petitioned for relief, but when the legislature refused to issue paper money or to pass the laws required to protect their property from seizure, petitions gave way to rebellion. Farmers forced the courts to close in several counties, and Daniel Shays, a revolutionary captain, organized an armed resistance. The rebels were defeated with surprising ease. The state called out the militia during the winter of 1786, and Shays' forces disintegrated after a minor fight. The incident was nonetheless, for many, the final straw atop a growing load of fears. Armed resistance to a republican government seemed the ultimate warning of a coming collapse.

Earlier in 1786, delegates from five states had met at Annapolis, Maryland to consider better means of regulating interstate and international trade. Nationalist sentiment was strong among the delegates. Hamilton and Madison were there. The participants quickly agreed that little could be done about commercial problems without a revision of the Articles of Confederation. They said as much in a report to Congress and their states, and Congress endorsed their recommendation for the meeting of a national convention to consider ways to make the central government "adequate to the exigencies of the union." Badly frightened by events in Massachusetts, whose constitution was widely thought to be among the best, every state except Rhode Island answered the call. From this context and in hope that it might save both liberty and union, the Constitutional Convention emerged.

Suggested additional readings:

Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (1969).

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Jack N. Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* (1979).

Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era*, translated by Rita and Robert Kimber (1980).

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Lance Banning is associate professor of history at the University of Kentucky. A former N.E.H. and John Simon Guggenheim Fellow, he is the author of *The Jeffersonian Persuasion: Evolution of a Party Ideology* (Cornell University Press, 1978). He is currently engaged in a study of the life and thought of James Madison.

Chief Justice Taney and His Court

by WILLIAM M. WIECEK

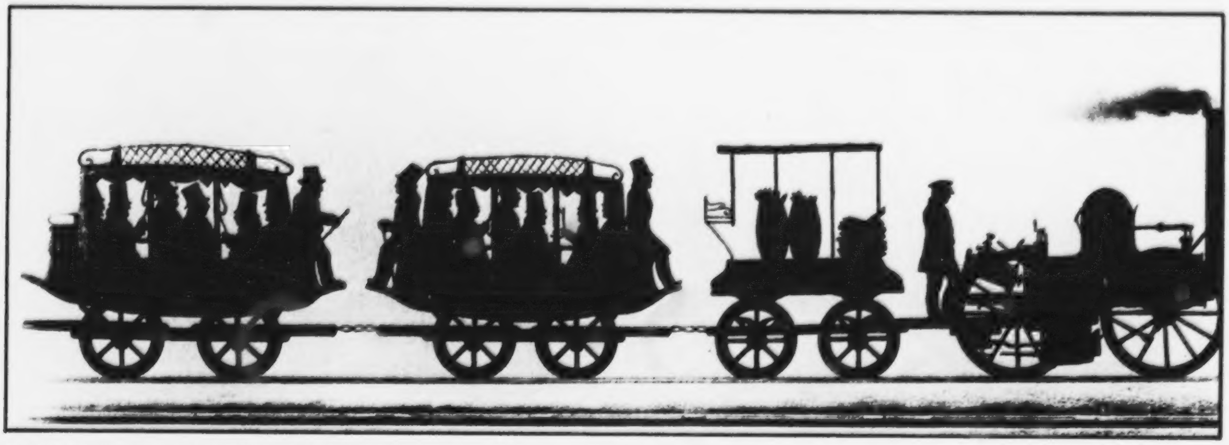
Chief Justice Roger B. Taney and the Court over which he presided from 1836 to 1864 have been the objects either of extravagant praise or single-minded condemnation. Contemporaries and observers ever since have run to extremes in their evaluation of the accomplishments of Taney and his brethren. Now, as the Constitutional Bicentennial nearly coincides with the sesquicentennial of Taney's appointment as Chief Justice of the United States, it might be a good time to take advantage of the perspective that time gives us in order to strike a more balanced and even-handed appraisal of the Taney Court and its Chief.

Taney's contemporaries rarely achieved a fair estimate of Taney and his Court. Taney himself was so feared and detested by Whigs and other conservatives that his first appointment to the Court was rejected by the Senate. Knowing that he was the draftsman of that part of President Andrew Jackson's Bank Veto Message of 1832 where the President claimed that he was not bound by a decision of the Supreme Court, jurists like James Kent and Joseph Story viewed Taney's appointment apprehensively. His maiden opinion in the *Charles River Bridge* case (1837) confirmed their fears because they thought that it threw corporations to the wolves of the state legislatures.

Taney and his brethren were just as unpopular at Taney's death in 1864, entirely because of the Court's "self-inflicted wound," the *Dred Scott* case of 1857. "The Hon. old Roger B. Taney has earned the gratitude of his country by dying at last," sneered George Templeton Strong; "better late than never." Opponents of slavery reviled his memory. Charles Sumner was typical: "he administered justice, at last, wickedly, and degraded the Judiciary of the country and degraded the age." "The name of Taney is to be hooted down the page of history," he predicted. And so it was. Until the 1930s, the Taney Court and its Chief were held in little account by historians and lawyers, who either condemned the Court because of its one great blunder, *Dred Scott*, or dismissed its tenure as an era of bronze following Chief Justice John Marshall's golden age.

But in the 1930s, Taney's reputation enjoyed a rehabilitation. His remote successor, Chief Justice Charles Evans Hughes, began the reappraisal of Taney in a 1931 dedicatory address praising Taney's positive contributions. The first modern biography of Taney, published by Carl B. Swisher in 1935, similarly extolled the Court's

***Roger Brooke Taney**, photograph att. to Mathew Brady. National Portrait Gallery, Smithsonian Institution, Washington, D.C.*



The first American railway train. *Library of Congress.*

achievements and overlooked its failings. Finally, Felix Frankfurter, shortly before his elevation to the bench, lavishly praised Taney's handling of commerce clause cases.

The pendulum began to swing back with the publication of a 1957 law review article by Robert Harris that nicely captured Taney's ambivalent legacy in its subtitle: "Prophet of Reform and Reaction." Meanwhile, the leading authority on Taney, Swisher, indicated second thoughts or reservations about Taney that did not appear in the 1935 biography, first in a short 1964 biographical sketch, and then at length in his posthumously published contribution to the Holmes Devise history of the Supreme Court. The renewed historical interest in slavery and its abolition during the 1960s assured that recent re-evaluations of Taney's work would be critical. Studies of Taney's handling of cases relating to slavery and its abolition by this author as well as by Don Fehrenbacher and Paul Finkelman sharply revised the apologetic glorification of Taney begun in the 'thirties.

The pendulum is now somewhere in mid-swing, and we may review the work of the Taney Court freed, at last, of the need either to defend or to condemn him, acknowledging the Court's lapses while noting its accomplishments, which were at least as significant. Let us begin with the achievements.

A Revolution in Industrial Technology

The Taney Court served a nation that was undergoing a revolution in industrial technology, transportation, and communications. It labored at a time when invention and engineering were foreshortening distance, creating an effective national market in goods and ideas. The judges understood this change and kicked aside obstacles to progress. For example, in 1851 it reversed a ruling of the Marshall Court that had left admiralty questions on the extensive inland waterway system entirely to the state courts, resulting in an undesirable diversity of applicable legal rules. In *The Genesee Chief* v. *Fitzhugh*, the Taney Court ruled that the federal admiralty jurisdiction would extend to inland waters, imposing some measure of national uniformity and predictability in the law regulating the national market and thereby encouraging waterborne interstate commerce.

Genesee Chief typified another Taney Court achievement, the expansion of federal judicial power. In *Swift* v. *Tyson* (1842), Justice Joseph Story, for a unanimous court, enabled the federal courts to unify much of the commercial law of the country. By the 1840s, the proliferating common law of the various states created a disadvantageous legal inconsistency throughout the Union—the same problem that troubled Taney in *Genesee Chief*. Thus when a case came up that required the Supreme Court to determine what rules of decision lower federal courts must follow in commercial law cases, the Court held that federal judges should look to the "general principles of commercial jurisprudence" derived from the international body of private law known as the "law merchant," rather than the particularized commercial common law of each state.

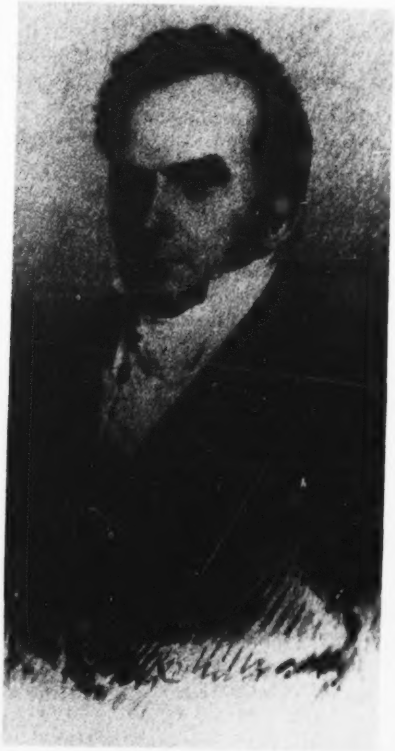
In the *Louisville Railroad* v. *Letson* case of 1844, Taney displayed his acute sense of the impact of technological change on law, his sensitivity to the needs of the national market, and his willingness to expand judicial power. In several early and ill-considered decisions, Chief Justice Marshall had held that in order for a corporation to have access to federal courts as a party to litigation under the diversity-of-citizenship clause of Article III, all of its shareholders must be citizens of states different from those of the parties on the other side. This interpretation reflected a concept of corporations that was obsolete even in its own time, and it became increasingly inconvenient as economic relations expanded with the growth of the country, because it virtually excluded large multistate corporations from federal courts. In *Letson*, Taney made short shrift of the obsolete rule, holding that a corporation was a citizen of the state where it was chartered. As with the *Genesee Chief*, this ruling introduced more uniformity in the national market.

Despite these decisions enhancing the federal courts' jurisdiction, Taney had a sharper appreciation than Marshall of the limitations on judicial power. This perception was most evident in the politically exciting case of *Luther* v. *Borden* (1849). In the Dorr Rebellion of 1842, Rhode Island reformers attempted to overthrow the state's political oligarchy by extending the vote to all white adult male citizens. They organized a constitutional convention without authorization from the legislature, then held elections under the constitution drawn up by that body. After the established government of the state put them down bloodlessly, Dorrites sought vindication of their political theory from the Supreme Court in the *Luther* case.

Taney, a Jacksonian Democrat in his pre-Court politics, acknowledged the theoretical validity of their position, but he refused to overthrow the regular government. His refusal was premised on the view that certain kinds of disputes—those involving "political questions"—are unsuitable for resolution by courts, and instead must be resolved by the executive or legislative branches. The "political question" doctrine has ever since provided a means of avoiding, for a variety of reasons, controversies such as the constitutionality of presidential commitment of troops in the Vietnam conflict. The political question doctrine was an example of Taney's usually unerring instinct for judicial statesmanship, his ability to know when to wield judicial power and when to withdraw prudently.

Balancing Competing Interests

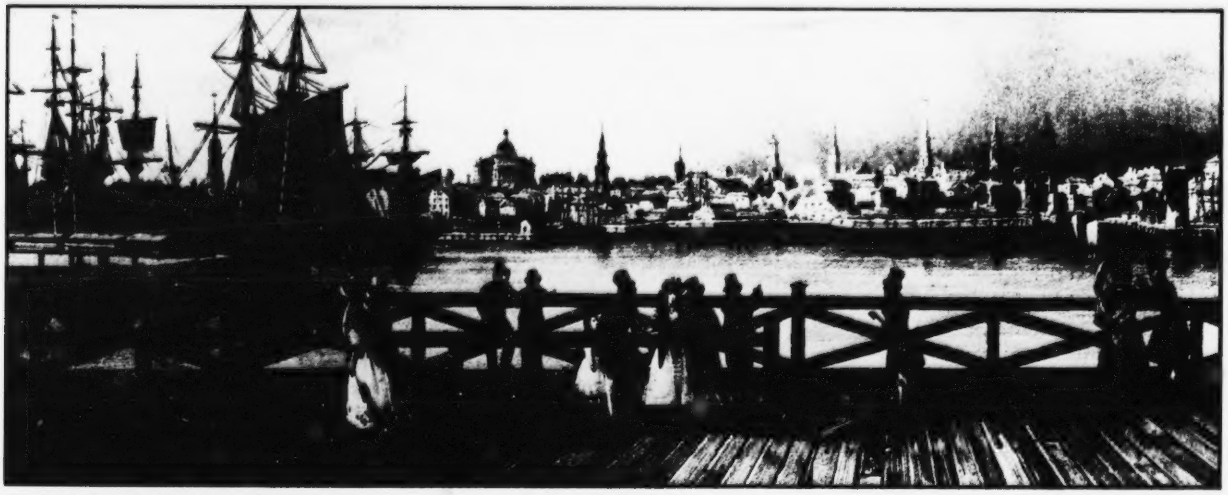
The Taney Court had a greater opportunity than its predecessors to widen the scope of democratic government in the United States. A half dozen decisions, stretching from the first to the last years of Taney's tenure, enabled his court to balance the powers of popular government against the opportunities demanded by property and investment capital. In his first term, Taney fashioned a rule of law balancing the two interests that proved to be so open-ended and flexible that it guided jurists through a generation of the most volatile economic growth up to that point in our history. The *Charles River Bridge* case (1837) pitted the claims of a bridge chartered in the eighteenth century against the competitive challenge of a more recent rival. The old bridge claimed a monopoly of traffic between Boston and its northern hinterland. To acknowledge this claim would have been to choke the economic development of Boston and northern Massachusetts to benefit the coupon-clipping shareholders of the old bridge. The new bridge represented dynamic risk capital so essential to economic growth and development in the era of the Transportation Revolution. At the end of his opinion, Taney warned that judges must be aware of the implications for technological advance of the legal rules they fashion. Were the Court to favor implied monopolies for older technologies, he cautioned, "we shall be thrown back to the improvements of the last century, and obliged to stand still, until the claims of the old turnpike corporations shall be satisfied, and they shall consent to permit these States to avail themselves of the lights of modern science."



Daniel Webster, watercolor by James Longacre. National Portrait Gallery, Smithsonian Institution, Washington, D.C.

But Taney was too much the judicial statesman simply to choose between the two competing sets of interests on the basis of his own vision of the American economic future. Rather, he recognized that in our constitutional order this choice was assigned to the legislatures as the representatives of the people. At the same time he was no enemy of established property interests either, as his conservative critics mistakenly saw him. He nicely balanced the two, while at the same time outlining the proper place for the judiciary in the American republic, in holding that the legislature could grant a monopoly if it wished, but it had to do so explicitly at the time of chartering a corporation. Taney upheld the power of the state governments to control corporations, but insisted that judges not read monopoly grants or other forms of favoritism into charters where legislatures had not granted them. The Taney Court applied the *Charles River Bridge* approach many times in the next quarter century, assuring a creative tension between enterpreneurial opportunity and democratic political control of business ventures. In the 1839 case of *Bank of Augusta* v. *Earle*, to cite just one example, the Court held that a state might exclude a corporation chartered in another state from doing business within its borders if it wished, but that it must do so explicitly.

The Taney Court sought both to enhance popular political control over a state's economic development and to assure the business community that such control would not arbitrarily discourage investment opportunity. A more doctrinaire Court might have considered these goals to be incompatible. Taney and his associates accomplished both. Whigs and other conservatives were distressed by an



The Charles River Bridge. *Library of Congress.*

1848 decision that recognized sweeping eminent domain powers in the states. In *West River Bridge Co.* v. *Dix*, the state of Vermont revoked a bridge franchise, with compensation for the taking, in order to construct a free highway. Daniel Webster, representing the bridge investors, darkly warned the Court that such a power was dangerously radical and would encourage other forms of social and economic experimentation, such as the abolition of slavery. The Court spurned such extremist reasoning, upholding a broad power in the states to regulate their economy for the welfare of the people. The *Boston Post*, though it was one of the numerous critics of the Taney Court, conceded the wisdom of the Court's balanced approach:

> Under this decision, any State has the power to check the assumption of these corporations, while, at the same time, all the necessary privileges of corporations are as well secured as ever, and their real value and authority enhanced by thus harmonizing them with popular sentiment. The Supreme Court has done a great act, and posterity will honor and thank them for it.

Although according a wide scope to eminent domain in *West River Bridge*, Taney and his brethren recognized that investors and other property owners required protection against uninhibited state regulatory power. In *Bronson* v. *Kinzie* (1843), the Court negated an Illinois insolvency law, typical of such statutes enacted in the absence of a federal bankruptcy law. The Illinois law mandated a one-year period for redemption of property foreclosed under a mortgage and prohibited foreclosure sales for less than two-thirds of the appraised value of the property. Taney struck the statute down as an impairment of contracts.

The Taney Court was not single-mindedly "pro-capitalist," as the *Bronson* case might suggest. Nor was it unthinkingly dedicated to the sanctity of property above all other values, as Daniel Webster might have wished. Rather, it achieved a dynamic balance between equally valid ideals of American democracy and capitalism, preserving a broad measure of democratic control, while drawing a line at what many Americans considered to be legislative excesses.

One Great Failure

In light of these achievements, why was the Taney Court held in such low esteem for two generations after Taney's death? Principally because the image of the Court was blighted by one great failure, its disastrous mishandling of cases involving slavery. Taney was a Marylander, born to a slaveholding plantation family, and at all times a majority of his brethren on the Court were from slave states. Their zeal for the security of their section beclouded their vision, obscuring their sense of judicial statesmanship that had been so striking in *Charles River Bridge* and *Luther* v. *Borden*.

Before 1850, relatively few cases came before the Supreme Court involving slavery expressly. But almost all cases that turned on a construction of the commerce clause raised slavery questions, in part because abolitionists were attempting to use the commerce clause to strike at slavery, as by prohibiting the interstate slave trade. Taney and his slave-state brethren responded with excessive vigilance to annihilate any sort of constitutional doctrine that might endanger the states' absolute control of slavery, black people (including free blacks) and abolitionists. Consequently the Taney Court's commerce clause cases passed on no luminous or influential doctrine comparable to Marshall's *Gibbons* v. *Ogden* (1824). Rather, they became entangled in subsurface ideological struggles over national versus state powers.

The Taney Court ran into commerce clause difficulties as soon as Taney had taken the oath of office. In *Mayor of New York* v. *Miln* (1837), three opinions disclosed divisions among the justices that spilled beyond the narrow scope of the question actually before the Court involving a New York effort to control the influx of diseased aliens. In the *License* cases (1847) involving a comparable question a 5-3 decision produced six opinions. Then, in the *Passenger* cases (1849), a 5-4 decision with eight opinions, the Court demonstrated that it could fashion no usable commerce clause doctrine that would command the support of a majority of the judges.

These cases had a peculiar shadow-boxing quality to them: pro-slavery jurists like Taney and Peter V. Daniel seemed to be grappling with opponents invisible to the northern mind. And indeed they were, for a southern judge had to be alert at all times to doctrines that might give abolitionists in the North some handle on the disproportionate political power of the slave states, even when northern actions were innocent of any such intent. Only once did the Taney Court manage to distance itself sufficiently from this hidden agenda to articulate a workable commerce clause doctrine. In *Cooley* v. *Board of Wardens* (1851), Justice Benjamin R. Curtis held that in matters requiring national uniformity, federal control must predominate, but that in local matters requiring particularity for their sensible resolution, state and local rules might control.

"Great cases like hard cases make bad law," Justice Oliver Wendell Holmes later observed. And so it was that *Dred Scott* v. *Sandford* (1857) elicited all of the Taney Court's worst tendencies. Taney's opinion, one of nine delivered in the case, was a witches' sabbath of judicial reasoning. Never before or since, not even in decisions now regarded as notorious in their error, such as *Lochner* v. *New York* (1905) or *Carter* v. *Carter Coal Co.* (1936), has a judicial opinion contained so many flagrant errors of reasoning and policy. Taney attempted to do two principal things in *Dred Scott*: first, he sought to thrust all black people, slave and free, into some constitutional limbo of utter subjection to the white race; and second, he tried to destroy all alternative constitutional theories to those propounded by John C. Calhoun concerning the place of slavery in the territories, so as to leave southern slaveholding demands the only permissible solution to that constitutional question.

Peter V. Daniel. *Library of Congress.*

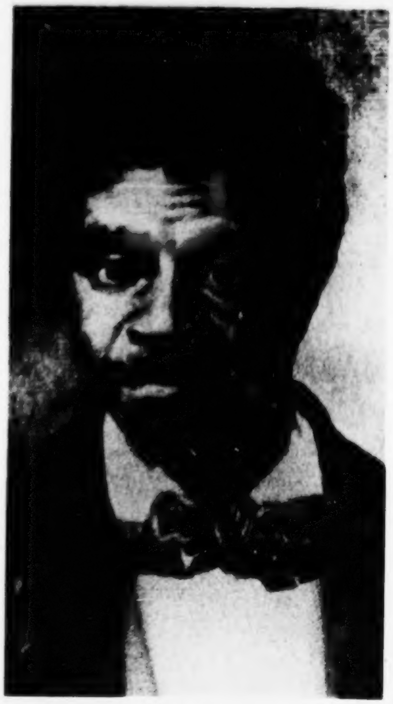
In the first part of his opinion, Taney denied that any black person, slave or free, had a right to sue in federal courts because no black could be a "citizen" within the meaning of the constitutional provision providing access to federal courts in suits between persons residing in different states. To do this, he gratuitously withdrew from blacks every possibility of a constitutional status based on national citizenship or the enjoyment of rights guaranteed by the United States Constitution. He declared that in 1787, when the Constitution was drafted, blacks had no rights a white man need respect, leaving the nation to infer that blacks' condition of rightlessness persisted into his own time.

To uphold this idea, Taney had to adopt a canon of interpreting the Constitution that insisted that the Constitution cannot change over time, except by the formal amendment process; its meaning was forever frozen in the concepts of 1787. Here, Taney betrayed all that was creative in his prior adjudication. The Constitution that could adapt to technological change could not adapt on matters of race. Taney and his brethren who supported slavery were driven to this monstrous judicial failure by their anxieties for the security of slavery in the slave states. Once let blacks claim rights, they believed, and the tight web of internal security controls on the black population would begin to unravel, with who-knows-what results for the future of slavery in America.

In the second part of his opinion, Taney turned from the question of individual rights to the issue of conflicts between the sections of the nation. There were four possible constitutional solutions to the question of whether slavery should be permitted to expand into the western territories acquired since 1846. Ranged along a continuum from antislavery to proslavery, they were: 1) exclude slavery entirely, the agenda of Republicans and abolitionists; 2) divide the territories by some geographical expedient like an extension of the Missouri Compromise line to the Pacific, allocating slavery to one side and prohibiting it on the other; 3) "popular sovereignty:" let the settlers of the territory decide for themselves whether their territory would be slave or free, the position of northern Democrats; 4) permit or force slavery into all the territories. The first and third were widely popular in the north; the fourth was embraced only by slave-state extremists. Taney nonetheless consecrated the last into constitutional dogma by holding that Congress had no power to exclude slaveholders and their slaves from the territories. Consequently, he declared each of the first three proposals to be fatally flawed. Taney was undismayed by the fact that this holding withdrew legitimacy from both the Republican and the northern Democratic platforms, thus committing the nations's future to the hands of an extremist and sectional minority. Such a forced constitutional resolution was doomed to fail, and to bring down with it the prestige of the Supreme Court. *Dred Scott* neither caused nor hastened the Civil War, but it did besmirch the reputation of the Court and its Chief on into our own times.

A century-and-a-quarter after *Dred Scott*, we can see the insufficiency of the old view that Taney and his brethren were either inferior imitators who followed the great era of Chief Justice Marshall or mere simple-minded proslavery zealots. The first judgment is wholly false; the second, built around an undeniable and large core of truth, nevertheless falls short of taking an adequate measure of the Court. The Taney Court sat in a time of precipitous economic and technological change. The problems coming to it were different from those facing Marshall, but no less urgent or important for the nation's well-being. Taney and his brethren successfully adapted a document of the late eighteenth century to an age of railroads, canals, and steam engines. They expanded its protective reach to cover a national market continental in scope. Taney, Story, Curtis, and other judges gladly encouraged the growth of federal judicial power, enabling the national courts to mediate the federal system more effectively. They introduced a greater measure of uniformity into national law than Marshall had been able to do, and left that law an effective instrument for controlling the direction of national economic development when the Industrial Revolution triumphed in the late nineteenth century.

Yet, like the presence of a malevolent witch at a christening, *Dred Scott* hovers around to poison the memory of Taney. We are reminded of Shakespeare's lines, "The evil that men do lives after them, The good is oft interred with their bones." The evil in the legacy of the Taney Court in slavery cases was not just the racism that permeated the judgments, but also the majority's determination to prostrate the entire nation before the demands of a sectional minority.



Dred Scott. *National Park Service, U.S. Department of the Interior.*

The same cases caution us that not all constitutional issues, even those embodied in a "Case" or "Controversy" specified in Article III of the Constitution, are suitable for resolution by courts. By a sad irony, it was Taney himself who articulated that insight first when he fashioned the political-question doctrine in *Luther* v. *Borden*. Great cases may make bad law, but they also teach us important lessons in the process. One is that there are certain constitutional issues that judges cannot handle, either because they lack the resources to make an informed judgment (as, for example, many questions involving foreign policy) or because the issue is simply too momentous. A second lesson is that the power of judicial review can only be exercised within a democratic framework. The power itself may be anti-democratic in theory, but it can nevertheless be accommodated to a democratic society and form of government. It cannot, however, function successfully when it flouts the basic premises of democracy, such as majority rule or respect for the rights of minorites. *Dred Scott* savaged both and was rightly consigned to contempt.

On balance, the positive accomplishments of Taney and his brethren outweigh their failings. The political-question doctrine provides an essential discretionary flexibility to the power of judicial review. The *Charles River Bridge* paradigm demonstrates that the Court can both protect economic opportunity and at the same time preserve popular and democratic control of the economy. Taney's adaptation of legal doctrine to a world changed by invention and material advance serves as an encouraging reminder that the law does not look only backwards. It is almost a century and a half since Taney was appointed Chief Justice of the United States, yet his curiously modern Court has much to tell us about the place of judicial power in a republic.

Suggested additional reading:

Carl B. Swisher, *History of the Supreme Court of the United States: The Taney Period, 1836–64* (1974).

Carl B. Swisher, *Roger B. Taney* (1935).

R. Kent Newmyer, *The Supreme Court under Marshall and Taney* (1968).

Harold M. Hyman and William M. Wiecek, *Equal Justice Under Law: Constitutional Development, 1835–1875* (1982).

Charles Warren, *The Supreme Court in United States History* (1926).

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DOCUMENTS

"Ourselves and Our Daughters Forever": Women and the Constitution, 1787–1876

by LINDA K. KERBER

In 1876, the United States celebrated one hundred years as an independent nation dedicated to the proposition that all men are created equal. The capstone of the celebration was a public reading of the Declaration of Independence in Independence Square, Philadelphia, by a descendant of a signer, Richard Henry Lee.

Elizabeth Cady Stanton, who was then president of the National Woman Suffrage Association, asked permission to present silently a women's protest and a written women's Declaration of Rights. Her request was denied. "Tomorrow we propose to celebrate what we have done the last hundred years," replied the president of the official ceremonies, "not what we have failed to do."

Led by Susan B. Anthony, five women appeared nevertheless at the official reading, distributing copies of their own Declaration. After this mildly disruptive gesture, they withdrew to the other side of the symmetrical Independence Hall, where they staged a counter-Centennial. "With sorrow we come to strike the one discordant note, on this one-hundredth anniversary of our country's birth," Susan B. Anthony declared.

Although the rhythms of her speech echoed the Declaration of Independence, as was fitting for the day—"The history of our country the past hundred years has been a series of assumptions and usurpations of power over woman . . ."—the substance of her speech was built on references to the Constitution. Anthony and the women for whom she spoke were troubled by the discrepancy between the universally applicable provisions of the Constitution and the specificity of the way in which these provisions were interpreted to exclude women. For example, since all juries excluded women, women were denied the right of trial by a jury of their peers. Although taxation without representation had been a rallying cry of the Revolution, single women and widows who owned property paid taxes although they could not vote for the legislators who set the taxes. A double standard of morals was maintained in law, by which women were arrested for prostitution while men went free. The introduction of the word "male" into federal and state constitutions, Anthony asserted, functioned in effect as a bill of attainder, in that it treated women as a class, denying them the right of suffrage, and "thereby making sex a crime."

Anthony ended by calling for the impeachment of all officers of the federal government on the grounds that they had not fulfilled their obligations under the Constitution. Their "vacillating interpretations of constitutional law unsettle our faith in judicial authority, and undermine the liberties of the whole people," she declared.

> *Special legislation for woman has placed us in a most anamalous position. Women invested with the rights of citizens in one section—voters, jurors, office-holders—crossing an imaginary line, are subjects in the next. In some States, a married woman may hold property and transact business in her own name; in others her earnings belong to her husband. In some States, a woman may testify against her husband, sue and be sued in the courts; in others, she has no redress in case of damage to person, property, or character. In case of divorce on account of adultery in the husband, the innocent wife is held to possess no right to children or property, unless by special decrees of the court . . . In some States women may enter the law schools and practice in the courts; in others they are forbidden. . . .*
>
> *These articles of impeachment against our rulers we now submit to the impartial judgment of the people . . . From the beginning of the century, when Abigail Adams, the wife of one president and mother of another, said, "We will not hold ourselves bound to obey laws in which we have no voice or representation," until now, woman's discontent has been steadily increasing, culminating nearly thirty years ago in a simultaneous movement among the women of the nation, demanding the right of suffrage. . . . It was the boast of the founders of the republic, that the rights for which they contended were the rights of human nature. If these rights are ignored in the case of one-half the people, the nation is surely preparing for its downfall. Governments try themselves. The recognition of a governing and a governed class is incompatible with the first principles of freedom. . . .*

"Declaration of Rights"
***History of Woman Suffrage*, III, pp. 31–34**

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Division of Political History, Smithsonian Institution, Washington, D.C.

Let us stand with Susan B. Anthony at her vantage point of 1876 and review the constitutional issues that touched women's lives in the first hundred years of the republic. During those hundred years, basic questions were defined and strategies for affecting legislation were developed. Not until the century following the Centennial would women direct their energies to constitutional amendment. In the first century, the challenge was to understand whether and to what extent women's political status was different from that of men, and to develop a rationale for criticizing that difference.

It is intriguing to speculate how the Founders might have responded to Anthony's challenge. Throughout the long summer of 1787 in Philadelphia, the role of women in the new polity went formally unconsidered. Whether they came from small or big states, whether they favored the New Jersey or Virginia Plan, whether they hoped for a gradual end to slavery or a strengthening of the system, the men who came to Carpenters' Hall in 1787 shared assumptions about women and politics so fully that they did not need to debate them. Indeed, John Adams had missed the point in his now-famous exchange with Abigail Adams to which Anthony referred in her Centennial Address: Abigail Adams had clearly had domestic violence as well as political representation in mind as she wrote; that is, she was thinking in both practical and theoretical terms. Her husband refused to deal with the issue:

Abigail Adams to John Adams
March 31, 1776

> *. . . in the new Code of Laws which I suppose it will be necessary for you to make I desire you would Remember the Ladies, and be more generous and favourable to them than your ancestors. Do not put such unlimited power into the hands of the Husbands. Remember all Men would be tyrants if they could. If perticular care and attention is not paid to the Laidies we are determined to foment a Rebelion, and will not hold ourselves bound by any Laws in which we have no voice, or Representation.*
>
> *That your Sex are Naturally Tyrannical is a Truth so thoroughly established as to admit of no dispute . . . . Why then, not put it out of the power of the vicious and the Lawless to use us with cruelty and indignity with impunity. . . ."*

John Adams to Abigail Adams
April 14, 1776

> *As to your extraordinary Code of Laws, I cannot but laugh. We have been told that our Struggle has loosened the bands of Government every where. That Children and Apprentices were disobedient—that schools and Colledges were grown turbulent—that Indians slighted their Guardians and Negroes grew insolent to their Masters. But your Letter was the first Intimation that another Tribe more numerous and powerfull than all the rest were grown discontented. . . . Depend upon it, We know better than to repeal our Masculine systems. . . . We have only the Name of Masters, and rather than give up this, which would compleatly subject Us to the Despotism of the Peticoat, I hope General Washington, and all our brave Heroes would fight. . . .*

Abigail Adams to John Adams
May 7, 1776

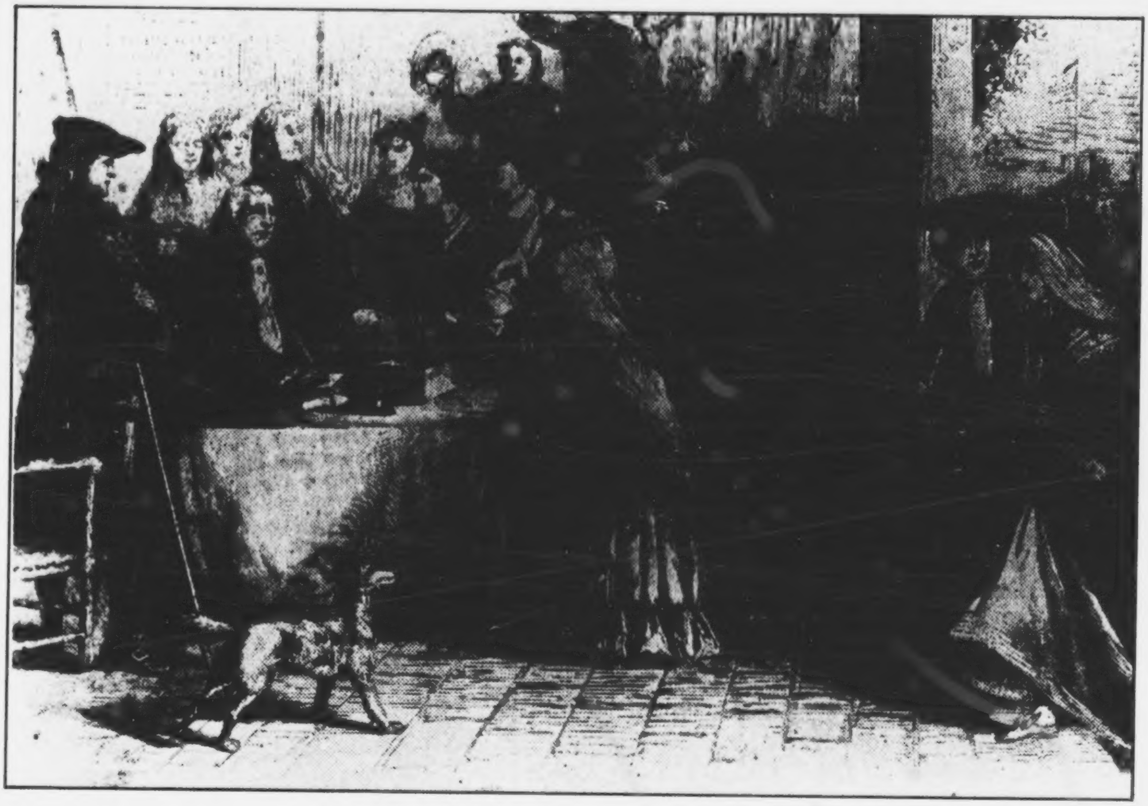
> *. . . Arbitrary power is like most other things which are very hard, very liable to be broken . . . ."*

The exclusion of married women from the vote was based on the same principle that excluded men without property from the vote. If the will of the people was in fact to be expressed by voting, it was important that each vote be independent and uncoerced. But men who had no property and were dependent on their landlords or employers for survival were understood to be vulnerable to pressure; they were, in John Adams' words, "too dependent upon other men to have a will of their own." Adams acknowledged, in fact, that excluding all women was somewhat arbitrary; but lines, as he explained in a thoughtful letter to the Massachusetts politician James Sullivan, had to be drawn somewhere.

John Adams to James Sullivan
May 26, 1776

> *It is certain, in theory, that the only moral foundation of government is, the consent of the people. But to what an extent shall we carry this principle? Shall we say that every individual of the community, old and young, male and female, as well as rich and poor, must consent, expressly, to every act of legislation? No, you will say, this is impossible. How, then, does the right arise in the majority to govern the minority, against their will? Whence arises the right of the men to govern the women, without their consent? Whence the right of the old to bind the young, without theirs? . . .*
>
> *But why exclude women?*
>
> *You will say, because their delicacy renders them unfit for practice and experience in the great businesses of life, and the hardy enterprises of war . . . . Besides, their attention is so much engaged with the necessary nurture of their children, that nature has made them fittest for domestic cares. And children have not judgment or will of their own. True. But will not these reasons apply to others? It is not equally true, that men in general, in every society, who are wholly destitute of property, are also too little acquainted with public affairs to form a right judgment, and too dependent upon other men to have a will of their own? . . . They talk and vote as they are directed by some man of property. . . .*
>
> *Your idea that those laws which affect the lives and personal liberty of all, or which inflict corporal punishment, affect those who are not qualified to vote, as well as those who are, is just. But so they do women, as well as men; children, as well as adults. What reason should there be for excluding a man of twenty years eleven months and twenty-seven days old, from a vote, when you admit one who is twenty-one? The reason is, you must fix upon some period in life, when the understanding and will of men in general, is fit to be trusted by the public. Will not the same reason justify the state in fixing upon some certain quantity of property, as a qualification?*
>
> *The same reasoning which will induce you to admit all men who have not property, to vote, with those who have, for those laws which affect the person, will prove that you ought to admit women and children; for, generally speaking, women and children have as good judgments, and as independent minds, as those men who are wholly destitute of property; these last being to all intents and purposes as much dependent upon others, who will please to feed, clothe and employ them, as women are upon their husbands, or children on their parents . . .*
>
> *Depend upon it, Sire, it is dangerous to open so fruitful a source of controversy and altercation as would be opened by attempting to alter the qualifications of voters; there will be no end of it. New claims will arise; women will demand a vote; lads from twelve to twenty-one will think their rights not enough attended to; and every man who has not a farthing, will demand an equal voice with any other, in all acts of state. It tends to confound and destroy all distinctions, and prostrate all ranks to one common level . . .*

John Adams spelled out with unusual frankness what most of his colleagues believed. If dependent men were to vote, the result would not be that the will of all individuals was counted; rather the result would be that landlords and employers would in effect exercise multiple votes. Married women were thought to be in much the same state as unpropertied men. Their property, according to the ancient tradition of British law, came into their husbands' power when they married, a practice known as *coverture*. The married woman, "covered" by her husband's civic identity, lost the power to manipulate her property independently. (She remained, however, an independent *moral* being under the law, capable of committing crimes, even treason.) To give a vote to a person so dependent



Women voting in eighteenth-century New Jersey. Library of Congress.

on another's will seemed to give a double vote to husbands, rather than to enfranchise wives. In a society in which it was assumed that the wife did the husband's bidding, it seemed absurd to give married men a political advantage over their unmarried brothers. Therefore virtually all the states denied the franchise to married women as well as to men without property.

The logic that excluded married women should not have, on the face of it, excluded unmarried women with property—including widows—who were not under the immediate influence of an adult man and who could buy and sell their property and who paid taxes. Single adult women might have formed a substantial electorate, even with coverture. But in practice custom rather than logic prevailed, and single women were treated for the most part as were their married counterparts.

Only in New Jersey, where the state constitution of 1776 enfranchised "all free inhabitants" who could meet property and residence requirements, did women vote; in 1790, possibly because of Quaker influence, an election law used the phrase "he or she" in referring to voters.

> *. . . all Inhabitants of this Colony, of full age, who are worth fifty pounds proclamation money, clear estate in the same, and have resided within the county in which they claim a vote for twelve months immediately preceding the election, shall be entitled to vote for Representatives in Council and Assembly; and also for all other public officers, that shall be elected by the people of the county at large . . .*

New Jersey Constitution, 1776

> *No person shall be entitled to vote in any other township or precinct, than that in which he or she doth actually reside at the time of the election . . . Every voter shall openly, and in full view deliver his or her ballot . . .*

Acts of New Jersey, 1797

The general tendency in suffrage law throughout the nineteenth century was to broaden the electorate by gradually eliminating property and racial qualifications; yet the New Jersey election statute did not become a model for other states. In 1797 the women's vote was thought to have been exercised as a bloc vote in favor of the Federalist candidate for Elizabethtown in the state legislature, and it was alleged to have made a real difference in the outcome of the election.

Faced with this gender gap, the defeated Democratic-Republicans launched a bitter campaign with two themes that were to appear and reappear as long as woman suffrage was debated in this country. First, they argued that women who appeared at the polls were unfeminine, forgetful of their proper place. Second, they asserted that women were easily manipulated, if not by husbands, then by fathers and brothers. It took ten years, but in 1807 New Jersey passed a new election law excluding all women from the polls, and no other state attempted New Jersey's 1776 experiment.

In the absence of a collective political movement, no delegate came to Philadelphia prepared to make an issue of woman suffrage or of any other distinctively female political concern; no one came prepared to engage in debate over the extent to which women were an active part of the political community.

With the benefit of hindsight, it is possible for historians to identify some political issues which politically empowered women might well have raised had the Constitution guaranteed their right to participate in a republican government. (Some of these issues were to be addressed only a few years later, by Montagnards and Jacobins in France.) One obvious issue is divorce reform. In some states divorce was nearly impossible in 1787; in all it was extremely difficult. Since the majority of petitioners for divorce were women, the issue was one in which women had a distinctive interest. The language of republicanism, with its acknowledgment that the new order validated a search for happiness, was taken by a number of people to imply that divorce reform was a logical implication of republicanism. But the Constitution said nothing about it, and the states loosened restrictions only slowly. Two generations later women's rights activists would place divorce reform high on their political agenda; it is probable that it would also have been given priority on an agenda drafted in the 1780's.

A second concern might have been pensions for widows of soldiers. The Continental Congress authorized modest pensions for the widows of officers, but widows of soldiers would not be provided with pensions until 1832, by which time, of course, many of them were dead. It is easy to think of other issues: the right of mothers to child custody in the event of divorce, restrictions on wife abuse, the security of dower rights. But expressions of opinion on these issues remained the work of individuals; no collective feminist movement gave them articulate expression as was the case in France. No organized female political pressure was brought to bear at the Constitutional Convention; there do not seem to have been American predecessors of the female Jacobin clubs of Paris.

The Constitution reflected the experience of the white upper and middle-class men who wrote it and the experience of their constituents, the men of the upper and lower middle classes, the farmers and artisans, who had, as historian Edward Countryman has observed, "established their political identity in the Revolution." Women had not yet, as a group, firmly established their political identity.

The Constitution did not explicitly welcome women as voters or take particular account of them as a class. However, what the Constitution left unsaid was as important as what it did say. The text of the Constitution usually speaks of "persons"; only rarely does it use the generic "he". Women as well as men were defined as citizens. The Constitution establishes no voting requirements, leaving it up to the states to set the terms by which people shall qualify to vote.

> **Article I, section 2:** *The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the qualifications requisite for Electors of the most numerous Branch of the State Legislature.*

Thus women were NOT explicitly excluded from Congress, nor even from the Presidency. The Constitution, in fact, left an astonishing number of substantive matters open to the choices of individual states; every part of it was open to change by amendment. This flexibility is an important reason for the survival of the American Constitution, as contrasted to the other republican constitutions of the era, like the French, which were far more detailed and explicit, but also less resilient. Women might have been absorbed fully into the American political community without the necessity of constitutional amendment.

Yet this absorption did not occur automatically. No state imitated New Jersey's experiment with suffrage before the Civil War; only a few—Utah, Wyoming, Colorado—did so after the war. No state moved to place non-voters on juries, although there was obvious common sense in the argument that in order for a woman to be tried by her peers a jury should include women, whether or not women voted in that state. Although the old argument that the proper voter was a person of property eroded as liberals steadily decreased property requirements for voting by men, women were not enfranchised.

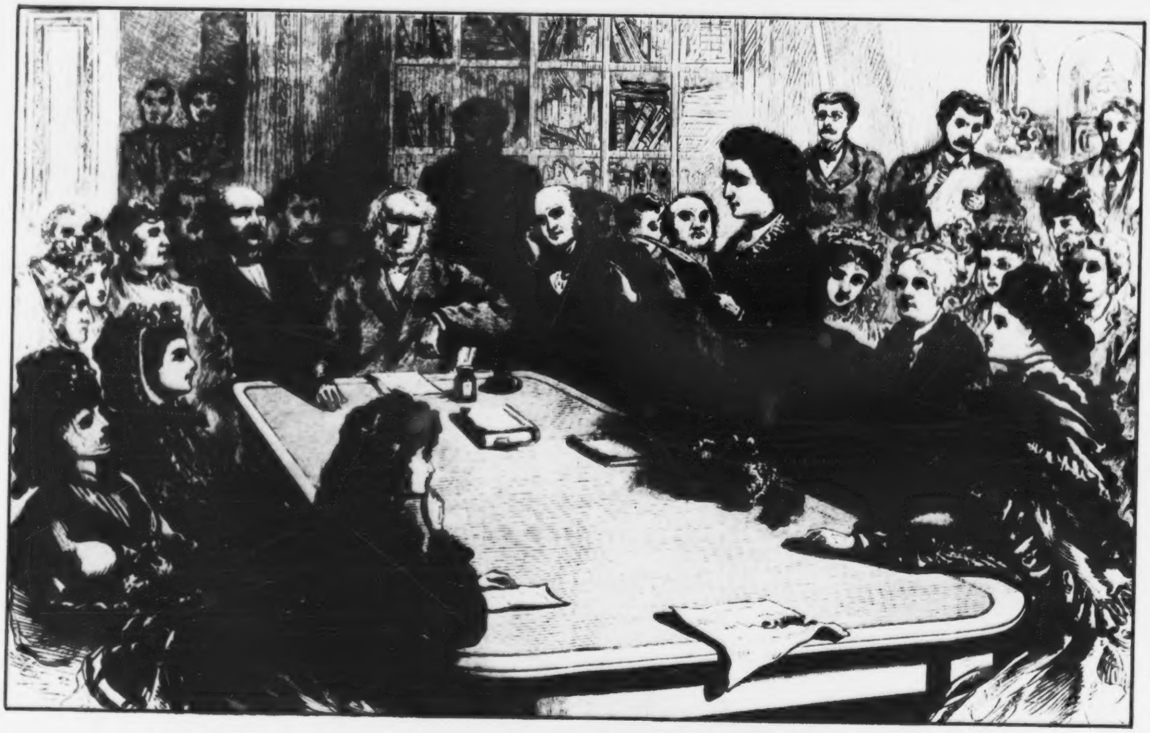
Elizabeth Cady Stanton, by L. Schamer. National Portrait Gallery, Smithsonian Institution, Washington, D.C.

Still, even without the vote, effective political coalitions of feminists and legal reformers developed at the end of the 1830s. They were interested in the codification and simplification of state laws. They pressed for the passage of Married Women's Property Acts that would enable married women to control property without necessitating cumbersome trusteeship arrangements. Beginning with a severely limited statute passed in Mississippi in 1839 and continuing throughout the century, state Married Women's Property Acts gradually extended the financial independence of married women, making it possible for a few feminists to entertain a vision of a full range of women's political activity, even under the older requirements of propertyholding. However, the new control which women achieved over their own property was not accompanied by the extension of the franchise.

The New York State Married Women's Property Act provides an example of this type of legislation:

> *The real and personal property of any female [now married and] who may hereafter marry, and which she shall own at the time of marriage, and the rents, issues and profits thereof shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property, as if she were a single female. . . . It shall be lawful for any married female to receive by gift, grant, devise or bequest, from any person other than her husband and hold to her sole and separate use, as if she were a single female, real and personal property, and the rents, issues and profits thereof, and the same shall not be subject to the disposal of her husband, nor be liable for his debts . . . .*
>
> *A married woman may bargain, sell, assign, and transfer her separate personal property, and carry on any trade or business, and perform any labor or services on her sole and separate account, and the earnings of any married woman from her trade . . . shall be her sole and separate property, and may be used or invested by her in her own name . . . .*
>
> *Any married woman may, while married, sue and be sued in all matters having relation to her . . . sole and separate property . . . in the same manner as if she were sole . . . .*
>
> *Every married woman is hereby constituted and declared to be the joint guardian of her children, with her husband, with equal powers, rights, and duties in regard to them, with the husband . . . .*
>
> **New York State Married Women's Property Acts, 1848, 1860**

Elizabeth Cady Stanton, who had been a strong supporter of the New York Married Women's Property Act, was also an energizing force behind the gathering of women in Seneca Falls in 1848. She and others who prepared and signed the "Declaration of Sentiments" at that meeting addressed forcefully the ways in which women had not been fully absorbed into the republican political order, although they were citizens. After a preface casting "Man" in a rhetorical role comparable to that played by King George III in the Declaration of Independence, the Declaration of Sentiments addressed constitutional and legal as well as social questions: trial by jury, the relationship between taxation and representation, the persistence of coverture.



Suffragists before the House Judiciary Committee, 1871. Frank Leslie's Illustrated Newspaper, February 4, 1871. *Library of Congress.*

> *He has compelled her to submit to laws, in the formation of which she had no voice . . . .*
>
> *He has made her, if married, in the eye of the law, civilly dead . . . .*
>
> *He has taken from her all right in property, even to the wages she earns . . . .*
>
> *After depriving her of all rights as a married woman, if single, and the owner of property, he has taxed her to support a government which recognizes her only when her property can be made profitable to it . . . .*
>
> **Declaration of Sentiments**

The legislative gains of the early part of the century and the emergence of a women's movement at mid-century were not, however, followed by a wave of enfranchisement. In fact, women found themselves excluded from the debate about the extension of the franchise which was engendered by the Civil War.

The Civil War was not only a military crisis but also a revolution in politics, which would be validated by the Thirteenth, Fourteenth, and Fifteenth Amendments. By now there was, most emphatically, a collective women's presence—in the Sanitary Commissions, the women's abolitionist societies, the Women's National Loyal League. But the "Woman Question" had not been central to the ideology of the Civil War, and once again, women found they could not claim its benefits by implication. Abolitionist and Republican feminists had permitted themselves to anticipate that suffrage would be the appropriate reward for their sacrifices and support of the war effort. Their resentment was therefore all the greater when woman suffrage was not made part of the post-war amendments. The inclusion of the word "male" in the second section of the Fourteenth Amendment—a section never enforced—rubbed salt in a raw wound.

Fourteenth Amendment, 1868

Section one

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Section two

> *Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to*

Myra Bradwell. *Library of Congress.*

> *any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State . . .*

Holding their tempers, suffragists embarked on a national effort to test the possibilities of the first section of the Fourteenth Amendment, only to discover that the Supreme Court rejected their arguments. It was tested first in 1873 by Myra Bradwell, a Chicago woman who had studied law with her husband. She had been granted a special charter from the State of Illinois permitting her to edit and publish the *Chicago Legal News* as her own business, a business she carried on with distinction. (After the Chicago fire destroyed many law offices, it was the files of Bradwell's *Legal News* on which the city's attorneys relied for their records.) Bradwell claimed that one of the "privileges and immunities" of a citizen guaranteed by Section 1 was her right to practice law in the State of Illinois and to argue cases. The Illinois Supreme Court turned her down, on the ground that as a married woman, she was not a fully free agent.

In her appeal to the Supreme Court, Bradwell's attorney argued that among the "privileges and immunities" guaranteed to each citizen by the Fourteenth Amendment was the right to pursue any honorable profession. "Intelligence, integrity and honor are the only qualifications that can be prescribed . . . . The broad shield of the Constitution is over all, and protects each in that measure of success which his or her individual merits may secure." But the Supreme Court held that the right to practice law in any particular state was a right that might be granted by the individual state; it was not one of the privileges and immunities of citizenship. A concurring opinion added an ideological dimension:

> *The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded on the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong or should belong to the family institution, is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state . . . many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most states. One of these is that a married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him. This very incapacity was one circumstance which the supreme court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counselor.*
>
> ***Myra Bradwell* v. *State of Illinois*, 1873.**

Meanwhile, suffragists in a number of places attempted to test the other possibilities of the first section of the Fourteenth Amendment. In the presidential election of 1872, suffragist women in a number of districts appeared at the polls, arguing that if all citizens had the right to the privileges of citizenship, they could certainly exercise the right to vote. Susan B. Anthony presented herself at a barber shop in the eighth ward in Rochester, New York, which was serving as a polling place, and convinced two out of the three polling inspectors to register her, on the grounds that the New York State Constitution made no sex distinctions in the qualifications for voters. By the end of the day, fifteen more women had registered. On November 5, having first assured the inspectors that if they were prosecuted for admitting unauthorized persons to the polls, she would pay their legal fees, Anthony and the other women voted. But it was Anthony and the other women who were arrested for an illegal attempt to vote. When she was judged guilty, she refused to pay her bail, hoping to force the case to the Supreme Court. A supporter, however, thinking he was doing Anthony a favor, paid it. The case was set for trial; in the interlude she voted in the Rochester city elections, and no one made a fuss. When the trial was moved to another county, Anthony and her colleagues made a whirlwind tour, speaking in approximately twenty towns each, ensuring that public opinion would not be uniformly against them even in a strange locale.

Anthony reasoned that sex was a characteristic markedly different from youth or being an alien. Although aliens could not vote, an individual alien man could choose to become a naturalized citizen. Minors could not vote, but minors, in the nature of things, grew to adulthood. "Qualifications," she argued, "can not be in their nature permanent or insurmountable. Sex can not be a qualification any more than size, race, color, or previous condition of servitude."

The judge, wanting to deny Anthony the legal system as a forum, directed the jury to bring in a verdict of guilty, and immediately discharged the jury. He fined Anthony $100. When she announced that she would "never pay a dollar of your unjust penalty," he declined to enforce the punishment. "Madam, the Court will not order you to stand committed until the fine is paid." Thus he had it both ways; a verdict of guilty, which would dissuade others from following Anthony's path, but a refusal to punish, thus avoiding making Anthony a martyr.

The President of the Woman Suffrage Association of Missouri was able to do what Anthony could not. Observing that the "power to regulate is one thing, the power to prevent is an entirely different thing," Virginia Minor attempted to vote in St. Louis. When the registrar refused to permit her to register, she and her husband Francis, an attorney who had developed the distinction between regulation and prohibition of suffrage, sued him for denying her one of the privileges and immunities of citizenship. When they lost the case they appealed to the Supreme Court.

In *Minor* v. *Happersett*, decided in 1875, the Court ruled that change must happen as a result of explicit legislation or constitutional amendment, rather than by interpretation of the implications of the Constitution. In a unanimous opinion, the Court observed that it was "too late" to claim the right of suffrage by implication; the Founders had been men who weighed their words carefully. Nearly a hundred years of failure to claim inclusion by implication made a difference. What might have been gradual evolution in the Founders' generation was avoidance of legal due process a hundred years later—"If suffrage was intended to be included . . . language better adapted to express that intent would most certainly have been employed." The Court was not prepared to interpret the Constitution freshly: "If the law is wrong it ought to be changed; but the power for that is not with us . . . . " The decision of the Court meant that woman suffrage could not emerge from reinterpretation of the Constitution; it would require either an explicit constitutional amendment or a series of revisions in the laws of the states.

> *. . . For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice long continued can settle the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be.*
>
> ***Minor* v. *Happersett*, 1875.**

In the years between 1848 and 1876, American women had created a collective movement. It is true that it did not include the entire female population; many women were unaware and more were hostile. But the activists had brought into being an articulate and politically sophisticated pressure group which was prepared to offer an explicit and detailed criticism of the American political system and to make direct demands for inclusion in it.

Susan B. Anthony, *by L. Schamer. National Portrait Gallery, Smithsonian Institution, Washington, D.C.*

When Susan B. Anthony rose to speak on July 4, 1876, the strategies of feminist politics were being realigned. She had the court decisions in *Bradwell* and *Minor* in mind as she spoke. She addressed not only the issue of suffrage but also the exclusion of women from multiple aspects of the political community which the Constitution had created. The right to serve on a jury had been so precious to American men that some states had refused to ratify the Constitution until they were convinced it would be added; yet "the women of this nation have never been allowed a jury of their peers," even in crimes like infanticide or adultery, where women's perspective might well be different from that of men. Anthony decried the division of the community into a class of men, which governed, and a class of women, which was governed.

Anthony's generation of feminists would begin their campaign for suffrage to restore what the second section of the Fourteenth Amendment—with its introduction of the word *male*—had killed by implication. A suffrage amendment would be introduced in the Senate in 1878, and a new chapter in the political history of feminism would begin.

It is important to recognize that Stanton and Anthony's definition of equality under the Constitution was considerably more inclusive than the vote alone. It included a vision of egalitarianism in the *process* of lawmaking as well as in the outcome. Ever since the 1848 Declaration of Sentiments, it had included a vision of equality within the family, between husbands and wives, as well as social equality, between male and female citizens, in the public realm. In her Centennial Address, Anthony expressed the full range of this vision, attacking double standards in moral codes, unequal pay scales, unequal treatment of adulterers. She would not be surprised today to see wife abuse, female health, or the feminization of poverty emerge as topics high on the contemporary feminist agenda. "It was the boast of the founders of the republic, that the rights for which they contended were the rights of human nature. If these rights are ignored in the case of one-half the people, the nation is surely preparing for its downfall," she declared.

Anthony ended her Declaration of Rights with a ringing conclusion. If there are any schoolchildren today who still memorize, as children did in the nineteenth century, great moments in the oratorical tradition of this country—Webster's reply to Hayne, Lincoln's Gettysburg Address—they should add this to their repertory:

> *And now, at the close of a hundred years, as the hour-hand of the great clock that marks the centuries points to 1876, we declare our faith in the principles of self-government; our full equality with man in natural rights; that woman was made first for her own happiness, with the absolute right to herself—to all the opportunities and advantages life affords for her complete development; and we deny that dogma of the centuries, incorporated in the codes of all nations—that woman was made for man—her best interests . . . to be sacrificed to his will. We ask of our rulers, at this hour, no special privileges, no special legislation. We ask justice, we ask equality, we ask that all the civil and political rights that belong to citizens of the United States be guaranteed to us and our daughters forever.*

Suggested additional reading:

Elizabeth Cady Stanton et al. *The History of Woman Suffrage*, 6 vols. (1881–1922).

Alice S. Rossi, ed. *The Feminist Papers* (1973).

Linda K. Kerber is the author of *Women of the Republic: Intellect and Ideology in Revolutionary America* (Chapel Hill, University of North Carolina Press, 1980) and co-editor, with Jane De Hart Mathews, of *Women's America: Refocusing the Past* (New York: Oxford University Press, 1982). She is professor of history at the University of Iowa.

THE QUESTION OF WOMEN'S RIGHTS IN 1776: LETTERS OF JOHN AND ABIGAIL ADAMS

The lesson included here comes from the second edition of Law in United States History: A Teacher Resource Manual, *prepared by the New Mexico Law-Related Education Project, and published by the Social Science Education Consortium. This lesson is one of 37, designed as supplementary material for use in intermediate, junior and senior high school history courses. The manual, which was edited by Melinda R. Smith, spans American history from colonial times to the modern era. For further information on the development of the materials, write to: New Mexico Law-Related Education Project, P.O. Box 25883, Albuquerque, NM 87125 or call (505) 842-6136. To order the lessons, contact the Social Science Education Consortium, 855 Broadway, Boulder, CO 80302 or call (303) 492-8154. (This lesson has been edited for inclusion in* ***this Constitution.****)*

Introduction:

The American Revolution stirred demands for rights among segments of the non-white and non-male population that took almost two centuries to win. This activity presents an exchange of letters between John and Abigail Adams that will give students a sense of the prevailing attitudes toward rights for women in 1776. The letters also provide a basis for comparison with contemporary views.

Objectives:

1. To develop understanding of attitudes toward rights for women and minorities during the American Revolution.
2. To prompt students to compare contemporary and historical views of equal rights.

Level:

Advanced grade 8 and above

Time:

One class period

Materials:

Copies of handout for all students

Procedure:

1. Have students read the three letters and discuss the questions that follow them.
2. As an optional follow-up activity, have students write a letter to Abigail or John Adams that includes the following:

—Agreement or disagreement (according to the student's point of view) with their views on equal rights and the comparative power of men and women in society.

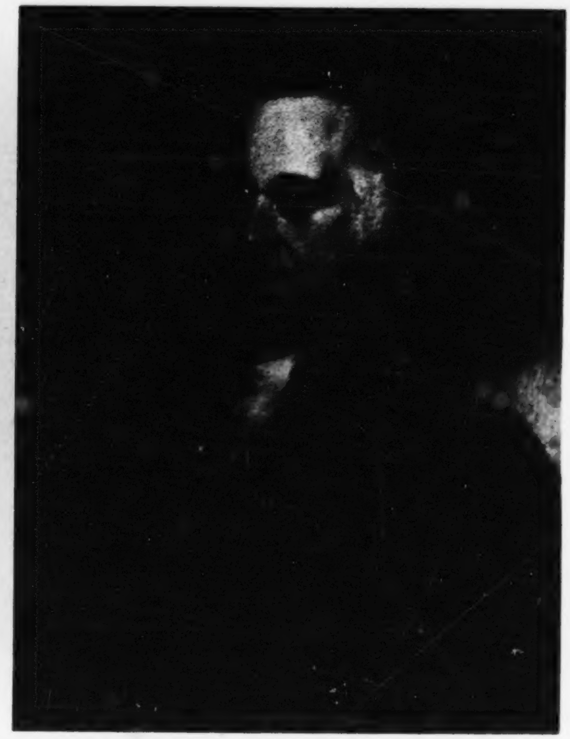
—An historical update on the acquisition of rights of women and minorities, including the Fourteenth and Fifteenth Amendments and the unratified Equal Rights Amendment.

HANDOUT

AN EXCHANGE OF LETTERS BETWEEN JOHN AND ABIGAIL ADAMS

At the time our nation was born—and for a long while afterward—women were not allowed to vote, manage property, sign contracts, serve on juries, or act as legal guardians for their children. However, some women advocated rights for women as far back as 1776. One of these women was Abigail Adams, wife of John Adams, Patriot and delegate to the Continental Congress (and later the President of the United States). In letters to her husband, Abigail Adams expressed her views on rights for women. Read the following exchange of letters and discuss the questions that follows.

Abigail Adams, painting by Gilbert Stuart. Library of Congress.



John Adams, painting believed to have been begun by Gilbert Stuart, finished by Jane Stuart. National Portrait Gallery, Smithsonian Institution, Washington, D.C.

Abigail Adams to John Adams
March 31, 1776

. . . I long to hear that you have declared an independency—and, by the way, in the new code of laws, which I suppose it will be necessary for you to make, I desire you would remember the ladies, and be more generous and favorable to them than [were] your ancestors. Do not put such unlimited power into the hands of the husbands. Remember all men would be tryants if they could. If particular care and attention is not paid to the ladies, we are determined to [instigate] a rebellion, and will not hold ourselves bound by any laws in which we have no voice or representation.

That your sex are naturally tyrannical is a truth so thoroughly established as to admit of no dispute. But such of you as wish to be happy willingly give up the harsh title of master for the more tender and endearing one of friend. Why, then, not put it out of the power of the vicious and lawless to use us with cruelty and indignity . . .? Men of sense in all ages abhor those customs which treat us only as the vassals of your sex. Regard us then as beings, placed by providence under your protection, and in imitation of the Supreme Being make use of that power only for our happiness.

1. What was Abigail Adams's view toward men? Do you agree or disagree with her views?
2. In her letter, Abigail Adams wrote that "[we] will not hold ourselves bound by any laws in which we have no voice or representation." What does she mean? Compare her views with the attitudes of the Patriots toward the British government during the Revolution.

John Adams to Abigail Adams
April 14, 1776

As to your extraordinary code of laws, I cannot but laugh. We have been told that our struggle has loosened the bands of government everywhere. That children and apprentices were disobedient—that schools and colleges were grown turbulent—that Indians slighted their guardians and Negroes grew insolent to their masters. But your letter was the first intimation that another tribe more numerous and powerful than all the rest [had] grown discontented. This is rather too coarse a compliment, but you are so saucy, I won't blot it out.

Depend upon it, we know better than to repeal our masculine systems. Although they are in full force, you know they are little more than theory. We dare not exert our power in its full latitude. We are obliged to go fair and softly, and in practice, you know, we are the subjects. We have only the name of masters, and rather than give up this, which would completely subject us to the despotism of the petticoat, I hope General Washington, and all our brave heroes would fight. . . . A fine story indeed. I begin to think the ministry as deep as they are wicked. After stirring up Tories, landjobbers, trimmers, bigots, Canadians, Indians, Negroes, Hanoverians, Hessians, Russians, Irish Roman Catholics, Scotch, . . . at last they have stimulated the [women] to demand new privileges and [to] threaten to rebel.

1. Do you think John Adams takes his wife's concerns seriously?
2. Who does he think holds the real power? How do his views compare with current attitudes about the power of men and women?
3. Why would a period of revolutionary activity encourage many different grups to demand rights and privileges?

Abigail Adams to John Adams
May 7, 1776

I cannot say that I think you very generous to the ladies. For, whilst you are proclaiming peace and good will to men, emancipating all nations, you insist upon retaining an absolute power over wives. But you must remember that arbitrary power is like most other things which are very hard—very liable to be broken; and, notwithstanding all your wise laws and maxims, we have it in our power not only to free ourselves but to subdue our masters, and without violence throw both your natural and legal authority at our feet. . . .

By 1848, more and more women were concerned with gaining equal rights with men. Elizabeth Cady Stanton, a supporter of women's rights, attended the first Women's Rights Convention in New York in 1848. She delivered a speech in which she said:

> *The history of mankind is a history of repeated injuries and usurpations on the part of men toward women, having as direct object the establishment of tyranny over her.*

Compare Stanton's views with those written by Abigail Adams 75 years earlier.

John Adams House, Quincy, Mass., c. 1893.

The Mount Vernon Conference: First Step Toward Philadelphia

by RICHARD B. MORRIS

An unusual convergence of issues drawn from history, geography and technology, and initially involving just two states, began the chain of events that drew twelve of the thirteen states to Philadelphia in May of 1787.

It all started on a small scale, a localized conflict between Maryland and Virginia over the jurisdiction and navigation rights of waters they shared in common. For reasons quite obscure, the Virginia Constitution of 1776—in the writing of which both Thomas Jefferson and James Madison had had a hand—recognized the claims of Maryland to the southern (i.e., the Virginia) shore of the Potomac River under the Baltimore charter of 1632, though the Virginia Constitution also asserted Virginia's rights to the free navigation of the Potomac and Pocomoke* rivers. In 1784, Madison had visited Alexandria, a port on the Virginia side of the Potomac. Shippers, foreign or domestic, were a canny breed, quick to find out which port of call offered the best deal. Madison was shocked to observe "several flagrant evasions" practiced with "impunity and success" by foreign vessels that had loaded at the port, presumably free from duty or customs supervision by the state of Virginia. On March 16, 1784, he expressed his dismay in a letter to his friend and political ally, Thomas Jefferson, then sitting in Congress prior to his departure to take over the American ministry in France. Indubitably, Madison complained, Virginia should in her Constitution have expressly reserved the jurisdiction of her half of the two rivers. What better time to approach Maryland than now and correct this maladroit piece of drafting, he asked. The latter state was in particularly "good humor," having ratified the Articles of Confederation following Virginia's cession of her western lands to Congress. Hence, it seemed timely to resolve the issue by appointing commissioners from the two states. Since Jefferson was himself disenchanted with some of the restraints of his state's Constitution, under which he had struggled to function as governor, he agreed.

The idea met with general favor and both states designated representatives to meet, Virginia as early as June of 1784, and Maryland in January, 1785. Virginia, however, kept fumbling the ball. That legislature's instructions to its delegates addressed only the rectification of the claims over the Potomac; they neglected to mention the Pocomoke River or the need to survey and divide jurisdiction over the Chesapeake Bay. Thus, the Virginia legislature in a careless moment failed to cover many issues that had plagued relations between the two colonies and states in these waters—shore rights, customs duties, disagreements over navigation, coastal defense, and lighthouses. Maryland's instructions, on the other hand, covered all the points at issue.

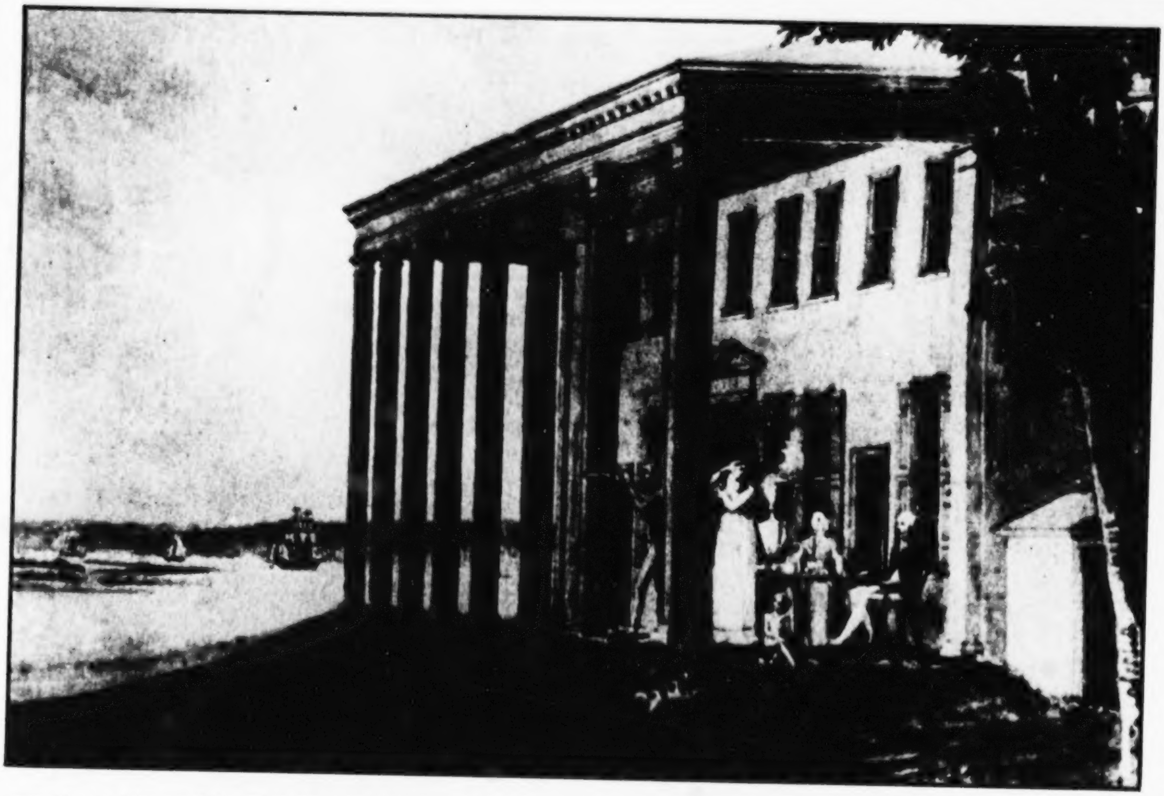
Moreover, the muddle in Virginia continued. The state named George Mason, Edmund Randolph, Alexander Henderson, and James Madison as commissioners, but someone placed these appointments in a pigeonhole, with the result that Governor Patrick Henry neglected to notify his commissioners either of their appointment or of the time and place set for the meeting. Maryland, scrupulous in its instructions, conscientiously notified its commissioners to attend the conference at Alexandria, the week of March 21, 1785.

Thus, the Marylanders—Daniel of St. Thomas Jenifer, Thomas Stone, and Samuel Chase—arrived at Alexandria to find no Virginia commissioners awaiting them. They descended upon Alexander Henderson, an Alexandria resident, informing him that they were present and ready to proceed. News reached Mason at Gunston Hall, and that gout-ridden delegate, obviously embarrassed, decided that the meeting should proceed without delay, even though Randolph and Madison had failed to make an appearance (not receiving notification in time) and in spite of the fact that the Virginia authorizing resolution empowered "*any three*" of the commissioners to "frame such liberal and equitable regulations concerning the said river, as may be mutually advantageous to the two states."

The conference, however, was not destined to

MOUNT VERNON BICENTENNIAL CONFERENCE

The Regent and the Vice-Regents of the Mount Vernon Ladies' Association, with Project '87, will host a conference at Mount Vernon on April 2, 1985, to commemorate the Bicentennial of the Mount Vernon Conference of March 1785. The conference, on the theme of "The Constitution: Commerce and the Pursuit of Happiness," will open on April 1 with a dinner at the Supreme Court hosted by Chief Justice Warren E. Burger, honorary chairman of Project '87's Advisory Board. Governor Charles S. Robb of Virginia will address the participants at the conference luncheon. A full report on the conference will appear in the Fall 1985 issue of ***this Constitution***.



George Washington (with telescope) at Mount Vernon, 1798—the only such contemporary drawing, by Henry Benjamin Latrobe. The Mount Vernon Ladies' Association.

remain at Alexandria. The delegates were quickly honored by an invitation from General George Washington to adjourn a few miles south to Mount Vernon, where he offered the hospitality of his estate. There the conference convened on March 25. Washington acted as host but did not participate. However, it could not be said that his hospitality was entirely disinterested. Shortly to be elected president of the recently formed Potomac Company, initiated in January 1785 by acts of the Virginia and Maryland assemblies, Washington, with the collaboration of his friend and political ally "Light-Horse" Harry Lee, was already engaged in an ambitious engineering and navigation program. His objective was to bring the Potomac to the Shenandoah and Ohio valleys by a series of locks. Such a plan would make possible a successful penetration of the interior by a waterway system, at least as far west as Cumberland and the Allegheny Mountains, thereby joining East and West to the advantage of the Potomac and Chesapeake regions. Washington's company was about to embark on the construction of a series of locks to bypass a formidable obstacle to his long-range program—the Great Falls of the Potomac, a surging, roaring cataract some thirty-five feet high in the Potomac, which forms a series of rapids about fifteen miles above the present city of Washington where the river descends some ninety feet. Steamboating on the Potomac was being seriously considered (although its execution was held up by the fiercely contested rival claims of "inventors" James Rumsey and John Fitch), and the navigation of the interior waterways was now gaining national attention.

In the warm atmosphere of Mount Vernon and with the obvious encouragement and expert knowledge of General Washington, all the chief issues were amicably settled and an interstate compact quickly drawn up. The meeting concluded on March 28, 1785. The commissioners' report went beyond tidewater navigation and considered a multitude of problems related to navigation and commerce. It provided for entrance and clearance of vessels at naval offices and established the proportion of duties to be paid where entry was made in both states. It declared the Potomac River "a common High Way," not only to the citizens of Virginia and Maryland but to those of the United States and to all other persons "in amity with the said states" trading to or from Virginia or Maryland. It provided for common fishing rights, for erecting lighthouses, beacons, and buoys in Chesapeake Bay to be charged jointly to both states. It dealt with jurisdiction over piracy and other crimes committed on the waters off the Potomac, Pocomoke, or Chesapeake Bay; it included a provision for attachment for debt of vessels entering the Pocomoke. As regards naval security, the commissioners urged that Congress authorize the two states to make due provision, if and when needed. The commissioners further recommended equality in the valuation accorded the current money of the two states as well as foreign gold and silver coin, along with a uniform treatment of protested bills of exchange. Finally, they recommended that duties on imports and exports be the same for both states.

Indeed, the sweeping, if sensible, recommendations of the Mount Vernon Conference went considerably beyond the instructions that the respective legislatures had given to them. The five commissioners wrote to the President of the Executive Council of Pennsylvania on March 28, 1785, outlining the plans for expanding the navigation of the Potomac as far as practicable to open a convenient route from the head of such navigation to the waters running into the Ohio. Since much, if not all, of this route ran through Pennsylvania, they urged the legislature of that state to allow vessels from Maryland and Virginia passing through Pennsylvania to be exempted from duties or tolls other than those necessary to help defray Pennsylvania's share of expenditures on its portion of the project. Significantly, the commissioners further asserted the principle that the same rights of navigation be accorded the citizens of the United States, thereby stressing the notion that transportation on navigable or inland waters was a national concern.

In sum, the commissioners had raised questions of great national import, timed to express a general consensus of the needs of a nation still in deep depression. Currency, commerce, navigation, debt collection, and discriminatory duties — all these were problems which could only be resolved by individual states on a stop-gap basis or through interstate compacts. In fact, they compelled national attention and regulation.

Both states ratified the compact, the Maryland legislature even going so far as to propose including Delaware in the agreement. As floor manager, James Madison, an ardent nationalist well before 1785, steered the agreement through the Virginia legislature. Had it been his choice, the compact would have been submitted to Congress for ratification in deference to the sixth article of the Articles of Confederation barring "two or more states" from entering into "any treaty, confederation, or alliance" without the consent of the United States in Congress assembled. His nationalist proposal was voted down, however. Instead, the Virginia House adopted a resolution, which Madison initiated and John Tyler, not then identified as an extreme nationalist, sponsored. It authorized a meeting of Virginia delegates with other state commissioners at Annapolis in 1786 to discuss "such commercial regulations [as] may be necessary to their common interest and their permanent harmony." Thus, the action of the Mount Vernon commissioners set the stage for the Annapolis Convention of September 1786, in which James Madison and Alexander Hamilton played stellar roles.

By its creative moves, the Mount Vernon Conference made Annapolis inevitable, and the audacity of the nationalists turned that subsequent ill-attended convention into a summons for Philadelphia.

But that meeting deserves a story by itself.

Suggested additional reading:

Irving Brant, *James Madison, the Nationalist, 1780–1787* (1948).

John Bach MacMaster, *A History of the People of the United States*, vol. I (1924).

Andrew C. McLaughlin, *The Confederation and the Constitution* (1905).

Robert A. Rutland, ed., *The Papers of George Mason*, vol. II (1979).

Richard B. Morris is Gouverneur Morris professor of history emeritus at Columbia University and editor of the Papers of John Jay. He has now in press a book entitled *Witnesses at the Creation*, to be published in fall, 1985, by Holt, Rinehart & Winston.

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*The Pocomoke rises in southern Delaware, flows south across the Maryland border, emptying into Pocomoke Sound, an inlet of the Chesapeake Bay.

Great Falls of the Potomac River. ***National Park Service, U.S. Department of the Interior.***

Bicentennial Gazette

ORGANIZATIONS and INSTITUTIONS

NATIONAL ARCHIVES VOLUNTEERS CONSTITUTION STUDY GROUP

National Archives Building
Pennsylvania Avenue at
Eighth Street, N.W.
Washington, D.C. 20408
(202) 523-3183
Contact: Ralph S. Pollock

With the support of the D.C. Community Humanities Council, the monthly lecture series will offer the following speakers: Kenneth W. Thompson, University of Virginia, on "The Constitution and the Public Philosophy" (January 16); Albert P. Blaustein, Rutgers School of Law, on "The Worldwide Influence of the Constitution of the United States" (February 20); James MacGregor Burns, Williams College, on "The Constitution: Past, Present and Future" (March 14); Stephen H. Sachs, Attorney General of Maryland, on "The Role of the States in the Federal System" (April 18); William E. Colby, former director of Central Intelligence, on "The Constitution and the CIA" (May 15); and William D. Carey, American Association for the Advancement of Science, on "The New Power of Science and its Place in the Constitutional System" (June 19). The program on March 14 is part of an all-day symposium to prepare for the Bicentennial.

All meetings are held at noon; there is no admission charge.

THE JOHNS HOPKINS UNIVERSITY SCHOOL OF CONTINUING STUDIES

102 Macaulay Hall
Baltimore, MD 21218
(301) 338-8500

"The American Revolution: The Unfinished Agenda," a two-day conference on issues raised but not resolved by the American Revolution and the 1783 Treaty of Paris, will be presented March 29 and 30, 1985, by the Johns Hopkins University School of Continuing Studies and the Department of History in the School of Arts and Sciences.

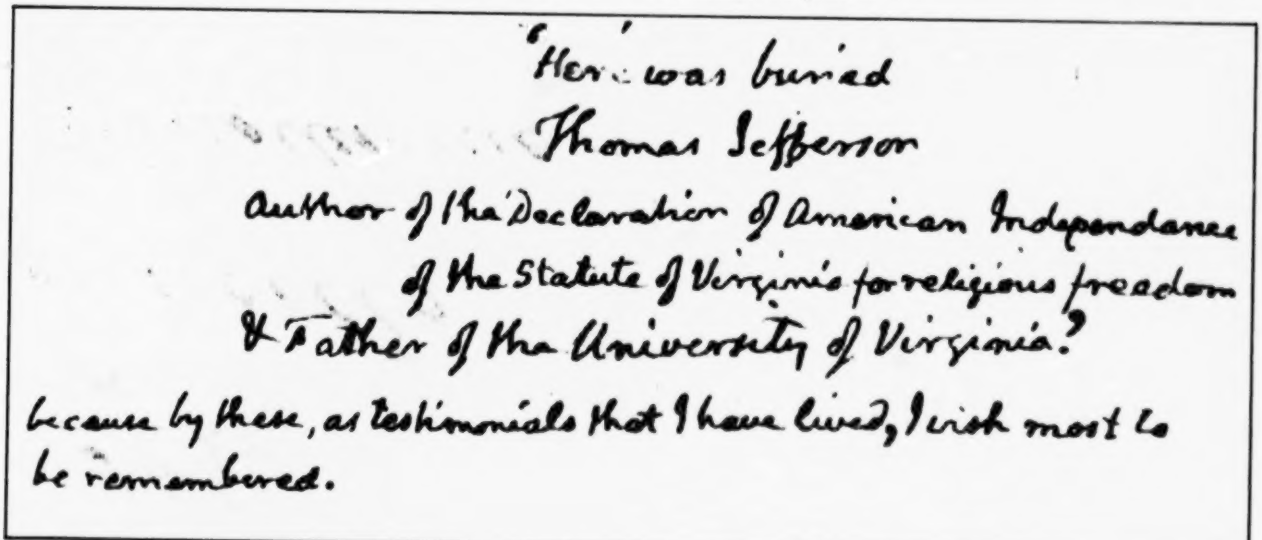
Conference sessions will be held on the University's Homewood campus and will feature presentations by fifteen scholars on a variety of problems confronted by the new American nation once its independence was achieved. Some of the general topics to be addressed include defense and public order, national unity, slavery, and religious freedom. Questions from the audience will be encouraged.

The project has been made possible with funds from the Maryland Humanities Council, Inc., through a grant from the National Endowment for the Humanities, Office of State Programs. It is also supported by a supplementary award from NEH.

VIRGINIA FOUNDATION FOR THE HUMANITIES AND PUBLIC POLICY

1-B West Range
University of Virginia
Charlottesville, VA 22903
(804) 924-3296

As part of its program in honor of the Bicentennial of the Virginia Statute for Religious Freedom, written by Thomas Jefferson and passed by the House of Burgesses on January 16, 1786, the Virginia Foundation has planned a conference to be held on September 19–21, 1985. The meeting will be organized around five themes: the American antecedents of the Statute; the enactment of the Statute; the relationship of the Statute to the tradition of religious freedom; contemporary perspectives on religious freedom and the Statute 200 years later. Speakers include Edwin S. Gaustad, University of California, Riverside, Henry F. May, University of California, Berkeley, J.G.A. Pocock, Johns Hopkins University, Martin Marty, University of Chicago, Henry Abraham, University of Virginia, Thomas Buckley, S.J., Loyola Marymount University, Rhys Issac, LaTrobe University, Australia, John T. Noonan, Jr., University of California, Berkeley, Walter Berns, American Enterprise Institute, Cushing Strout, Cornell University, Richard Rorty, University of Virginia, A.E. Dick Howard, University of Virginia, David Little, University of Virginia. The conference will take place at the University of Virginia.



'Here was buried
Thomas Jefferson
author of the Declaration of American Independance
of the Statute of Virginia for religious freedom
& Father of the University of Virginia.'
because by these, as testimonials that I have lived, I wish most to be remembered.

Jefferson's instructions, in his own hand, for his gravestone. ***University of Virginia.***

ORIGINAL THIRTEEN STATES URGED TO FORM COMMISSIONS

The chairman of the Bicentennial Commission on the United States Constitution of the state of New Hampshire and the Lieutenant Governor of the state of North Carolina have joined in a resolution, adopted October 17, 1984, at Concord, New Hampshire, urging all of the original thirteen colonies to establish commissions for the Bicentennial of the Constitution. The goal of the state groups should be to carry forward their individual programs, to cooperate in a national celebration and to support the federal commission established by P.L. 98-101. The resolution follows:

WHEREAS: The Bicentennial of the formulation of the United States Constitution occurs on SEPTEMBER 17, 1987, and

WHEREAS: The celebration of this National Event is a milestone in the life of these UNITED STATES, and

WHEREAS: The Thirteen Original Colonies were involved in the formulation and adoption of the Constitution, and

WHEREAS: It is essential that all freedom loving peoples around the world recognize that these United States place a high value on the document that prescribes their form of National Government.

BE IT HEREBY RESOLVED BY THE PARTIES MEETING THIS DAY, OCTOBER 17, 1984
FOR THE PURPOSE OF FURTHERING SUCH A CELEBRATION THAT:

Every effort be extended to encourage the Original Thirteen Colonies to establish Commissions and join a group effort to celebrate the Bicentennial.

AND FURTHER, BE IT RESOLVED

that a copy of this Resolution be forwarded to the Governors and the Legislatures of all of the States but with urgent encouragement for immediate action by the Original Thirteen Colonies.

Signed in Concord, New Hampshire October 17, 1984

Project '87

Project '87 would like to know about events being planned for the Bicentennial of the United States Constitution, which we will report on in ***this Constitution.*** Please send notices to:

this Constitution
1527 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Photographs and camera-ready art of logos, posters, etc. are welcome and will be returned.

National Council for the Social Studies

The National Council for the Social Studies Board of Directors has adopted a resolution designed to promote educational programs in conjunction with two important Bicentennials—the signing of the Constitution in 1987 and the ratification of the Bill of Rights in 1991.

The action came as part of the NCSS annual meeting which drew about 2,700 educators to Washington, D.C., for five days of conferences from November 14–19, 1984.

RESOLUTION FOR THE BICENTENNIALS OF THE CONSTITUTION AND BILL OF RIGHTS

Submitted by the Citizenship Committee

WHEREAS student and public understanding about the United States Constitution, Bill of Rights, and the law generally should be recognized as a national educational priority as the nation prepares to honor the Bicentennials of these documents;

BE IT RESOLVED that the National Council for the Social Studies undertake and encourage *educational* programs commemorating the Bicentennials of these documents; and

BE IT FURTHER RESOLVED that the National Council for the Social Studies calls upon its members and their colleagues; Affiliated Councils and Associated Groups; as well as government officials, educational leaders, and the public to commit substantial personal and institutional energies and resources toward improving understanding of our Constitution and the Bill of Rights.

For further information, write to NCSS, 3501 Newark Street, N.W., Washington, D.C. 20016.

NORTH CAROLINA ESTABLISHES BICENTENNIAL COMMISSION

North Carolina has become the second state in the nation to ratify legislation establishing a Bicentennial Commission on the United States Constitution. The legislation, which became effective December 1, 1984, cleared the North Carolina House and Senate on July 7, 1984. Patterned after Public Law 98-101, which established a federal commission, the Act provides for a 21-member body.

Co-chairmen of the commission will consist of the Chief Justice of the State Supreme Court, President Pro Tempore of the State Senate and Speaker of the State House of Representatives. Each co-chairman is responsible for appointment of six members "from among individuals who have demonstrated scholarship, a strong sense of public service, expertise in the learned professions, and abilities to contribute to the fulfillment of the duties of the Commission." The co-chairman shall designate one of themselves annually to preside at Commission meetings.

The North Carolina legislation also provides for the appointment of a Commission director and public staff of five persons. No limitation has been placed on the appointment of staff personnel paid with funds from contributions to the commission. The North Carolina Act includes an appropriation of $300,000 for fiscal 1985–86 to fund commission activities.

New Hampshire became the first state to establish a Commission in 1981.

KNOXVILLE, TENNESSEE, ESTABLISHES COMMISSION FOR THE BICENTENNIAL

Knoxville, Tennessee, has established a Bicentennial Commission for the Knoxville-Knox County metropolitan region of 300,000 people to plan and oversee a program of activities appropriate to the commemoration of the Bicentennial of the Constitution. The commission is composed of ten persons, five chosen by the Mayor of Knoxville and five by the Executive of Knox County; Professor Milton M. Klein, Department of History, University of Tennessee, Knoxville, is the Chairman. The commission would welcome an exchange of ideas with comparable local commissions on the organization of Bicentennial programs.

PUBLICATIONS

OAH MAGAZINE OF HISTORY

A New Publication for, by, and about Secondary School Teachers

As part of its commitment to quality education in America, the Organization of American Historians is pleased to announce that the first issue of the *OAH Magazine of History* will be available in April 1985. Designed specifically for and according to the recommendations of secondary school teachers of American history and social studies and supported in part by funds from the Rockefeller Foundation, the *Magazine* will include concise feature articles of practical value in the classroom; lesson plans; annotated bibliographies; reproducible documents; transparency masters; media reviews and suggestions; regular columns edited or written by secondary school teachers (including columns by middle and high school students); reviews of social science degree programs; and news and notices of interest to educators and students alike.

The *OAH Magazine of History* will measure 8.5 by 11 inches, and pages will be perforated and drilled to fit a standard three-ring binder for easy storage. Issues will be topical, in part, and correspond chronologically to the curricular needs of the classroom. The April 1985 issue will focus on the 1960s and include articles on historiography, the second women's movement, and John F. Kennedy and the Nuclear Test Ban Treaty. The pilot issue of the *OAH Magazine* will also include an article by Bobby Knight, coach of the 1984 Olympic basketball team, on the condition of American education, and a piece on Project '87. (Future issues will include regular updates on the Bicentennial of the Constitution.)

Six issues of volume 1 of the *OAH Magazine of History* will be available for our regular 4-issue price of $12 for individuals, $25 for institutions, or $10 each for multiple subscriptions (minimum of 3). For a subscription form or more information, contact Kathryn Caras, Editor, *OAH Magazine of History*, 112 North Bryan, Bloomington, IN 47401 or call (812) 335-7311.

PUBLIUS: THE JOURNAL OF FEDERALISM

Publius: The Journal of Federalism invites manuscript submissions for a special issue to be published in 1987 on State Constitutional Law.

This issue will examine such matters as (1) the development and modification of state constitutions over time; (2) patterns of influence among states in the development of state constitutional law; (3) the influence of factors at the federal level, especially federal constitutional interpretation, on state constitutional law; (4) comparative analyses of how constitutional problems common to the various states have been resolved; (5) comparative analyses of how the states and federal government have resolved similar constitutional problems; (6) legal issues involving the autonomy of state constitutional interpretation, especially in the area of individual liberties; and (7) the interplay between state politics and state constitutional law. Proposals on topics other than those listed above will also be considered.

Proposals for articles (3 copies) should be sent by November 15, 1985 to: Dr. G. Alan Tarr, Department of Political Science, Rutgers University, Camden, NJ 08102. Manuscripts (4 copies) will be due to Professor Tarr by September 15, 1986.

THE NEW DEAL LEGACY AND THE CONSTITUTION: A HALF-CENTURY RETROSPECT

The New Deal Legacy and the Constitution: A Half-Century Retrospect has been published by the Boalt Hall School of Law, University of California, Berkeley. Included are essays by Harry N. Scheiber of Berkeley, Lawrence Friedman of Stanford, Robert Dallek of UCLA, and Malcolm Feeley of Berkeley. A panel discussion of judicial activism, with contributions by Martin Shapiro, Judge Robert Peckham, and others also appears in this 43-page paperbound publication.

Among the topics of essays are "From the New Deal to the New Federalism," by Prof. Scheiber, an analysis of federalism and legal change since 1933; and a complementary essay by Prof. Friedman, "The Welfare and Regulatory State Since the New Deal." Prof. Feeley's contribution is on "Judicial Activism Since 1933," and Prof. Dallek writes on "The Presidency from Roosevelt to Reagan."

The publication results from a conference held at Boalt Hall on the occasion of the half-century anniversary of the New Deal's commencement. Boalt Hall School of Law's Earl Warren Legal Institute and the California Council for the Humanities sponsored the conference and the publication. Under the Council's grant, the conference involved a large number of high-school teachers as well as the general public.

The New Deal Legacy is available for $3.95, including handling and postage, on payment to the following address: Earl Warren Legal Institute, Boalt Hall, University of California, Berkeley, CA 94720.

THE NATIONAL ENDOWMENT FOR THE HUMANITIES SPECIAL INITIATIVE FOR THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION

NEH Grants Awarded August, 1984

American Historical Association—Project '87
1527 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Project Director: Jamil Zainaldin
Project: Supplement to The Records of the Federal Convention *by Max Farrand.*
Award: $48,566

The National Endowment for the Humanities grant will provide research assistance to collect documents for a supplement to the original Farrand volumes; the research will be conducted by Leonard Rapport. Mr. Rapport, an archivist with more than three decades' experience at the National Archives, has also served as the associate editor for the Documentary History of the Ratification of the Constitution and the Bill of Rights. James Hutson, the chief of the manuscript division of the Library of Congress, will edit the new volume; publication is anticipated in 1987. The supplement will be printed by Yale University Press, which published the original Farrand set. Yale also plans to reissue the original set, which is now out of print.

Center for the Study of the Constitution
Carlisle, PA
Project Director: Richard Stevens
Project: Lecture series on constitutional law to be offered in 1986.
Award: $86,359

The Center will prepare a series of lectures throughout the United States that will reconstruct the dialogue of the ratification process. The program will emphasize that the problems and prospects of popular government that prompted the Federal Convention to craft the Constitution are still very much a part of the politics of the American republic. Speakers will discuss the theoretical foundation on which the Constitution is based, and the realistic appraisal of the permanent problems of human nature that motivated the founders. The lectures will be videotaped for classroom use; edited and abridged versions will be distributed to newspapers through Public Research, Syndicated. The lectures, with related materials, will also be published as a resource book for teachers.

Duke University
Office of Continuing Education
Durham, NC 27708
Project Director: Judith G. Ruderman
Project: Community forums in North Carolina
Award: $200,000

Community forums addressing constitutional issues will be organized at county libraries and state historical sites one evening each week for seven weeks. The forums will attempt to recreate the ambience and debates in North Carolina in 1787–1790 and will focus on the following topics: the 1787 convention; the ratification debate over the Constitution in North Carolina; the nature of representation; lawyers and judicial review in the republic; women as citizens; the status of blacks in the new nation; consensus on the Constitution. To support these dialogues between scholars and local citizens, the project will develop a sourcebook of original materials, including records of the ratification debate, newspaper editorials, letters, legislative petitions and other items.

American Historical Association—Project '87
1527 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Project Directors: Sheilah Mann, Adele Seeff
Project: Television-assisted distant-learner college course on the history of the Constitution
Award: $130,000

Project '87, the International University Consortium and the Maryland Center for Public Broadcasting are collaborating to create a three-credit course on the history of the Constitution to be used by colleges and universities for off-campus students. A course team of scholars chaired by Herman Belz, University of Maryland, will develop the print materials and advise on the production of eight half-hour television programs which will highlight aspects of the Constitution's development. The NEH grant will support the development of the course and the production of two of the eight television programs.

University of Dallas
Politics Department
Irving, Texas 75061
Project Director: Thomas West
Project: Lecture and publication program on "Constitutionalism in America"
Award: $483,113

The University of Dallas will conduct a three-year program of scholarly research and public education which aims at a wide public audience in the Dallas-Fort Worth area and a national audience of scholars. The funds will support three Bicentennial lectures, three conferences, 225 public speaking engagements, 30 study groups, 12 teacher in-service sessions, three monographs, three bibliographies, three sets of conference notes and three books. The objective of the program is to awaken reflection on what it means to live under a constitution, on the concept of human life evident in the very terms of the U.S. Constitution, and on the obstacles to the success of constitutional government.

Columbia University
Center for the Study of Human Rights
New York, NY 10027
Project Director: Louis Henkin
Project: Studies and public programs on the influence of the United States Constitution abroad
Award: $152,178

The Center plans 16 studies to focus on the United States system and the degrees of its influence overseas, examining both text and practice, values and social forces. The studies, which an international advisory board will help direct, will particularly emphasize constitutional rights. Public programs in New York, Los Angeles and Dallas will provide an opportunity to discuss the findings before publication. The studies themselves will be published in 1986.

GARY McDOWELL HEADS BICENTENNIAL OFFICE

In December, 1984, Gary L. McDowell replaced Edward J. Erler as the director of the NEH Bicentennial Office. Dr. McDowell, a political scientist, comes to the Endowment from Tulane University. He was also the co-director of the Center for the Study of the Constitution in Carlisle, Pa., and a member of the legal advisory board of the National Legal Center for the Public Interest. In 1981–82, he was a fellow in law and political science at Harvard Law School. Dr. McDowell is the author of *Curbing the Courts: The Constitution and the Limits of Judicial Power* (Louisiana State University Press, forthcoming) and *Equity and the Constitution: The Supreme Court, Equitable Relief and Public Policy* (Chicago University Press, 1982).

Network of Scholars: Supplement

The initial network listing of scholars interested in Bicentennial programs appeared in the Fall, 1984, issue of ***this Constitution***; a supplement followed in Winter, 1984. The present listing includes entries received since that time. Planners should get in touch directly with those whom they would like to have participate in their programs.

CALIFORNIA

Richard Funston, Ph.D., J.D.
Department of Political Science
San Diego State University
San Diego, CA 92182
Constitutional law and history; civil liberties; Supreme Court

ILLINOIS

Gerald Fetner, Ph.D.
University of Chicago
5801 Ellis Avenue
Chicago, IL 60637
Twentieth-century legal and constitutional history

DISTRICT OF COLUMBIA

Bradford Wilson, Ph.D.
Research Associate
Supreme Court of the United States
Washington, D.C. 20543
American constitutional studies; role of the judiciary

KENTUCKY

W. Richard Merriman, Ph.D.
Department of History and Political Science
Berea College
Berea, KY 40404
Colonial and revolutionary political thought in America; race

OREGON

James R. Klonoski, Ph.D.
Department of Political Science
University of Oregon
Eugene, OR 97403
Bill of Rights; race

VIRGINIA

Stephen P. Halbrook, Ph.D., J.D.
4150 Chain Bridge Road
Fairfax, VA 22030
Second and Fourteenth Amendments; standing armies

WISCONSIN

Gaspare J. Saladino, Ph.D.
Department of History
University of Wisconsin
Humanities Building
455 N. Park Street
Madison, WI 53706
Ratification of the Constitution

Corrected entry:

NEW YORK

Paul Finkelman, Ph.D.
Department of History
State University of New York at Binghamton
Binghamton, NY 13901
Constitutional law and history

SUBSCRIPTION INFORMATION

The National Endowment for the Humanities is underwriting the publication of ***this Constitution*** as a quarterly magazine so that it may be distributed free to organizations planning programs for the Constitution's Bicentennial. The officer of the organization who is responsible for planning programs is invited to write us and ask to be placed on the free mailing list; requests should include a short statement about the program being planned. Free subscriptions begin with the next issue after receipt of the letter. Institutions wishing to receive more than one copy may do so by subscribing for additional copies at the rates below.

Individuals and organizations who are not planning Bicentennial programs but who wish to receive the magazine may subscribe as follows:

Individuals	$10.00 per year (4 issues)
Institutions	$16.00 per year (4 issues)

(Individuals and institutions outside the United States and Canada please add $5.00 per subscription.)

Paid subscriptions received by November 1, 1985, will begin with issue no. 6 (Spring, 1985) and end with no. 9 (Winter, 1985).

Single copies (less than 10) of back issues can be purchased for $4.00 each. Each issue of the magazine will also be available for purchase at bulk rate.

Bulk rate (10 or more copies)	$1.75 each

Shipping for bulk orders:

10—25	no charge
26—45	$4.25
46—65	$5.50
66—85	$6.75
86—100	$7.50

(Please write for bulk rate shipping charges for foreign orders.)

In order to subscribe, or to order in quantity, please fill out the form on this page and return it, with your check, to: **Project '87, 1527 New Hampshire Avenue, N.W., Washington, D.C. 20036.** We must request that **all orders be pre-paid.** If you have already received the magazine, please include a photocopy of the mailing label with orders or changes of address.

SUBSCRIPTION FORM

Enclosed please find $________ for ________ subscriptions or copies to be sent to:

Name________________________________ **Title**____________________

Institution____

Address____

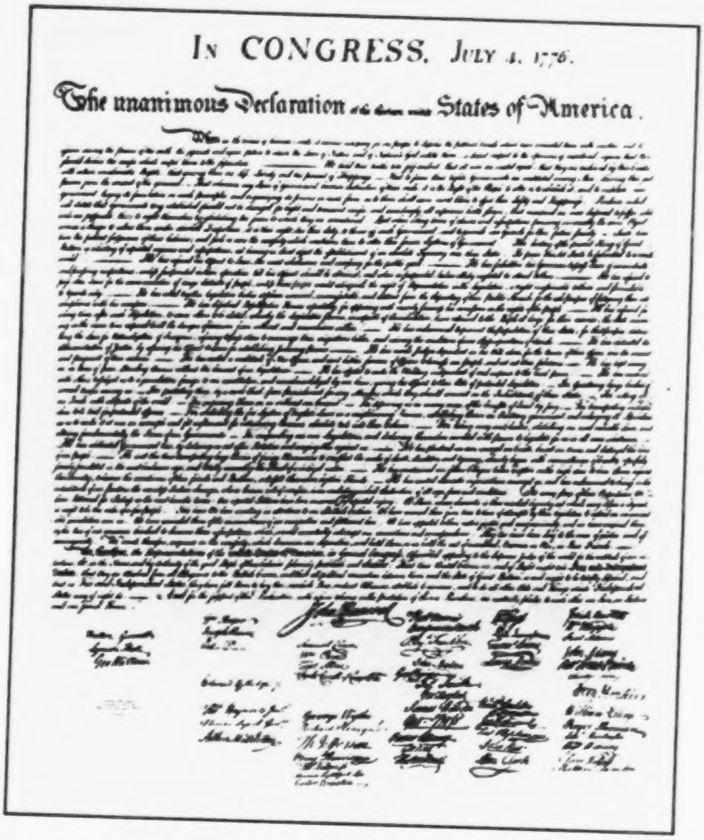
City__________________________________ **State**________ **Zip Code**________

Please check appropriate spaces:

____individual, $10.00 per subscription ($15 foreign)
____institution, $16.00 per subscription ($21 foreign)
____bulk order: issue no.____ number of copies ____ @ $1.75
shipping charge____. Total enclosed____.

The Declaration of Independence: A Constitutional Document

by George Athan Billias



IN CONGRESS. JULY 4, 1776.

The unanimous Declaration [illegible] States of America.

The Declaration of Independence represents the most important public paper ever produced in the United States. Besides being the birth certificate of the nation, it remains the best and most succinct statement of America's constitutional ideals. Within the context of our country's history, the document articulated those constitutional values which had relevance for all mankind. Constitution-makers throughout the world referred to the document in precisely such terms during the past two hundred years. For these reasons, the Declaration deserves to be ranked among the major milestones in the history of Western constitutionalism—if constitutionalism is defined as the ideal of a fundamental law above and outside of the structure of government.

Many historians, political scientists, and legal scholars, however, refuse to consider the Declaration as a constitutional document. It is, they hold, a document designed to persuade, proclaiming rights and different from a constitution creating a government and granting rights. In their eyes it lacks the force of a legal instrument normally associated with a written constitution. Four arguments may be advanced for including the Declaration among America's major constitutional documents.

First, American constitutionalism abroad is identified more with the Declaration than with any other single document. The Declaration, to be sure, had almost no influence overseas immediately after the Revolution, and Europeans scarcely mentioned it. But in subsequent years, its preamble exercised a powerful impact. People throughout the world came to consider it one of the great charters of human freedom. "During the nineteenth century," wrote the historian Carl Becker, "it was accepted by radical and revolutionary parties in every European country, in South America and in the United States as a classic and semi-sacred formulation of the fundamental democratic doctrines that governments 'derive their just Powers from the consent of the governed,' and that 'when any form of Government becomes . . . destructive of the natural rights of man it is the Right of the People to alter or to abolish it.' "

In the twentieth century, the Declaration still speaks forcefully to many peoples with a different heritage and history who seek to uphold human rights. The document has had a greater influence abroad than the Constitution itself. It embodies the spirit of American constitutionalism rather than the letter of the law and consequently has affected more people. When constitution-makers abroad wish to articulate three ideals—that all men are "created equal," that they have an equal right to life, liberty, and the pursuit of happiness, and that government should be based on the consent of the governed—framers turn to the eloquent phrases of the Declaration.

Second, the Declaration qualifies as a constitutional document because of the way it employs the concept of the social contract. To many Americans of 1776, the Declaration represented the precise moment in time when the tie, or social contract, between Great Britain and the thirteen colonial governments was cut. Since the British constitution supposedly had been subverted by the King, the original contract between the monarch and the American people was no longer considered binding. The colonists, according to this theory, were thereby released from their allegiance to George III. The Declaration, in other words, represented a deliberate attempt to put into practice in a literal way the severing of the contract between the ruler and ruled.

The Declaration, more importantly, was used also to provide the constitutional basis for creating new social contracts in the form of state governments. The state constitutions written in 1776 were perceived by American patriots as social contracts allowing legitimate governments to be established on the basis of the constituent power of the people. America's founding fathers, in other words, felt compelled to fall back upon a kind of convenient fiction—the contract theory—to provide an authorization for erecting new state governments.

Third, the principles of the Declaration were incorporated into a number of the first state constitutions. The spirit as well as many actual phrases were written into the preambles of eight of these constitutions. In the case of New York, the connection was more pronounced: the entire Declaration was included in the first constitution of that state.

Finally, the Declaration can be considered a constitutional document because it has been cited as such in decisions of the Supreme Court. In one of the Slaughter-House Cases, Justice Stephen Field in 1884 wrote in glowing terms of the right of butchers in New Orleans to slaughter their cattle as they pleased and their right to pursue any lawful business or avocation they desired. "These inherent rights have never been more happily expressed than in the Declaration of Independence, that evangel of liberty to the people," Field declared. Almost eighty years later, in 1963, Justice Potter Stewart in *Gray* v. *Sanders* cited the Declaration to base the concept of political equality on historical grounds. "The conception of political equality," Justice Stewart argued, "from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person one vote."

The place of the Declaration in world history has far transcended the circumstances of its birth. Its immediate purpose was to provide the patriots with an effective justification for the war against Britain. In 1776 the Declaration was a propaganda document based upon the national needs of the new nation and addressed to a "candid world" to gain its support. But the founding fathers built better than they knew. What was a nationalist manifesto listing grievances against King George III became recognized over time as a constitutional document of global significance. The famous preamble came into its own as a ringing affirmation of human rights. People world-wide insisted increasingly that government be based upon the concept of the consent of the governed and that it guarantee such fundamental rights as life, liberty, and the pursuit of happiness. Unless a government was based on this concept and provided such guarantees, they felt, it had no right to exist. The Declaration became in this way a model by which to measure constitutional government based upon the principles of popular consent and fundamental rights. Thus colonial peoples struggling for independence and seeking to set up governments along republican lines in the twentieth century came to consider the Declaration as one of the world's foundation documents of constitutional government.

Suggested additional reading:

Carl J. Friedrich, *Impact of American Constitutionalism Abroad* (1967).

Richard B. Morris, *Emerging Nations and the American Revolution* (1970).

Robert R. Palmer, *Age of Democratic Revolution* (2 vols., 1959–60).

George Athan Billias is Jacob and Frances Hiatt Professor of History at Clark University. He is working on a book entitled *Heard Round the World: American Constitutionalism Abroad*

Government. The History of the present King of Great-Britain is a History of repeated Injuries and Usurpations, all having in direct Object the Establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid World.

He has refused his Assent to Laws, the most wholesome and necessary for the public Good.

He has forbidden his Governors to pass Laws of immediate and pressing Importance, unless suspended in their Operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other Laws for the Accommodation of large Districts of People, unless those People would relinquish the Right of Representation in the Legislature, a Right inestimable to them, and formidable to Tyrants only.

He has called together Legislative Bodies at Places unusual, uncomfortable, and distant from the Depository of their public Records, for the sole Purpose of fatiguing them into Compliance with his Measures.

He has dissolved Representative Houses repeatedly, for opposing with manly Firmness his Invasions on the Rights of the People.

He has refused for a long Time, after such Dissolutions, to cause others to be elected; whereby the Legislative Powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the Dangers of Invasion from without, and Convulsions within.

He has endeavoured to prevent the Population of these States; for that Purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their Migrations hither, and raising the Conditions of new Appropriations of Lands.

He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers.

He has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries.

He has erected a Multitude of new Offices, and sent hither Swarms of Officers to harrass our People, and eat out their Substance.

He has kept among us, in Times of Peace, Standing Armies, without the consent of our Legislatures.

He has affected to render the Military independent of and superior to the Civil Power.

He has combined with others to subject us to a Jurisdiction foreign to our Constitution, and unacknowledged by our Laws; giving his Assent to their Acts of pretended Legislation:

For quartering large Bodies of Armed Troops among us:

For protecting them, by a mock Trial, from Punishment for any Murders which they should commit on the Inhabitants of these States:

For cutting off our Trade with all Parts of the World:

For imposing Taxes on us without our Consent:

For depriving us, in many Cases, of the Benefits of Trial by Jury:

For transporting us beyond Seas to be tried for pretended Offences:

For abolishing the free System of English Laws in a neighbouring Province, establishing therein an arbitrary Government, and enlarging its Boundaries, so as to render it at once an Example and fit Instrument for introducing the same absolute Rule into these Colonies:

For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments:

For suspending our own Legislatures, and declaring themselves invested with Power to legislate for us in all Cases whatsoever.

He has abdicated Government here, by declaring us out of his Protection and waging War against us.

He has plundered our Seas, ravaged our Coasts, burnt our Towns, and destroyed the Lives of our People.

He is, at this Time, transporting large Armies of foreign Mercenaries to compleat the Works of Death, Desolation, and Tyranny, already begun with circumstances of Cruelty and Perfidy, scarcely paralleled in the most barbarous Ages, and totally unworthy the Head of a civilized Nation.

He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the Executioners of their Friends and Brethren, or to fall themselves by their Hands.

He has excited domestic Insurrections amongst us, and has endeavoured to bring on the Inhabitants of our Frontiers, the merciless Indian Savages, whose known Rule of Warfare, is an undistinguished Destruction, of all Ages, Sexes and Conditions.

In every stage of these Oppressions we have Petitioned for Redress in the most humble Terms: Our repeated Petitions have been answered only by repeated Injury. A Prince, whose Character is thus marked by every act which may define a Tyrant, is unfit to be the Ruler of a free People.

NOR have we been wanting in Attentions to our British Brethren. We have warned them from Time to Time of Attempts by their Legislature to extend an unwarrantable Jurisdiction over us. We have reminded them of the Circumstances of our Emigration and Settlement here. We have appealed to their native Justice and Magnanimity, and we have conjured them by the Ties of our common Kindred to disavow these Usurpations, which, would inevitably interrupt our Connections and Correspondence. They too have been deaf to the Voice of Justice and of Consanguinity. We must, therefore, acquiesce in the Necessity, which denounces our Separation, and hold them, as we hold the rest of Mankind, Enemies in War, in Peace, Friends.

WE, therefore, the Representatives of the UNITED STATES OF AMERICA, in GENERAL CONGRESS, Assembled, appealing to the Supreme Judge of the World for the Rectitude of our Intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly Publish and Declare, That these United Colonies are, and of Right ought to be, FREE AND INDEPENDENT STATES; that they are absolved from all Allegiance to the British Crown, and that all political Connection between them and the State of Great-Britain, is and ought to be totally dissolved; and that as FREE AND INDEPENDENT STATES, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which INDEPENDENT STATES may of right do. And for the support of this Declaration, with a firm Reliance on the Protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor.

Signed by ORDER *and in* BEHALF *of the* CONGRESS,

JOHN HANCOCK, PRESIDENT.

ATTEST.

CHARLES THOMSON, SECRETARY.

PHILADELPHIA: PRINTED BY JOHN DUNLAP.

SIGNERS OF THE DECLARATION OF INDEPENDENCE

ACCORDING TO THE AUTHENTICATED LIST PRINTED BY ORDER OF CONGRESS OF JANUARY 18, 1777 *

John Hancock.

NEW-HAMPSHIRE.	*Josiah Bartlett,* *W^{m}. Whipple,* *Matthew Thornton.* †	DELAWARE.	*Cæsar Rodney,* *Geo. Read,* (*Tho M:Kean.*) ‡
MASSACHUSETTS-BAY.	*Sam^{l}. Adams,* *John Adams,* *Rob^{t}. Treat Paine,* *Elbridge Gerry.*	MARYLAND.	*Samuel Chase,* *W^{m}. Paca,* *Tho^{s}. Stone,* *Charles Carroll, of Carrollton.*
RHODE-ISLAND AND PROVIDENCE, &c.	*Step. Hopkins,* *William Ellery.*	VIRGINIA.	*George Wythe,* *Richard Henry Lee,* *Th^{s}. Jefferson,* *Benj^{a}. Harrison,* *Tho^{s}. Nelson, j^{r}.* *Francis Lightfoot Lee,* *Carter Braxton.*
CONNECTICUT.	*Roger Sherman,* *Sam^{l}. Huntington,* *W^{m}. Williams,* *Oliver Wolcott.*	NORTH-CAROLINA.	*W^{m}. Hooper,* *Joseph Hewes,* *John Penn.*
NEW-YORK.	*W^{m}. Floyd,* *Phil. Livingston,* *Fran^{s}. Lewis,* *Lewis Morris.*	SOUTH-CAROLINA.	*Edward Rutledge,* *Tho^{s}. Heyward, jun^{r}.* *Thomas Lynch, jun^{r}.* *Arthur Middleton.*
NEW-JERSEY.	*Rich^{d}. Stockton,* *Jno. Witherspoon,* *Fra^{s}. Hopkinson,* *John Hart,* *Abra. Clark.*	GEORGIA.	*Button Gwinnett,* *Lyman Hall,* *Geo. Walton.*
PENNSYLVANIA.	*Rob^{t}. Morris,* *Benjamin Rush,* *Benja. Franklin,* *John Morton,* *Geo. Clymer,* *Ja^{s}. Smith,* *Geo. Taylor,* *James Wilson,* *Geo. Ross.*		

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* Braces, spelling, and abbreviation of names conform to original printed list.

† Matthew Thornton's name was signed on the engrossed copy following the Connecticut Members, but was transferred in the printed copy to its proper place with the other New Hampshire Members.

‡ Thomas McKean's name was not included in the list of signers printed by order of Congress on January 18, 1777, as he did not sign the engrossed copy until some time thereafter, probably in 1781.

NOTES REGARDING THE SIGNING OF THE DECLARATION

The only names on the first printed copy of the Declaration of Independence, which is attached to the original manuscript Journals of Congress as a part of the official record of the proceedings on July 4, 1776, are printed thereon as follows:

"Signed by Order and in Behalf of the Congress, John Hancock, President. Attest, Charles Thomson, Secretary."

The manuscript Journal of July 4, 1776, does not contain any other statement in regard to signing the Declaration at that time or the names of the Members present and agreeing to its adoption. Copies of the Declaration sent to the State assemblies and to General Washington for proclamation, by order of Congress, likewise had printed thereon an authentication only by Hancock and Thomson. Their names likewise are signed to the first publication of the Declaration, on July 6, 1776, in the Pennsylvania Evening Post of Philadelphia which did not include any other signatures.

On July 19, 1776, Congress adopted the following resolution:

"*Resolved*, That the Declaration passed on the 4th, be fairly engrossed on parchment with the title and stile of 'The unanimous Declaration of the thirteen united States of America' and that the same, when engrossed, be signed by every member of Congress."

The Journal of August 2, 1776, further records,

"The declaration of independence being engrossed and compared at the table was signed by the members."

The subsequently printed Journals have inserted in the proceedings for July 4, 1776, the text of the Declaration as engrossed on August 2, 1776, and the names of the signers of the parchment copy which is on display in the exhibition hall of the National Archives. The Journals for 1776, printed in 1777 and 1800, list 55 of the 56 signers, the name of Thomas McKean of Delaware not being included, as he had not up to that time signed the engrossed Declaration. McKean voted for the resolution of independence, but was with Washington's Army when the Declaration was engrossed and was not a Member of Congress from December 1776 to January 30, 1778.

As a matter of fact, a number of the Members who later signed the Declaration were not present in Congress when it was adopted on July 4 or when it was engrossed on August 2. Several who were Members on July 4 did not sign the engrossed Declaration. Michael, in his "Story of the Declaration of Independence" published by the State Department, states, "It is quite certain that George Wythe signed about August 27; Richard Henry Lee, Elbridge Gerry, and Oliver Wolcott in September; Thornton in November; and Colonel McKean says he did not sign until 1781."

Thornton was not appointed by New Hampshire until September 12, 1776, and first attended Congress on November 4, 1776. Five other signers of the engrossed Declaration—Benjamin Rush, George Clymer, James Smith, George Taylor, and George Ross of Pennsylvania—were not appointed to Congress until July 20, 1776, when they succeeded three Pennsylvania Members who were in Congress on July 4 but did not support the Declaration.

Robert Morris of Pennsylvania, William Williams of Connecticut, and Samuel Chase of Maryland were absent on July 4, but signed the engrossed Declaration on August 2. Oliver Wolcott of Connecticut, and George Wythe and Richard Henry Lee of Virginia were absent on July 4 and August 2. Elbridge Gerry of Massachusetts was also absent on August 2, and likewise signed on return to Congress.

Charles Carroll of Carrollton was appointed a Delegate by Maryland on July 4, 1776, presented his credentials on July 18, and signed the engrossed copy of the Declaration on August 2. Three Maryland Members who were reappointed on July 4 did not sign.

The New York State convention did not authorize its Delegates to approve the Declaration until July 9, and Congress was so notified on July 15. Four of the New York Members who refrained from voting for lack of authority on July 4 signed the engrossed Declaration on August 2.

The Journal for January 18, 1777, contains the following entry:

"*Ordered*, That an authenticated copy of the Declaration of Independency, with the names of the members of Congress subscribing the same, be sent to each of the United States, and that they be desired to have the same put upon record."

Accordingly, authenticated copies of the Declaration with the names of subscribing members and the order of Congress signed by John Hancock as President and attested by Charles Thomson, as Secretary, were printed in broadside form by Mary Katharine Goddard in Baltimore, where Congress was then in session.

A copy of the Goddard broadside, authenticated in writing by "John Hancock, Presid^{t}," and "Attest Chas. Thomson, Secy., A TRUE COPY", is in the Library of Congress, together with the following letter, written and signed by Hancock on January 31, 1777, transmitting copies of the broadside to the States:

"I am therefore commanded by Congress, to transmit to you the enclosed copy of the act of Independence, with the list of the several members of Congress, subscribed thereto; and to request that you will cause the same to be put upon record, that it may henceforth form a part of the archives of your state and union, a lasting testimony of your approbation of that necessary and important measure."

The print of the Declaration in January 1777 contains the first list of the signers to be published by order of Congress. The list does not include the name of Thomas McKean, as evidently he had not then signed the engrossed copy. The printed list of signers varies from the engrossed copy by placing the name of Matthew Thornton with those of the other New Hampshire signers. Thornton's signature on the engrossed copy follows the Connecticut Members.

The signatures on the original engrossed copy were written in six columns, without State designations but in geographical order from north to south beginning with the right column.

The Goddard broadside groups the names of the signers in four columns, braced with their respective States, reading from right to left as follows: First column, Massachusetts, Rhode Island, and Connecticut; second column, Delaware (without McKean's name), New York, New Jersey, and New Hampshire (including Thornton); third column, Virginia and Pennsylvania; fourth column, Georgia, North Carolina, South Carolina, and Maryland. John Hancock's name is printed in large letters above the center.

To conform to the size of the present publication, the names of the signers have been placed in two columns with a reproduction of the braces used for State designations in the Goddard print of 1777. The geographical order of States from north to south, as regularly observed in the proceedings and roll calls of the Continental Congress, has been followed.

...do ordain and establish

this Constitution

for the United States of America.

A Bicentennial Chronicle Summer 1985, No. 7

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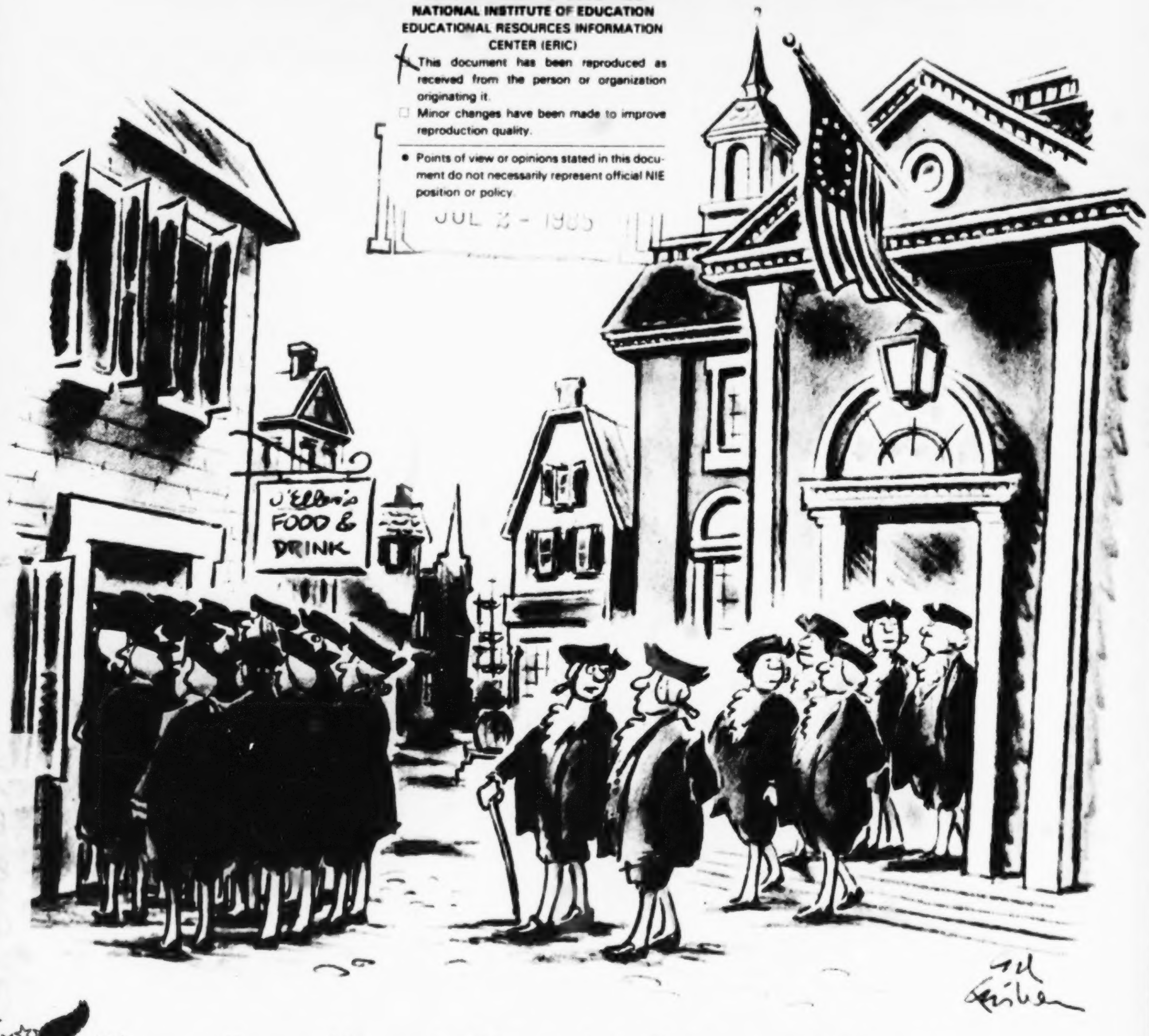

"I can tell you this much. If we admit Vermont and Kentucky, we'll have to find a bigger place to go for lunch."

Project '87

The Articles of Confederation

To all to whom these presents shall come, we the undersigned delegates of the states affixed to our names send greeting. WHEREAS the delegates of the United States of America in Congress assembled did on the fifteenth day of November in the year of our Lord One Thousand Seven Hundred and Seventy-seven, and in the second year of the independence of America, agree to certain articles of confederation and perpetual union between the states of New-hampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia in the words following, viz.

"Articles of confederation and perpetual union between the states of New-hampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.

ARTICLE 1

The stile of this confederacy shall be "The United States of America."

ARTICLE 2

Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.

ARTICLE 3

The said states hereby severally enter into a firm league of friendship with each other for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.

ARTICLE 4

The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states—paupers, vagabonds, and fugitives from justice excepted—shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any state, to any other state of which the owner is an inhabitant; provided also that no imposition, duties, or restriction shall be laid by any state on the property of the United States, or either of them.

If any person guilty of, or charged with treason, felony, or other high misdemeanor in any state shall flee from justice, and be found in any of the United States, he shall upon demand of the governor or executive power of the state from which he fled be delivered up and removed to the state having jurisdiction of his offense.

Full faith and credit shall be given in each of these states to the records, acts, and judicial proceedings of the courts and magistrates of every other state.

ARTICLE 5

For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each state shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each state to recall its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year.

No state shall be represented in Congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person being a delegate, be capable of holding any office under the United States for which he, or another for his benefit, receives any salary, fees, or emolument of any kind.

Each state shall maintain its own delegates in a meeting of the states, and while they act as members of the committee of the states.

In determining questions in the United States in Congress assembled, each state shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress, and the members of Congress shall be protected in their persons from arrests and imprisonments during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace.

continued on page 50

...do ordain and establish
# this Constitution
for the United States of America.

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Cover: *Drawing by Ed Fisher. © 1984 The New Yorker Magazine, Inc.*

this Constitution **is published with the assistance of a grant from the National Endowment for the Humanities as part of its special initiative on the Bicentennial of the United States Constitution. Editorial offices are located at 1527 New Hampshire Avenue, N.W., Washington, D.C. 20036. All material in this publication may be photocopied if attributed as follows: "Reprinted from *this Constitution: A Bicentennial Chronicle*, Summer 1985, published by Project '87 of the American Historical Association and the American Political Science Association." Project '87 would appreciate notification from those who photocopy material in this issue for use in presentations to other groups. Articles appearing in this magazine are annotated and indexed in *Historical Abstracts* and *America: History and Life*. © Copyright 1985 by the American Historical Association and the American Political Science Association**

this Constitution

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From the Editor:

In this issue, ***this Constitution*** continues to focus on the topic of federalism, the uniquely American relationship between the states and the national government. In the spring issue, Jack P. Greene examined the model for federalism found in the British empire; now, Peter S. Onuf shows us how the creation of a strong union fortified state sovereignty, a motive for the states to give up some power in order to gain security.

Thomas P. Slaughter addresses the question of how much power the central government thus formed should have, particularly in the realm of taxation. The passage of the Whiskey Excise—an internal tax—brought first passive then violent resistance to the central authority. The outcome of the dispute revealed that the national government could indeed enforce its laws, a source of relief for some if not for others. The Whiskey Rebellion is also the subject of the lesson that appears in the section "For the Classroom." In the Documents section, Jacob E. Cooke offers an insight into the thinking of one of the chief advocates of a strong central government; Alexander Hamilton warned: "As too much power leads to despotism, too little leads to anarchy, and both eventually to the ruin of the people."

"Too little power" was the problem with the Articles of Confederation, America's first constitution. Although its weaknesses made it inadequate as a permanent basis of national government, it formalized the union between the newly-independent colonies and made the state governments aware that their interests lay in forming "a more perfect union," with the power to perform its functions effectively. The Articles begin on the inside front cover; a brief historical background note appears in the "Bicentennial Gazette."

Robert McClory, who has served in the U.S. House of Representatives, and Randi S. Field view the workings of the government with an analytical eye in the "Public Forum" section as they look at both the historical roots of the impeachment process and its adaptation by the American system.

The feature article in the "Bicentennial Gazette" is the second in a series of portraits of the state delegations to the Constitutional Convention, this one devoted to the commonwealth of Virginia. Of course, the "Gazette" continues to report on ongoing Bicentennial programs.

We are also publishing our first "Letter to the Editor"; it makes an important point. We solicit your observations on all of the material which appears in ***this Constitution.***

Thirteen Enduring Constitutional Issues

- National Power—limits and potential
- **Federalism—the balance between nation and state**
- The Judiciary—interpreter of the Constitution or shaper of public policy
- Civil Liberties—the balance between government and the individual
- Criminal Penalties—rights of the accused and protection of the community
- Equality—its definition as a Constitutional value
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- The Rights of Ethnic and Racial Groups Under the Constitution
- Presidential Power in Wartime and in Foreign Affairs
- The Separation of Powers and the Capacity to Govern
- Avenues of Representation
- Property Rights and Economic Policy
- Constitutional Change and Flexibility

Letters

The Constitution and Race

To the Editor:

Your issue No. 5 of Winter 1984 provided me much intellectual profit and enjoyment. I am moved to write, however, not so much by the desire to express deserved praise for the fine articles you have published as by the need to correct an error, small in appearance but large in importance, in your "Chronology of Bicentennial Dates." I refer to the parenthesis within the entry for July 12, 1787, on page 51, which reads:

> THE CONNECTICUT COMPROMISE (I). Based upon a proposal made by Roger Sherman of Connecticut, the Constitutional Convention agrees that representation in the lower house should be proportional to a state's population (the total of white residents, and three-fifths of the black).

In so brief a calendar, no sensible person could fault your desire to condense the cumbersome constitutional language, "the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed" plus "three fifths of all other Persons." But an accurate condensation might be "the total of free persons plus three-fifths of the slaves"; the words "*white* residents and three-fifths of the *blacks*" are profoundly misleading.

Those misleading words imply that the Constitution gave recognition to differences between the races and allotted full citizenship only to whites. Such a line of thought was later developed by Chief Justice Roger B. Taney's opinion in the Dred Scott decision. Reflecting on the evident conflict between the founders' assertion in the Declaration of Independence that all men are created equal and their acceptance of slavery's existence in the Constitution, Taney argued that they held blacks not to be included among all men and never contemplated their sharing in full citizenship. All this, however, is false. No language to that effect is to be found in the Constitution, and the historical fact that free blacks did enjoy rights of citizenship at the time of the Constitution's ratification refutes any such interpretation. The Constitution, which sought to form a more perfect Union, itself fell short of perfection; and its deepest imperfection surely lay in its compromise with the evil of slavery, a compromise justified, the founders thought, only by ineluctable necessity. It is useful and at the same time pleasant to remind ourselves, however, that while forced to compromise with the intractable problem of slavery, the Constitution itself (as distinguished from misrepresentations of it like Taney's) conceded nothing to racism.

Sincerely,

James H. Nichols, Jr.
Associate Professor of Political Science Claremont McKenna College (on leave for government service; the views stated here are my own)

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Virginia, Vermont, and the Origins of the Federal Republic

by PETER S. ONUF

A "more perfect" union under the federal Constitution promised to secure and strengthen the individual states. In the years prior to its adoption—when the Articles of Confederation functioned as the nation's first constitution—many states discovered that they were vulnerable to challenges from other states or from their own discontented citizens. Unable or unwilling to resort to force to uphold their claims, they turned to Congress for help. Large states wanted their boundaries secured; small states hoped to reduce disparities in state size by forcing their large neighbors to give up their western claims; frontier separatists agitated for the creation of new states. In all of these cases, the promotion of state interests and the guarantee of state sovereignty—and, for separatists, statehood itself—depended on congressional action. A strong, effective national government thus was essential for the security of sovereign states. A weak national government jeopardized their survival. In the debates over ratification of the new constitution, Federalists successfully exploited this logic, portraying themselves as the true proponents of states' rights.

The conventional understanding of our early constitutional history emphasizes the struggle between nation and states for sovereign powers. Such an account makes a good deal of sense, particularly when we consider the states in isolation from each other and in areas where the relative limits of state and federal authority were poorly defined. But in a union of states racked by interstate conflict and threatened by increasingly pervasive popular contempt for state governments, the classic fear of central power that had led patriotic Americans to resist British tyranny was balanced by a growing appreciation of the possible advantages of a strong national government. During the so-called "critical period," proponents of national constitutional reform could argue persuasively that the dramatic expansion of national power was the best—perhaps the only—means of preserving the governments of the individual states.

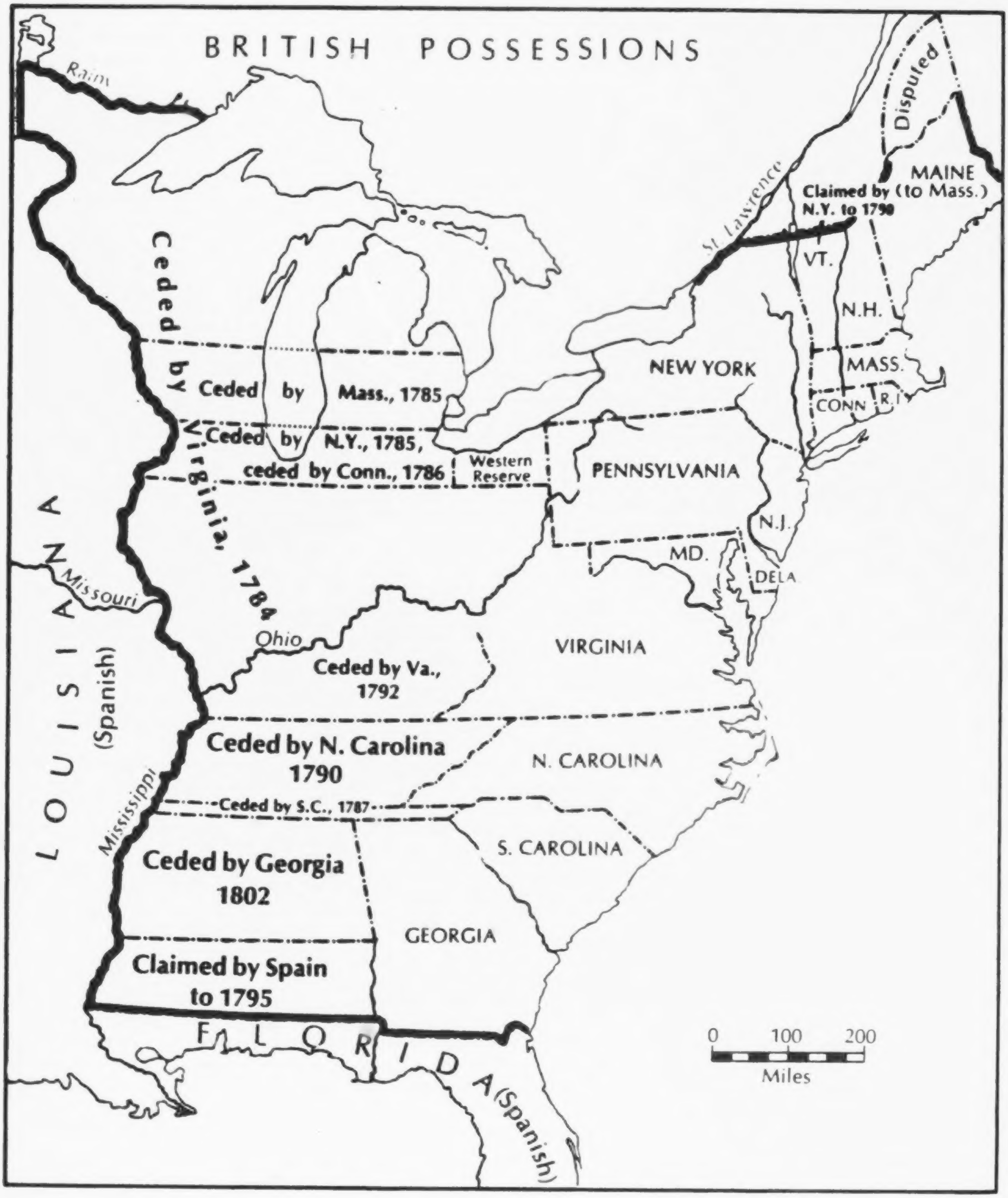
How could Americans have believed state sovereignty compatible with a stronger national government? To answer this question we need to look more closely at contemporary concepts of statehood. The founding fathers were reluctant to confront the issue directly: as long as they could, they avoided classic connundrums such as whether the states or the union came first. (Priority would have suggested preeminence.) The Patriots were having problems enough prosecuting the common cause against the British without raising troublesome theoretical issues that still defy resolution two centuries later. But if Americans did not articulate their concepts of statehood—or of union—the break with Britain did suggest certain implicit assumptions about what made a state a state. These assumptions became clearer when the American states asserted their statehood claims *against* each other. Jurisdictional controversies thus offer significant clues about the most important but most elusive questions in the history of early American constitutional thought: What was the meaning of state "sovereignty"? What sort of union did these sovereign states create?

The related struggles over whether or not to accept the cession of Virginia's western land claims and over the admission of the renegade republic of Vermont into the union will show how answers to these questions gradually emerged. Resolution of conflicts like these made possible the institution of a more powerful and effective central government.

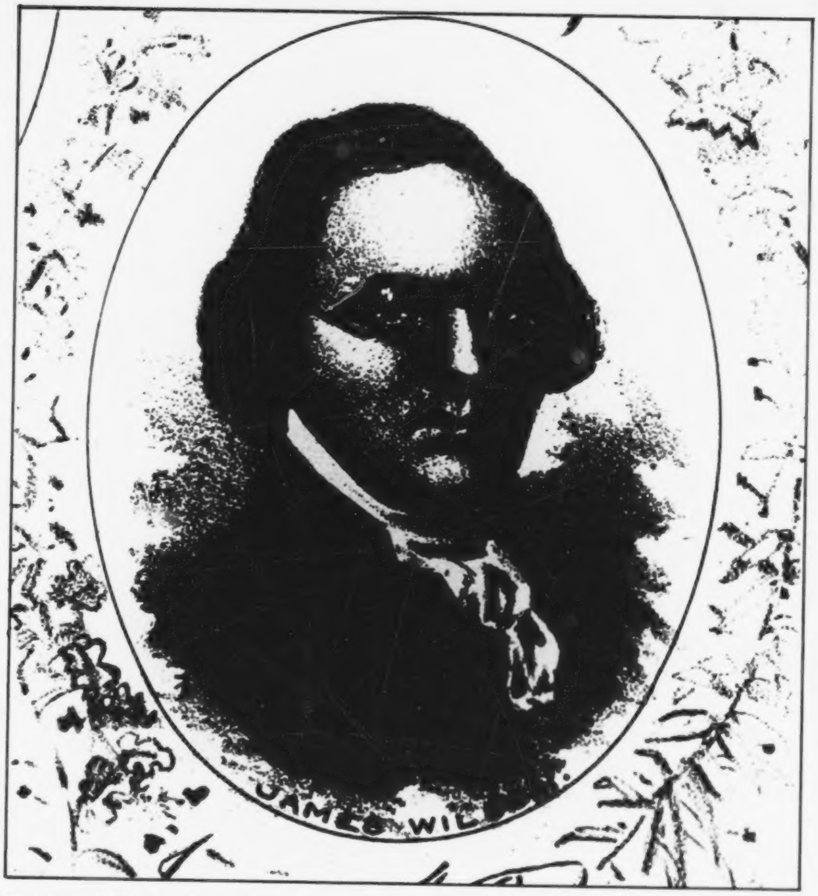
Virginia's Cession

Seven of the original thirteen states claimed the largely unsettled territory west of the Appalachians to the Mississippi River. Massachusetts, Connecticut, Virginia, North Carolina, South Carolina, and Georgia all based their western claims on royal charters; New York invoked jurisdiction over the Iroquois to support its pretensions. The six states without western claims—the "landless" states—feared that their large, "landed" neighbors would wield dominant power in the union because of their superior resources and capacity for future development. For their part, the landed states found their far-flung domains difficult to govern. Cession of state claims in the West to the national government offered an obvious solution to both these problems.

The Confederation Congress issued a call for cessions in late 1780. Eager to come to terms with Congress, the Virginia Assembly passed an act in January 1781 ceding its charter claims to the vast region across the Ohio. But for three years—until March 1784—Congress refused to accept Virginia's offer. The cession was rejected because it came with strings attached: Virginia insisted that Congress agree to a series of conditions securing the state's interests, including guarantees to holders of Virginia land titles and to military bounty claimants in the ceded territory. The stickiest issue was a cession condition banning out-of-state land company claims based on agreements with Indian nations that had not been authorized by Virginia. Congressmen were also reluctant


BRITISH POSSESSIONS
Rainy
Disputed
MAINE
Claimed by (to Mass.)
N.Y. to 1790
St. Lawrence
VT.
N.H.
MASS.
CONN
R.I.
NEW YORK
Ceded by Virginia, 1784
Ceded by Mass., 1785
Ceded by N.Y., 1785,
ceded by Conn., 1786
Western Reserve
PENNSYLVANIA
N.J.
MD.
DELA
Missouri
Ohio
VIRGINIA
Ceded by Va.,
1792
LOUISIANA
(Spanish)
Ceded by N. Carolina
1790
N. CAROLINA
Ceded by S.C., 1787
Mississippi
Ceded by Georgia
1802
S. CAROLINA
GEORGIA
Claimed by Spain
to 1795
FLORIDA
(Spanish)
0
100
200
Miles

From A Concise History of the American Republic: An Abbreviated and Newly Revised Edition of the Growth of the American Republic *by Samuel Eliot Morison, Henry Steele Commager and William E. Leuchtenburg. © 1977 by Oxford University Press, Inc. Reprinted by permission.*



James Wilson. *Library of Congress.*

to recognize Virginia's title in the Kentucky District, the extensive unceded region south of the Ohio. But representatives of the small, landless states—many of whom, as members of the land companies, stood to lose their investments—were finally forced to capitulate in this key test of Virginia's sovereign will. In exchange for Virginia's title, the United States agreed to implement the state's western policy goals as they were embodied in cession conditions. The most important of these conditions for the future of the federal republic was the promise that new and equal states eventually would be created out of this wilderness empire.

Completion of the long-delayed Virginia cession on March 1, 1784, was an epochal event. The immediate effect was to remove the chief obstacle in resolving the broader struggle between large "landed" states and their more circumscribed "landless" neighbors. The western lands controversy had complicated the drafting of the Articles of Confederation, delayed their ratification until 1781 and—all too often—had dominated and distorted interstate relations. Now all the states shared a common interest in the national domain: the United States finally had property of its own to survey and sell. This new source of revenue promised to rescue the Confederation from financial disaster. Congress could also begin drafting plans for an enlightened "colonial" policy in the Old Northwest—culminating in the famous Ordinance of 1787—that would secure future states an equal place in the Union.

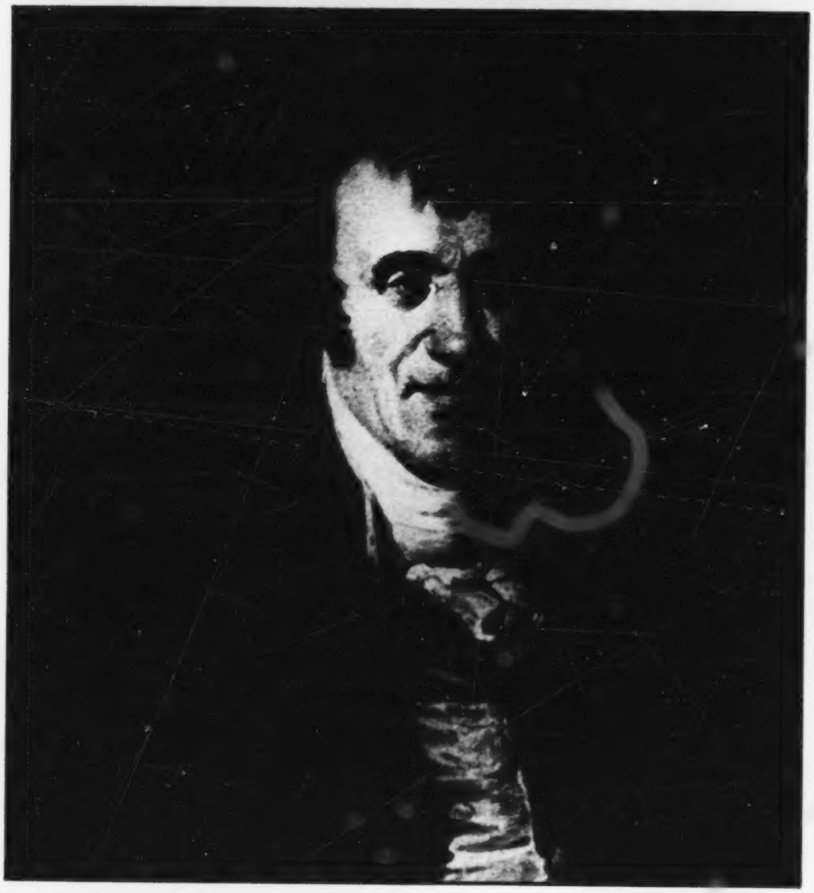
The Virginia cession also benefitted Virginia. Understanding what Virginians gained by giving away their northwestern claims helps explain how the founding fathers were able to accomplish their "miracle" at Philadelphia. First, the state was left with more manageable boundaries. All the large states had found their frontier areas hard to govern; New York's loss of its northeastern counties to the Vermont separatists is the most striking instance. Virginians were convinced that it "would not be productive of either their or our happiness" for easterners to hold on to the western settlements—even if they could. The weakness of the state's authority in the West encouraged jurisdictional challenges from other states, Congress, and land companies as well as by domestic dissidents. In a very concrete way, the cession helped to define what Virginians meant by "Virginia." Virginia's territorial claims were thus brought into closer harmony with the precept of contemporary political theory that republican government could not survive in large states. Virginians had looked forward to the creation of new states in the West since the break with Britain, but they had been thwarted by the unwillingness of the other states to accept their terms. Completion of the cession and the state's successful sponsorship of "independence" for Kentucky meant stable, permanent boundaries *recognized* by Virginia's old jurisdictional rivals. Securing territorial integrity was critical to consolidating state sovereignty.

Virginia's leaders, including "nationalists" like James Madison, rallied behind the state's title claims and cession policy. It made good sense to give away lands that they would be hard-pressed to hold. The potential costs of bringing effective local government to the far-flung Illinois settlements were staggering. Skeptical congressmen like Stephen Higginson of Massachusetts suggested that "Virginia and New York mean only to give [Congress]... what is of no value... in order to secure to themselves a valuable territory which they now have no good claim to." The brilliant Pennsylvanian James Wilson well knew how much his longtime "landed" state adversaries stood to benefit by ceding their western claims. "If the investigation of right was to be considered," quipped Wilson, "the U[nited] S[tates] ought rather to make cessions to individual States than receive Cessions from them."

The immediate effect of the cessions was that Virginia and the other ceding states were left with much more tenable claims. Their remaining territories were now less dangerously unwieldy. Further, by accepting the cessions, Congress recognized the validity of state titles. Wilson and "landless" state colleagues who argued for a national title in the West—based on succession to the Crown's claims or on the national war effort—saw clearly that reception of the state cessions was a victory for proponents of state sovereignty. What they did not see was that it was also an important step toward the reinvigoration of the union.

In retrospect, the advantages of the cessions to the United States as well as to the individual ceding states are so apparent that it is hard to understand why there should have been so much difficulty completing them. The challenge is to recapture contemporary perspectives. Beyond the obvious clash of interests, both private and public, over who would get to develop the West, two related concerns worked against easy resolution of the cessions question.

The first was widespread concern about the durability of the union. Frustrated by congressional unwillingness to accept Virginia's cession conditions, Madison counselled his fellow Virginians to proceed under the assumption "that the Union will but little survive the present war." Congress's weakness or "imbecility" raised the spectre of disunion; it also seemed to invite factious combinations and foreign intrigue. What would Congress do with its national domain? Virginians asked. Edmund Randolph hinted darkly at "the possibility of this fund being diverted to offensive measures" against Virginia. Such suspicions were amply reciprocated by the state's opponents who saw themselves being called upon to guarantee Virginia's preeminence—and their own subordination—by accepting the conditional cession. All these anxieties shared a common premise: that there was no authentic *national* interest, only state and sectional interests masquerading as such. The survival of the union was doubtful; worse yet, if it did survive, it might become the instrument of state power.

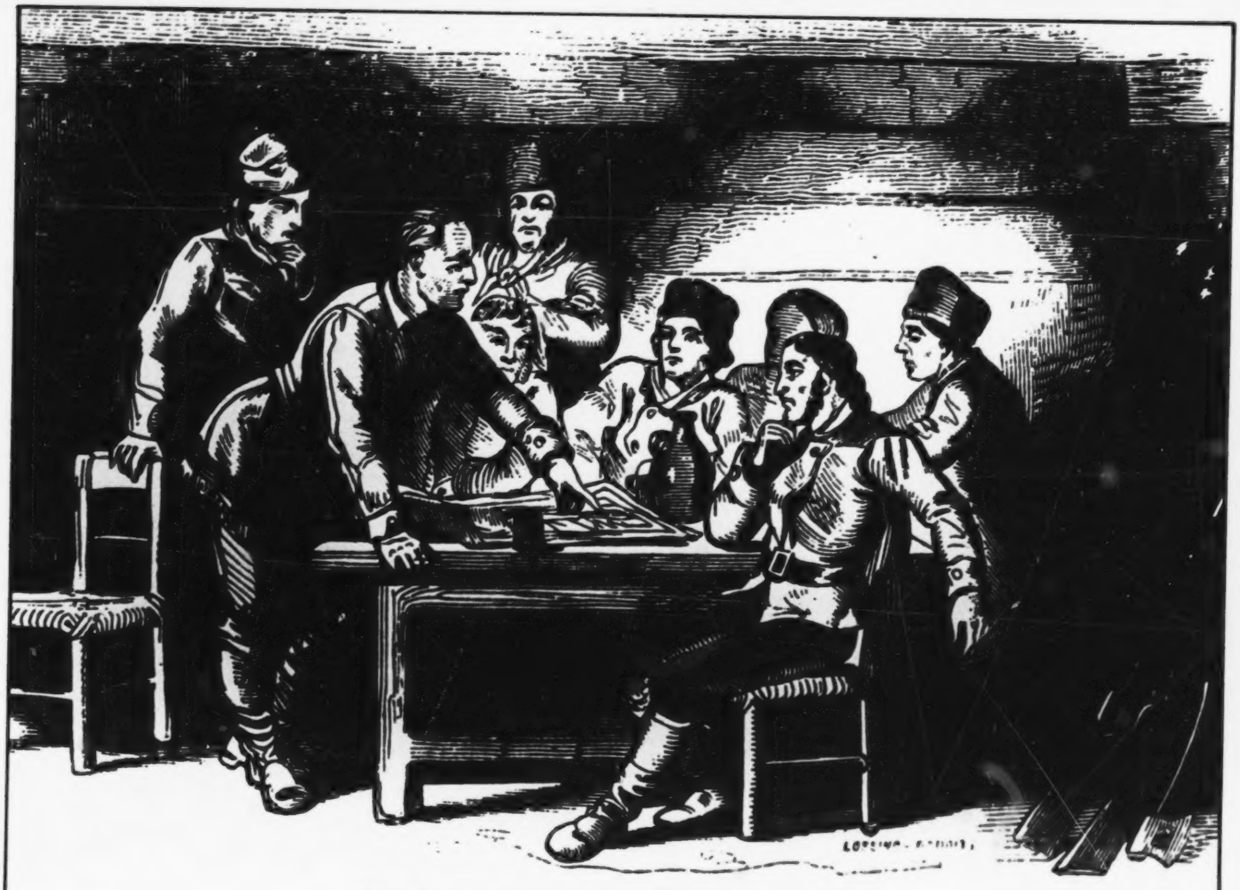


Ethan Allen. ***Library of Congress.***

The weakness of the union was the best argument for a stronger union. But ironically that same weakness inspired the pervasive suspicions that impeded national constitutional reform. Thus it was necessary to establish that there could be a true national interest distinct from, and not necessarily opposed to, state interests. Only then would it be possible to escape the conclusion that one state's gain was the other's loss. The debates over the future of the West encouraged this pessimistic logic. Resolution of the western lands controversy broke the impasse, however, creating a national interest in developing the West and, more importantly, making it possible for Americans to conceive of an expanding union including new western states that would outgrow the old state rivalries.

The Vermont Question

Though the western lands controversy dragged on for years, the cessions idea at least provided a basis for negotiation and ultimate compromise. But the Vermont question defied solution altogether. Vermonters—who set up their own state government in an area generally acknowledged to be part of New York State—had to wait until the new federal government was in operation before finally being admitted to the union in 1791. The significance of the Vermont issue



THE GREEN MOUNTAIN BOYS IN COUNCIL.

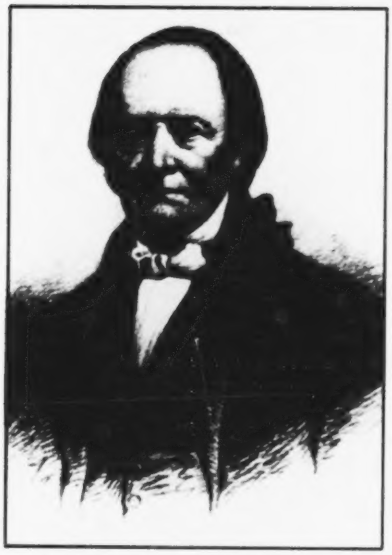
The Green Mountain Boys in Council. Harper's Weekly, *1858. Library of Congress.*

for the history of early American constitutional ideas is a result of this impasse. The Continental Congress's failure either to put down the insurgency or to recognize the new state provoked the most sustained and illuminating debate about the meaning of statehood and union in the Revolutionary era.

Vermont came into being in July 1777 when representatives of villages scattered throughout New York's northeastern counties—in the region then known as the New Hampshire Grants—met at Windsor on the Connecticut River to draft a state constitution. Vermont's move for "independence" from New York culminated years of agitation by the Green Mountain Boys on behalf of settlers holding titles from the colony of New Hampshire against New York claimants and New York courts. Ethan Allen and other new state propagandists successfully adapted patriotic rhetoric against British tyranny—with their talk of aristocratic New York City speculators "enslaving" the virtuous freeholders of Vermont—to promote their cause and their interests.

Notwithstanding a barrage of ingenious (and often ingenuous) arguments—including the claim that Vermont had received a colonial charter before the Revolution—the jurisdictional status of the area was all too clear. If any boundary in British colonial America was fixed it was the line between New York and New Hampshire, set at the Connecticut River by the British Privy Council in 1764. In other jurisdictional controversies Congress could invoke a plausible conflict of rights to justify its dilatory and ineffectual behavior. But in response to the Vermont challenge, Congress did nothing, thus betraying its own repeated resolutions in support of New York's title and—for New Yorkers at least—calling into question the point of the Revolution itself. Why should they attempt "to expel a foreign Tyranny," asked the New York assembly, "while we remain Subject to the domestic Usurpation?" Congress was supposed to preserve the states from each other as well as from the common enemy. After all, as Congress acknowledged in 1779, one of the "great objects" of union was "mutual protection and security." This was more than pious platitude. Virtually every large state—including Massachusetts, Pennsylvania, Virginia, and North Carolina—had to confront a separatist challenge at one time or another. Recognition of Vermont would be a dangerous precedent. "Our several states will crumble to atoms," warned Jefferson, unless Congress firmly rebuffed separatist pleas.

If the United States was firmly committed to upholding the territorial integrity of its member states, why did Congress not move swiftly to quash the separatists in places like Vermont? The most obvious "political" explanation is that it would have been dangerous to alienate the Vermonters and drive



Thomas Chittenden. *Courtesy Vermont Historical Society.*

them into alliance with the British. Rumors of negotiations between Vermont leaders and representatives of General Frederick Haldimand, the British commander in Canada, reached Congress in the summer of 1781, prompting an offer to admit the state. New Yorkers bewailed the sacrifice of "right" to "expediency." But "expediency" cut both ways: the statehood offer was revoked once the American victory at Yorktown definitively changed the strategic situation. Yet Congress refused to invade Vermont, despite the entreaties of New York Governor George Clinton. Americans were loath to spill each other's blood. Moreover, the basis of Vermont's pretensions to independent statehood, the right of a people to govern themselves, could not be dismissed without challenging the fundamental premise of the American Revolution itself. Unlike other new state movements, Vermont would not collapse without Congressional approval. Self-government was not simply a claim in Vermont; it was a reality.

When in 1791 Vermonters ultimately succeeded in vindicating their independence, they did so despite long-standing misgivings about the legitimacy of their new government. Compared to the claims of other states, Vermont's were notably defective. Unlike the Virginians, Vermonters could not invoke a colonial charter as the basis of their claims. The original thirteen members of the union all had been British colonies. As states they succeeded to the jurisdictional claims of the old colonies: this was a crucial component of early American statehood claims. Nor was Vermont a member of the union. Membership in the union meant—or was supposed to mean—recognition by the other states. Thomas Chittenden, Vermont's first governor, acknowledged that Vermonters believed "that a public Acknowledgment of the Powers of the Earth is essential to the Existence of a distinct separate *State*." Thus, even as the separatist leaders defied Congress, their goal was to consolidate the state's jurisdiction, which meant recognition by Congress. But as long as New York remained obdurate, Congress could not sanction the separation. Vermont's gain would be New York's loss.

Resolution of the Vermont problem depended on a change of heart by New York. From the beginning of the controversy, some foresighted New Yorkers saw the hopelessness of insisting upon the state's title. John Jay stated the case plainly to Governor Clinton in 1779: "We have unquestionably more Territory than we can govern." New York might have the best title, but it lacked the will and the means to enforce it. Forget the Privy Council decision and the territorial guarantee in the Articles of Confederation, Gouverneur Morris wrote—"How ridiculous for wise men to rear any edifice upon so slender a foundation." Just as Virginia was better off giving up its trans-Ohio claims, so New York would benefit by letting the unruly Vermonters go their own way. The clinching argument for Vermont independence was that New York and the other "eastern" states would gain another vote in Congress where all states were equally represented. A growing perception of distinct sectional interests led to a new receptivity to new state proposals throughout the country in the 1780s.

Strong States, Strong Union

The history of these jurisdictional controversies shows the limitations of the different claims to statehood in early America. New York had a good title to the New Hampshire Grants: all of the original states relied on such titles in proclaiming their independence from Britain and from each other. The fatal defect of New York's claim, however, was the unwillingness of its putative citizens to take it seriously. The new state of Vermont won the contest for popular loyalties—or at least popular acquiesence. The Vermonters took the Revolutionary idea of self-government to its logical outcome. If the American people could draft new state constitutions in the old states then they could constitute new states. But brave talk notwithstanding, it did not follow that Vermont could stand on its own indefinitely; indeed, the story of independent Vermont revolves around the pursuit of recognition and legitimation by a higher authority. If Congress would not play this role, then the Vermonters would have to turn to Great Britain. By contrast, Virginia was one of the original, recognized members of the union and its jurisdictional claims were securely grounded in a colonial charter. Further, Virginia could make a credible threat to pursue its own western policy in defiance of Congress if Congress would not accept its terms. Nonetheless, Virginia—like New York and Vermont—turned to Congress to vindicate its territorial claims.

Congress eventually emerged as not only the arbiter of conflicting

States could be more secure if their jurisdiction were recognized by the other states and if Congress would intervene effectively against foreign or domestic challenges. From this perspective, a stronger central government meant stronger states.

statehood claims among the old states but as the creator of valid statehood claims in the new states of the Northwest. It would be a mistake to conclude, however, that Congress' growing role in defining statehood meant that the states were sacrificing their sovereignty. Indeed, the resolution of jurisdictional controversies made the states stronger and more effective. While states competed for territory, or separatists defied state governments, the ability of the states to govern—to hold courts, maintain order, call out the militia, or sell land—was seriously compromised. Controversial boundaries were a source of weakness; in the Vermont region where jurisdiction was in a constant state of flux, complete "anarchy"—the collapse of any legitimate authority—seemed imminent. Everyone recognized the importance of jurisdictional stability. A Pennsylvania newspaper writer thus celebrated the completion of the survey of his state's western boundary: "it is a Measure of great wisdom in the State, as it fixed their boundary and jurisdiction determinately and transmits it without equivocation to posterity."

States could be more secure if their jurisdiction were recognized by the other states and if Congress would intervene effectively against foreign or domestic challenges. From this perspective, a stronger central government meant stronger states. But how were the American states able to overcome the traditional fear—exploited by Antifederalist opponents of the new federal Constitution—that national power would be turned against the states? One simple answer is that with less at risk, with no major jurisdictional issues left unresolved, there was less to fear. By the same token, diminishing tension between large and small states, accelerated by resolution of the western lands controversy, removed one of the leading sources of interstate suspicion and hostility. But perhaps most important, the sorting out and circumscribing of state boundaries made it possible for states to consolidate their authority and to govern themselves more effectively.

By 1787 western land cessions had been received from New York, Virginia, Massachusetts, and Connecticut. Congress was busily organizing land sales in the national domain and establishing a temporary government for the new northwestern states. New York had given up pressing its claims in its former northeastern counties, and Vermont—and the District of Kentucky—impatiently waited for the day when Congress would find itself competent to admit new members. They would have to wait for the demise of the old Congress and the institution of the new federal Congress operating under a clear constitutional mandate to admit new states before this would happen. But the United States was well on the way out of its "Critical Period" when the "imbecility" of the state as well as national governments seemed to point to the collapse of legitimate order.

The states would be stronger; the union would be stronger as well. This was the vision the Federalists offered to voters in the ratifying conventions. They argued that the new Constitution "supports and adds a dignity to every government in the United States." Many Americans were skeptical—but not for long. Americans of all political persuasions soon joined in celebrating the supreme wisdom of the Constitution. To an extent that is now difficult to grasp, Americans of the antebellum years believed that the key to the Constitution was not that it guaranteed federal supremacy—it wasn't clear that it did. Instead, they saw states and union together rising in glory. Vermont jurist Nathaniel Chipman, one of the architects of his state's admission to the union, described this sudden transformation:

> Solely an impression of the efficiency of the federal government, favored perhaps, by its national magnitude and importance, added, at the instant of organization, a degree of energy to the state governments, and put an end to those factions and turbulent commotions, which made some of them tremble for their political existence.

In 1823, the editor of the influential *National Intelligencer* of Washington, D.C., endorsed Chipman's sanguine view: "So far from any injury having accrued to the State Governments from the general government, they have gone on in steady progress, strengthened rather than shorn of their strength." It was this expansive view of the union, spreading across the continent and growing in wealth and power, that enabled the founding generation of Americans to reconcile the apparently contradictory logic in their thinking about state and national sovereignty.

Suggested additional reading:

Peter S. Onuf, *The Origins of the Federal Republic: Jurisdictional Controversies in the United States, 1775–1787* (1983).

Thomas P. Abernethy, *Western Lands and the American Revolution* (1937).

Jack N. Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* (1979).

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Liberty and Taxes: The Early National Contest

by THOMAS P. SLAUGHTER

When eighteenth-century Americans discussed politics, they revealed their British heritage, their Enlightenment sensibilities, their distinctive brand of "Whig" ideology, and their capitalist experiences and values. They conceived of governance as something of a balancing act among the few and the many, the rich and the poor, the powerful and the weak. They imagined a delicate scale with liberty on one side and order on the other. Too much weight on either side, they believed, could bring disarray to the political world—anarchy if the masses ran amok, tyranny if the rulers became corrupted by power.

The Power to Levy Taxes

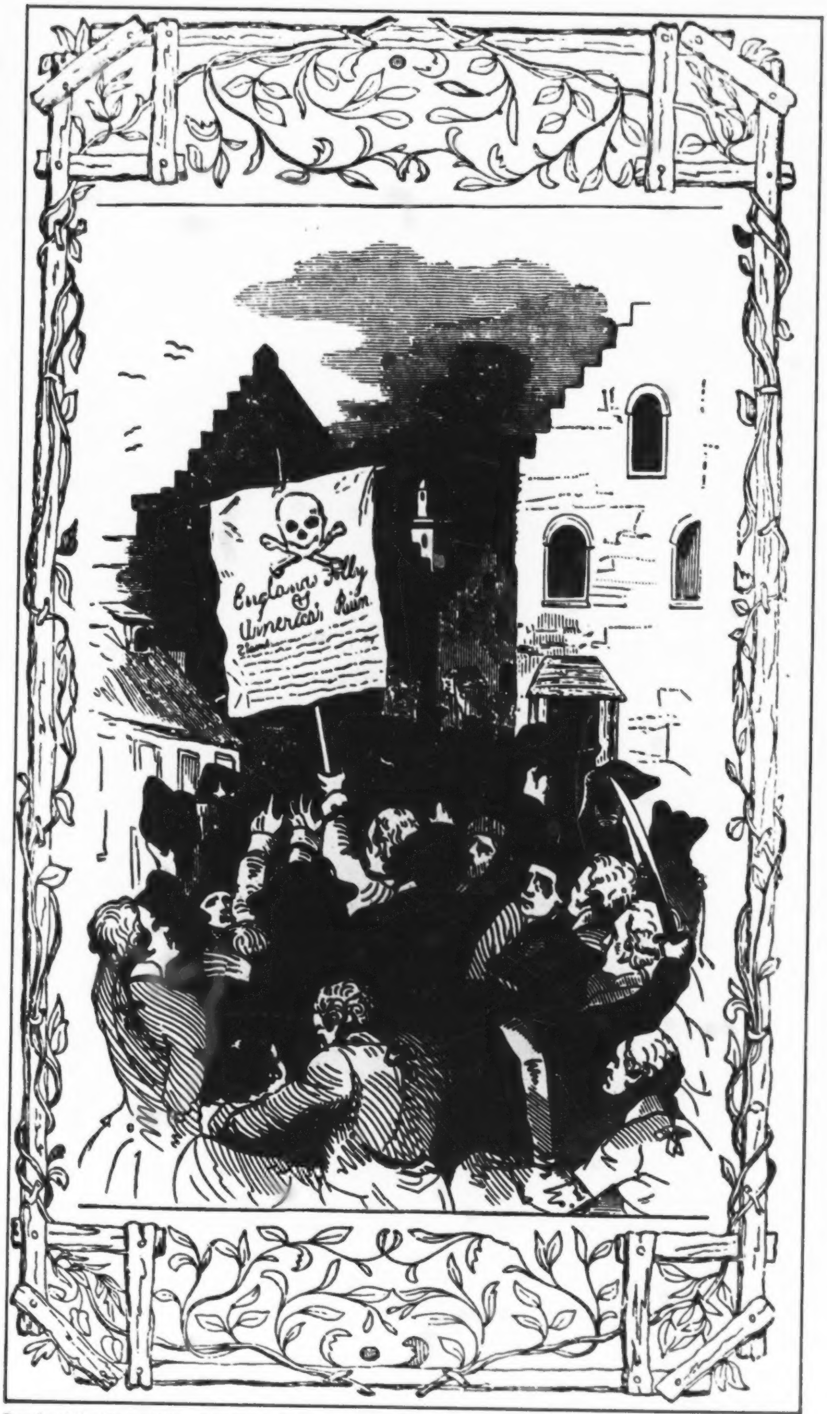
Politically-aware Americans envisioned the various levels of government—town, county, colony or state, and empire or nation—as points on spectrums of representation and authority. The more local political institutions were close to the people, more representative of their interests, and thus more responsive to their needs. Here, at the local level, some believed, was the place for those decisions that most directly affected the lives of common people—the repair of roads, the building of town halls, sanitation, and "internal" taxes (taxes on domestic products, land, and trade). More remote central authority had the virtue of seeing the big picture and thus seemed best qualified to make decisions affecting all in common—national defense, regulation of international commerce, patents, and "external" taxes (taxes or duties on imported goods). All of these governmental responsibilities required the sort of coordination and continuity best achieved by one national decision-making body like the British Empire's parliament or an American congress.

Taxes were, as always, a particularly sensitive matter. Indeed, it was the imposition of an internal stamp tax on the colonies by Parliament in 1765 that first raised the issues of the relationship between taxation and representation, local versus central governance, and liberty and order in irreconcilable ways between Americans and the Empire. "The parliament of Great Britain have no right to level an internal tax upon the colonies," one writer asserted. Another believed that the British legislature's attempt "to establish stamp duties and other internal taxes" threatened to reduce colonists to "the miserable condition of slaves."

For the most part, Americans agreed that they were not represented in Parliament. They shared a vision of the linkage between preservation of liberty and taxation only by their elected representatives, but they disagreed about the precise nature of these relationships and even the definitions of the terms involved. Benjamin Franklin, for example, thought that colonists could be represented in Parliament and then justly taxed by that body. "If you chuse to tax us," he wrote to an English correspondent, "give us members in your Legislature, and let us be one people." Other Americans were less sanguine about Parliament's ability ever to become sufficiently representative for the purposes of taxation. They held a different standard of what it meant to be "represented" in a legislature and a greater suspicion of geographically remote central governments. Stephen Hopkins, for one, thought the colonies were "by distance so separated from Great Britain that they are not and cannot be represented in Parliament."

Implicit disputes such as this would not prevent many Americans from uniting against Great Britain, its remote and unrepresentative government, and the threat posed to their liberty by the Empire's claim to authority over internal taxes. By any standard—either Franklin's or Hopkins'—British taxes and troops assaulted their liberty and property. Ideological fissures first revealed in 1765 would, however, have a profound impact on Americans' ability to balance liberty and order after they secured self-rule in the Revolution.

When it came to debate over the Constitution in 1787, some Americans—now pejoratively termed "Antifederalists" by their opponents—had not changed their minds about the relationship between local and central governments or representation and internal taxation. These men were appalled by the similarities between British ambitions in the 1760s and the authority granted by the proposed constitution. They were especially shocked by Article 1, section 8, which gave blanket authority over taxation—internal and external—to the national government. "They have the unlimited right to imposts and all kinds of taxes, as well to levy as to collect them," one distraught Antifederalist observed. "They have indeed very nearly the same powers claimed by the British Parliament. Can we have so soon forgot our glorious struggle with that power, as to think a moment of surrendering it now?" "When I recollect," another localist lamented, "how lately congress, conventions, legislatures, and people contended in the cause of liberty and carefully weighed the importance of taxation, I can scarcely believe we are serious in proposing to vest the powers of laying and collecting internal taxes in a government so imperfectly organized for such purposes."



Parade of the Stamp Act in New York. ***Wood engraving in Benson Lossing,*** **Seventeen hundred and seventy-six** ***(1850). Library of Congress.***

To the localists of 1787, the national congress of the proposed constitution was little more fit for the purpose of levying internal taxes than Parliament had been in 1765. They predicted a proliferation of taxes—poll, land, excise, and stamp—and hoards of tax men to collect them, men who would, "like the locusts of old, destroy us." If the people resisted such threats to their liberty and property, which surely they would according to the Antifederalists, an "internal war" might result. "Look at the part which speaks of excises," Patrick Henry warned, "and you will recollect that those who are to collect excises and duties are to be aided by military force.... Suppose an exciseman will demand leave to enter your cellar, or house, by virtue of his office; perhaps he may call on the militia to enable him to go."

Lack of knowledge and sympathy for the conditions and views of many regions, localists believed, would make the proposed congress the wrong institution to enact internal taxes. As in 1765, it seemed unlikely that the whole people could ever be represented adequately in a national legislature for the purposes of internal taxation. The Antifederalist standard of representation was different from that of most British politicians and American nationalists. To Antifederalists, the legislative branch of the proposed national government appeared to have "but very little democracy in it." The Constitution seemed to its opponents almost to ensure a wave of economic repression and political violence. They believed that the "same force that may be employed to compel obedience to good laws, might and probably would be used to wrest from the people their constitutional liberties."

For Antifederal localists, then,

"When I recollect," a localist lamented, "how lately congress, conventions, legislatures, and people contended in the cause of liberty and carefully weighed the importance of taxation, I can scarcely believe we are serious in proposing to vest the powers of laying and collecting internal taxes in a government so imperfectly organized for such purposes."

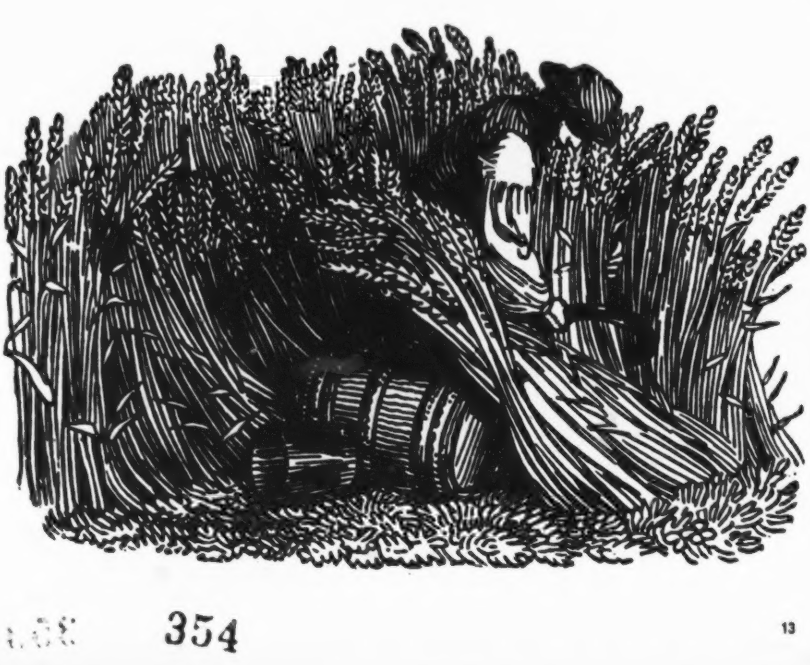
the issues and the stakes had changed little from the 1760s. The constitutional conflict over internal and external taxation had as much, if not more, meaning for some Americans in 1787 as it had in 1765. In both cases many saw the reservation of internal taxation to the colonies/states as crucial to the survival of liberty. In each case they predicted violent conflict and consequent loss of liberty as the likely results of granting the central government authority to assess internal taxes. It made little difference that the supreme authority after 1787 would be managed by elected Americans rather than British politicians over whom they had virtually no influence. The problems of representation remained largely the same. Whether elected or not, men who shared no sympathy for the needs of some regions could not represent all their constituents' interests adequately to tax them. In 1787 as in 1765, localists believed that internal taxing authority must be left to local representatives who lived among their constituents and knew their wants and needs. Under the proposed system this was not possible. Each congressman represented as many as 30,000 people, and districts would grow even larger. A senator from Philadelphia, Boston, or Charleston, for example, could never truly appreciate or represent the unique problems and needs of frontiersmen.

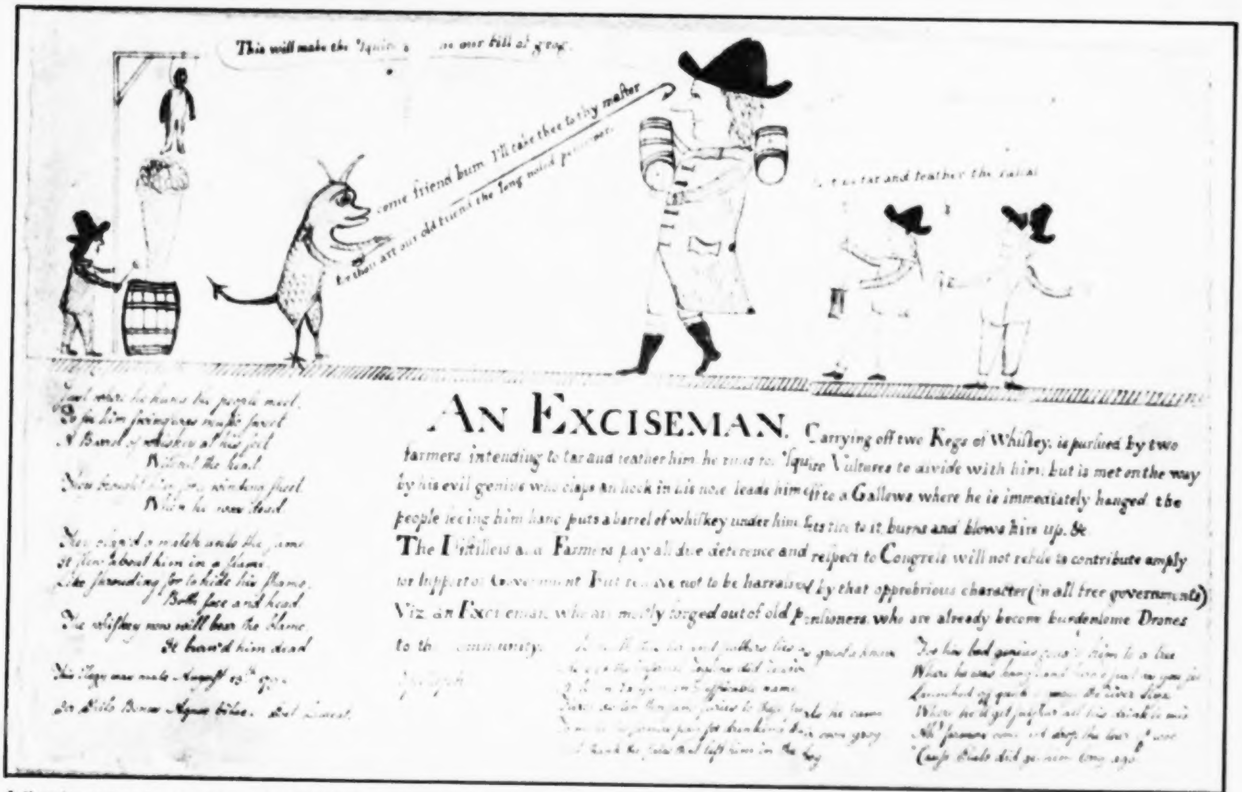
Furthermore, as a matter of logic and political theory, localists strongly resisted the idea that two sovereign governmental bodies could coexist, share concurrent jurisdiction, cooperate, and survive. They believed that sovereignty could be divided but not shared. To give both the central government and the states authority to lay internal taxes was to decree the virtual death of the states. The larger and stronger government would inevitably overwhelm the states with taxes, tax collectors, and, if necessary, soldiers to enforce its laws. In the face of such might, state governments would be compelled to repeal tax laws or simply leave an overburdened populace alone and not collect taxes at all. In the end, the states would either fade to shadows or be violently annihilated by a national army. However the end came, the fate of the citizen, the state, and the nation would ultimately be the same. Discontent, resistance, repression, violence, tyranny, and death would be the short and brutal history of the republic.

As subsequent events showed, the localists of 1787 were only partially correct in their predictions. The state governments were not annihilated, nor did they glide out of existence. The national government did not dissolve in a caldron of tyranny and anarchy.

The Whiskey Excise

On the other hand, the nationalists' assurances—which localists interpreted as promises—that a direct excise would only be a tax of last resort under the Constitution proved false. One of the earliest fiscal measures of the new congress was the whiskey excise of 1791. Localists were also correct in predicting that passage of internal taxes by a remote central government would bring the nation to the brink of "internal war." The Pennsylvania militia did not invade New England or Virginia to "quell an insurrection occasioned by the most galling oppression," as one Antifederalist had predicted. The militias of Pennsylvania, New Jersey, Maryland, and Virginia marched west, however, to suppress a tax revolt on the other side of the Appalachian Mountains in 1794. The Whiskey Rebellion result-




AN EXCISEMAN. Carrying off two Kegs of Whiskey, is pursued by two farmers intending to tar and feather him he runs to 'Squire Vultures to divide with him, but is met on the way by his evil genius who claps an hook in his nose leads him off to a Gallows where he is immediately hanged the people seeing him hang puts a barrel of whiskey under him sets fire to it burns and blows him up. &
The Distillers and Farmers pay all due deference and respect to Congress will not refuse to contribute amply for support of Government But resolve not to be harrassed by that opprobrious character (in all free governments) Viz an Exciseman who are mostly forged out of old Pensioners who are already become burdensome Drones to the community.
Come friend bum I'll take thee to thy master
for thou art our old friend the long noted pensioner
This will make the 'Squire's ... our fill of grog
... to tar and feather the rascal
Just where he hung the people meet.
To see him swing was music sweet
A Barrel of whiskey at his feet
Then he'll never ... when he ... dead
It hang'd him dead

Anti-excise cartoon by an unknown artist, 1792. The exciseman is hanged, and the captions says in part: "The distillers and farmers, pay all due deference and respect to Congress, will not refuse to contribute amply for support of government. But resolve not to be harrassed by that opprobrious character (in all free govermments) viz. an exciseman . . . ." The poem to the left begins: "Just where he hung the people meet./To see him swing was music sweet,/ A Barrel of whiskey at his feet." Courtesy of the Atwater Kent Museum, History Museum of Philadelphia.

ed from precisely the sorts of tensions foreseen by localists in 1765 and 1787.

Most members of Congress were ignorant or unsympathetic to the unique regional economy that made the whiskey excise an untoward burden for trans-Appalachian frontiersmen. Because the lower Mississippi River was periodically closed to American trade by its Spanish possessors, settlers had no option but to carry their meager crops back across the mountains to an eastern city such as Philadelphia, Baltimore, Richmond, or Charleston. The weight and bulk of wheat—the major surplus production of the West—made the journey unprofitable. Distillation of surplus grain into whiskey, however, created a more potable and portable commodity, making it the region's only lucrative product. Indeed, the frontier's entire culture revolved around distilled spirits. Whiskey circulated locally as the primary medium in a fundamentally barter economy. It was a crucial component of wages paid to day-laborers, who refused to work unless liberally rationed liquor. It brought in what very little cash the region accumulated. And it lubricated the social life enjoyed by people with few other luxuries.

The tax on distillation hit hardest at the small and intermittent producer, the farmer who had just enough wheat left over after feeding his family and animals to distill some whiskey for himself, for his laborers, and to barter for other necessaries. He realized no cash from the product, but the tax had to be paid in hard money. With cash so dear and whiskey so important to the delicate balance of his solvency, the tax seemed particularly unjust to the poor and marginal yeoman. Moreover, the government was far away, its services to him were unapparent, and its leaders were inaccessible. The frontiersman refused to pay.

Western farmers used the language and the logic of opposition to internal taxes levied by remote central governments as the rallying cry of resistance. Protestors writing in the public press reminded their readers of the Stamp Act crisis, when "the quick sightedness and spirit of Americans [first] showed themselves." In 1765, some still believed, Americans "made the world sensible that usurped power could neither cheat them by sophistry, nor awe them by force, giving a noble lesson to their posterity ever to watch against governmental encroachments, and to stifle them in their birth." In sum, opponents of the whiskey excise frequently argued during the 1790s that stamp tax resistance was a landmark in defense of liberty because Americans then first displayed their absolute rejection of the authority of remote central governments to levy "internal taxes" on a free people.

The issues of representation and internal taxes were again, as they had been in 1765 and 1787, at the heart of debates over just taxation. According to an anonymous writer, "every judicious politician must anticipate the remark that even the House of Representatives must necessarily be too limited in point of numbers, and in point of information, will possess too little knowledge of the citizens, and too feeble a participation in the particular circumstances of the subjects of taxation" to levy internal taxes justly. At

Localists were correct in predicting that passage of internal taxes by a remote central government would bring the nation to the brink of "internal war." The Whiskey Rebellion resulted from precisely the sorts of tensions foreseen by localists in 1765 and 1787.

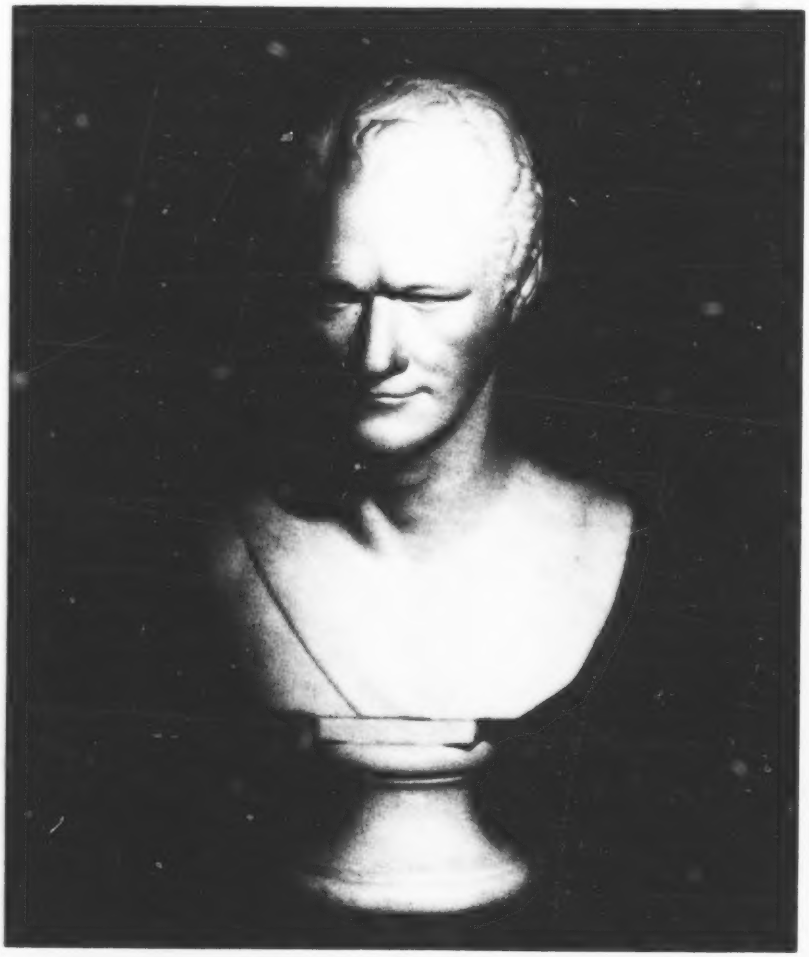
the time the excise law was passed, according to this same author, the local interests of about one-half the people of the nation were not represented. Since some states elected representatives-at-large before results of the first national census were available and since almost all senators were from the East, the needs and views of the vast rural reaches of frontier America were very poorly understood. "If we had not other proof," he argued, "this is sufficient to demonstrate that the federal government never was intended to embrace extensive internal powers; and that the powers of that kind which it possesses, were only intended for emergencies, in which the preservation of the government itself was at risque."

The difference for localists of 1794, compared to those of 1765, was that they lost their battle against the central government. The new constitution, drafted in response to nationalist fears of disorder epitomized by Shays' Rebellion in 1786, was purposefully constructed to insure suppression of resistance to the law. Before the Whiskey Rebellion, however, neither side knew for certain whether the solutions embodied in Articles I, II, and IV would actually work to crush political dissent. President Washington, utilizing his authority as commander-in-chief, was able to quell unrest in a manner only dreamt of by like-minded British authorities in the 1760s and 1770s. Washington marched an army of 12,800 men—approximating in size the force he led in the American Revolution—to make an example of frontier farmers in western Pennsylvania. Those nationalists who, like Alexander Hamilton, had hoped for a test of the document's power, could now rest assured that the Constitution was capable of maintaining order.

But what about liberty? American localists' most nightmarish fears seemed confirmed by the crushing of the Whiskey Rebellion. Additional excises and even a stamp tax assessed under the Federalist administrations, and President Adams' forceful suppression of the "Hot Water War" against federal tax assessors in 1798, all seemed to testify to the unlimited power and desire of the national government to levy internal taxes. Localist fears had not changed, although the threat to liberty once perceived to emanate from London now seemed to reside in the national capital.

But a lost battle is not necessarily a lost war. When the Jeffersonian-Republicans emerged victorious in 1800, one widely celebrated consequence was repeal of all the Federalist internal taxes. The "country"

Alexander Hamilton, ***bust by Guiseppe Ceracchi. National Portrait Gallery, Smithsonian Institution, Washington, D.C***



The ideological question remains to this day a partisan issue unresolved even by a constitutional amendment authorizing the federal income tax.

party of America's first party system remained loyal to its localist ideological roots and never adopted a peacetime internal tax. Only in war—President Madison's excises during the War of 1812—would the Republicans call upon what they saw as the emergency taxing power of the Constitution. Only for the duration of an extraordinary threat, localists agreed, might an exception be made to their ideological demand that remote central governments refrain from intrusion upon local control over internal taxes. After the three-year emergency had passed, the temporary revenue measures lapsed. Not until the Civil War was an internal tax again adopted, and it is in the 1860s that our modern system of excise stamps on liquor and tobacco products originated.

The power of the federal government to assess peace-time internal taxes was thus irrevocably determined by the Whiskey Rebellion. The ideological question, however, remains to this day a partisan issue unresolved even by a constitutional amendment authorizing the federal income tax. The battle continues as the federal government destroys thousands of homemade stills each year, machines designed by their owners to evade the national excise on whiskey. Annually, millions of dollars worth of cigarettes are smuggled out of the tobacco-producing states in an effort to avoid stamp taxes. Although the language of internal and external taxes has passed from the scene, newspaper reports of shoot-outs with internal-revenue agents, protest movements, and organized tax resistance on moral and political grounds testify to the modern legacy of this ideological debate that pre-dated the Constitution.

Suggested additional reading:

Bernard Bailyn, *The Ideological Origins of the American Revolution* (1967).

Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (1913).

Merrill Jensen, *The Articles of Confederation* (1948).

Gary B. Nash, *The Urban Crucible: Social Change, Political Consciousness, and the Origins of the American Revolution* (1979).

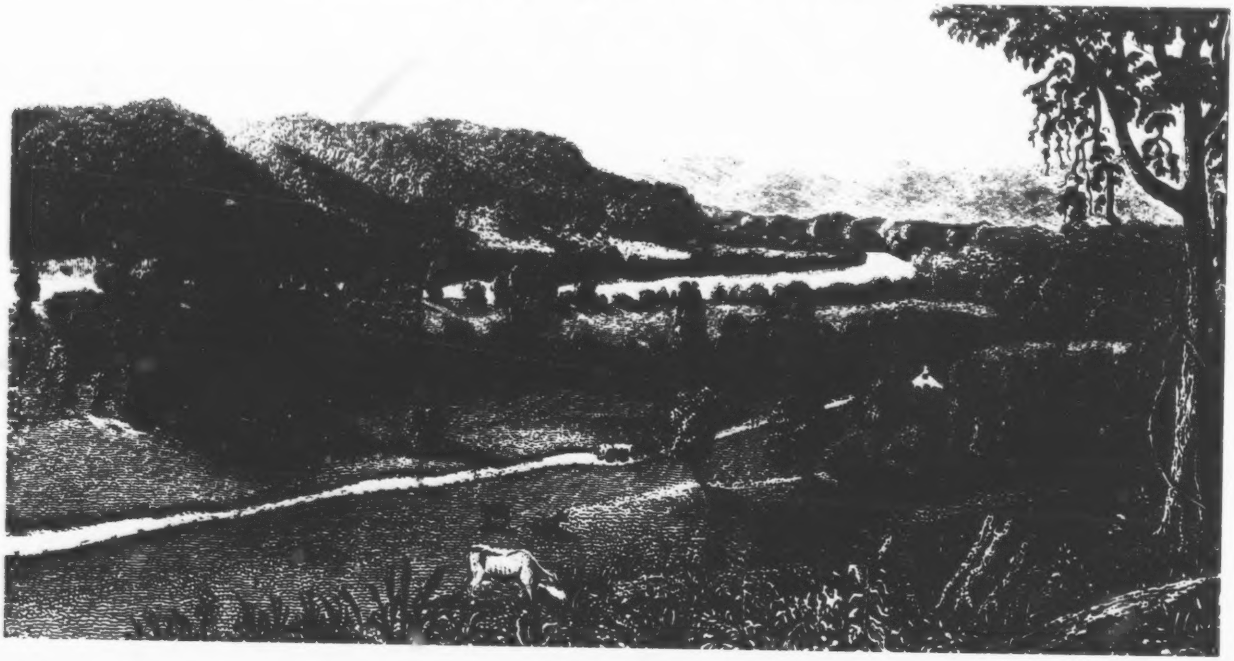
Herbert J. Storing, *What the Anti-Federalists Were For* (1981).

Gordon S. Wood, *The Creation of the American Republic* (1969).

Alfred E. Young, ed., *The American Revolution: Explorations in the History of American Radicalism* (1976).

Thomas P. Slaughter is an assistant professor of history at Rutgers University, and the author of *The Whiskey Rebellion: Frontier Epilogue to the American Revolution* (Oxford University Press, forthcoming).

Site of the Whiskey Rebellion on the Monongahela River. Engraving of a painting by William Coventry Wall. Library of Congress.



Public Forum

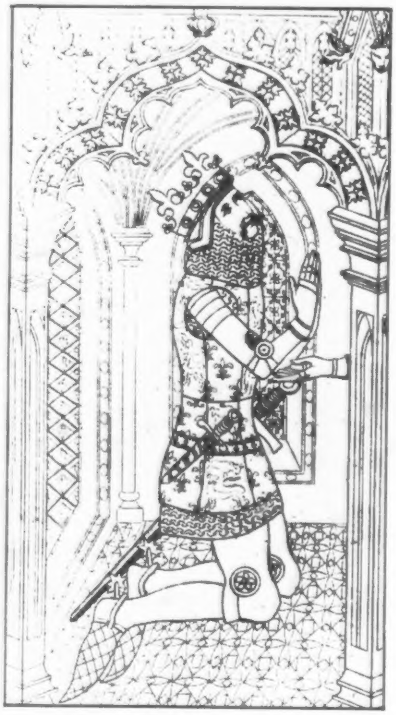
The Constitutional Power of Impeachment

by ROBERT McCLORY and RANDI S. FIELD

The year 1984 marked the tenth anniversary of the historic impeachment proceedings against Richard M. Nixon. Only twice in our history has the Congress conducted impeachment proceedings against a president of the United States. In both instances, the process designed by the framers of the Constitution has operated as they intended—to prevent governmental excess—once when the House of Representatives attempted to exercise inordinate authority over President Andrew Johnson, and once when President Nixon exceeded his constitutional authority by a flagrant misuse of executive agencies and prerogatives. A look at the history and implementation of the impeachment process, particularly as reflected in these two instances, shows that indeed "the system works."

The constitutional power of impeachment epitomizes the principles of "separation of powers" and "checks and balances." Under the "separation of powers" doctrine, our government consists of three branches, the executive, the legislative and the judicial, each with an assigned role. However, each branch can be prevented from taking action by one of the other branches. The president can veto legislation, the Supreme Court can declare statutes unconstitutional. Congress, on the other hand, can propose constitutional amendments or override vetoes, with the support of super-majorities. This kind of interaction constitutes a system of "checks and balances." In the case of impeachment, one house of Congress is authorized to bring a charge against an official of another branch which, if recommended by a majority vote, the second house must adjudicate. The official can be removed only if found guilty by a two-thirds vote.

Delegates at the Constitutional Convention unanimously insisted upon the legislative power of impeachment. An initial proposal vested both the power (a) to impeach, i.e., to bring charges of improper conduct, and (b) to adjudicate the validity of such charges and to render judgment, in the House of Representatives. James Madison, among others, argued against this proposal, asserting that under such a system, the House itself could become tyrannical, capable of determining at will when a president or his executive officers should be removed from office.



Edward III *, fresco, St. Stephen's Chapel, Westminster. Library of Congress.*

The principle of "checks and balances" was applied in order to resolve the delegates' dilemma. Thus, the Constitution gave to the House of Representatives "the sole power of impeachment" (Art. I, Sec. 2, Clause 5) and to the Senate "the sole power to try all impeachments" (Art. I, Sec. 3, Clause 8). In so doing, the founders provided a positive check against corrupt and political excesses by members of the executive branch or the federal judiciary while preventing the exercise of arbitrary power by members of the House. The result was a balanced grant of the extraordinary authority in the legislative branch to impeach officials in the other two branches. As a further check on the House's power of impeachment, the Constitution mandated a two-thirds vote in the Senate to effect a removal from office. In a very real sense the congressional power of impeachment vests a degree of control in the legislative branch of government superior to any comparable power in the executive or judicial departments. (And while impeachment does not reach members of the House or Senate, the authority of each chamber to discipline and even remove its own members represents an even more efficient system than impeachment.)

Historical Precedents

The impeachment power as described in the Constitution has roots reaching back into the history of English governance. During the reign of Edward III in the fourteenth century, Parliament was divided into two houses: the House of Lords and the House of Commons. The Commons sat as the grand jury of the realm and presented individuals accused of grave offenses against the State to the Lords for trial. Although ordinary magistrates might fear to punish noblemen who infringed on the people's rights, the impeachment process provided a

Edwin Stanton. ***Library of Congress.***

method by which Parliament could discipline such individuals. However, the House of Commons, which consisted of representatives of the people, could not act as judge because it represented the people injured; therefore, it could only accuse. The House of Lords, on the other hand, was composed of peers of the persons accused; therefore, it could sit in judgment upon them, without being swayed by the interests and passions that influenced the popular assembly. The proceedings against Lords Latimer and Neville in 1376 during the reign of Edward III are probably the earliest cases of trial by the House of Lords upon a definite accusation by the House of Commons.

The phrase "high crimes and misdemeanors," which is set forth in our Constitution, first appeared during the impeachment proceedings against the King's Chancellor, the Earl of Suffolk in 1386. Although English impeachments did not require an indictable offense, they were, nonetheless, criminal proceedings and conviction carried a punishment of death, imprisonment, or a heavy fine. Grounds for impeachment included giving bad advice to the King, enticing the King to act against Parliament's advice, buying offices, giving medicine to the King without the advice of physicians, procuring exorbitant personal grants from the King and putting good magistrates out of office while advancing bad ones. Accordingly, the English cases could be categorized to delineate the scope of the phrase "high crimes and misdemeanors" to include such acts as misapplication of funds, abuse of official power, neglect of duty and corruption. Thus, when the framers adopted the phrase in our Constitution, they were aware that it had an historically-defined meaning.

When our Constitution was drafted in 1787, the framers at the Convention adapted the language of English law. Article 2, Section 4, of the U.S. Constitution provides:

> the President, Vice-President and all civil officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

The original draft had contained the language "treason, bribery or maladministration," but the term "maladministration" was replaced with "other high crimes and misdemeanors," because its historical context gave clarity to its meaning and thus placed a limitation on Congress' power in impeachment cases.

The framers, however, did not want to confer an unlimited power to convict. Therefore, they separated removal proceedings from subsequent indictment and criminal prosecution: Political passions could no longer result in death or imprisonment of the accused. Article 1, Section 3, Clause 7 provides:

> Judgment in Cases of Impeachment shall not extend further than removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable to Indictment, Trial, Judgment and Punishment, according to Law.

By limiting punishment in impeachment cases to removal from office and disqualification from holding office in the future, the framers ensured that the goal of impeachment was only to divest the offender of his right to hold political office. The responsibility for punishing the offender for crimes was retained by the criminal courts.

Article 1, section 2, clause 5 states that "The House of Representatives . . . shall have the sole power of impeachment." Thus, the Constitution designated the House as the body to consider evidence relating to impeachable offenses or charges

The process designed by the framers of the Constitution has operated as they intended.

against a member of the executive or judicial branches of the government. In other words, the House of Representatives could be likened to a Grand Jury authorized to charge or indict an offender in the other two branches of the federal government.

The Senate's authority to try cases of impeachment as set forth in Article 1, Section 3, Clause 6, provides:

> The Senate shall have the sole Power to try all impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no person shall be convicted without the Concurrence of two-thirds of the Members present.

Accordingly, when the Senate sits during an impeachment trial, it sits as a court. By designating the House of Representatives to present the articles of Impeachment and then specifying that two-thirds of the members of the Senate present shall be required to convict, the framers circumscribed the power with the necessary safeguards to protect innocent officials, yet left sufficient room to promote the public welfare. This division of functions between the House of Representatives and the Senate was modeled after the English law which assigned the role of prosecutor to the House of Commons while the House of Lords served as the tribunal to try cases of impeachment and to render judgment.

The U.S. Constitution limits impeachment to the President, Vice-President and civil officers, a departure from English law which permits impeachment of "any of the King's subjects." Moreover, the framers replaced an unimpeachable King with an impeachable president. The issue of whether the president should be removable on impeachment was debated extensively during the convention. Rufus King of Massachusetts argued that it was appropriate to make members of the judiciary impeachable because judges held their posts not for a limited time, but during good behavior. Accordingly, it was necessary that a forum be established for trying judicial misbehavior. In contrast, the executive was to hold his place for a limited term much the same as members of the legislature. If the voters disliked the president's actions, they could refuse to return him to office. King contended that impeachment by the legislature would destroy the executive's independence and undermine the principles of the Constitution. Nevertheless, at the end of the debates, the vote was eight to one in favor of authorizing impeachment of the president.

The question of impeachment arose again with respect to government officials appointed by the president when the first Congress debated the creation of the Department of Foreign Affairs. Some representatives maintained that the secretary of the department could be removed *only* by impeachment. James Madison disagreed. He contended that it was necessary for the president to have the power of removing officials he had appointed. Such power would make the president responsible for the conduct of the officers. It would also subject the president himself to impeachment if he allowed his officers to perpetrate high crimes or misdemeanors against the United States or if he neglected to superintend their conduct or to check their excesses. Madison insisted that construing the Constitution so that the officer could not be displaced without the advice and consent of the Senate meant that the president would no longer be answerable for the conduct of the officer. When the question was put before the House, a considerable majority voted that the president had the power of removal.

The Impeachment Process Works

This very issue in fact later precipitated the first impeachment of a president. In 1868, the House of Representatives impeached Andrew Johnson primarily for removing his Secretary of War, Edwin Stanton.

After Abraham Lincoln's assassination, Congress and the new president quickly clashed. Following the defeat of the Confederacy, Congress had passed civil rights and reconstruction laws which dealt severely with the states that had seceded. President Johnson opposed these measures and attempted to undermine them. Secretary Stanton, on the other hand, endeavored to comply with the congressional mandate, and Congress feared that Johnson would try to remove him.

Early in 1867, Congress passed the Tenure of Office Act which prohibited a president from removing cabinet members he had appointed and which the Senate had confirmed. President Johnson, convinced that the Tenure of Office Act was unconstitutional, decided to test it. In the summer of 1867, he dismissed Edwin Stanton from office. Three days later, the House of Representatives impeached him by an overwhelming vote of 128 to 47.

But the Senate did not convict Johnson. First, he had not violated the Tenure of Office Act, because Lincoln, not Johnson, had appointed Stanton. Second, many senators feared the radicalism of Johnson's

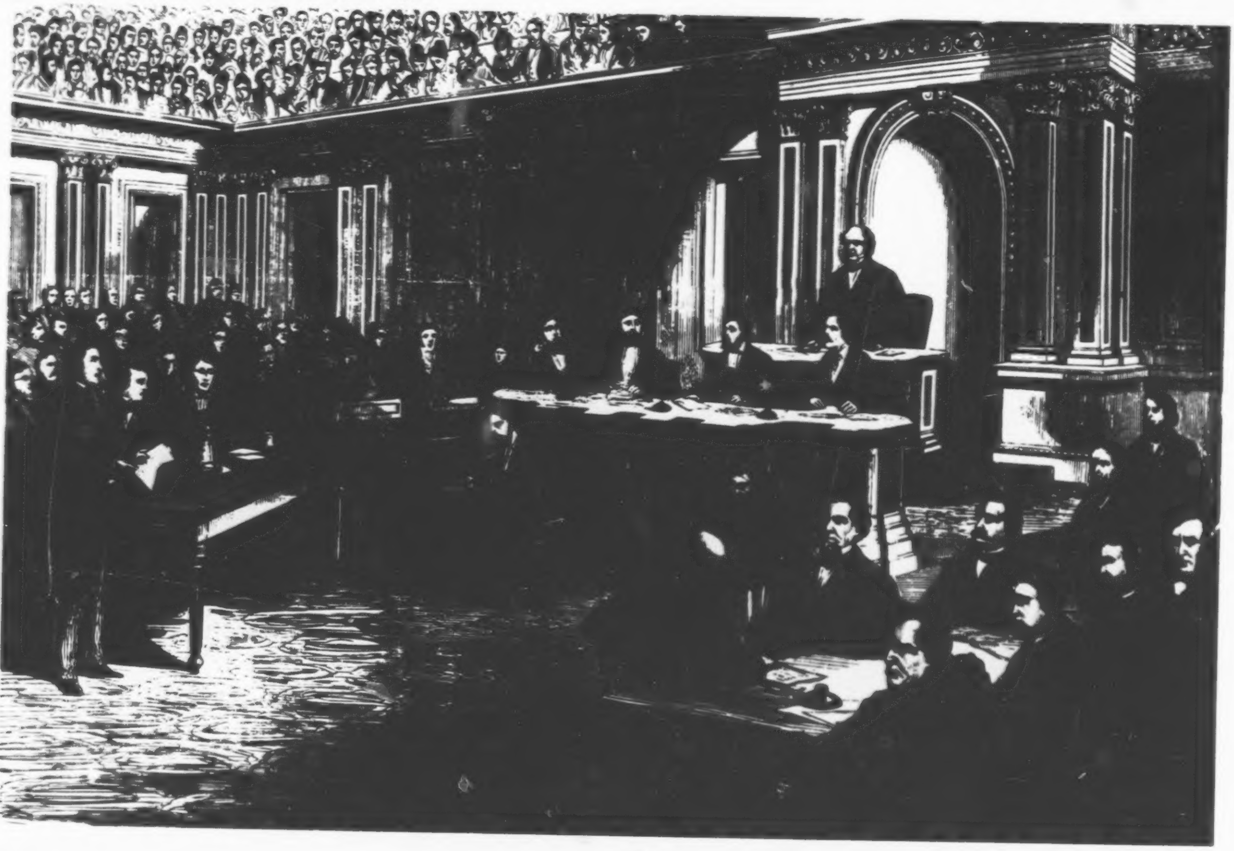
Only the impeachment authority appears to be immune from substantial criticism, and with good reason.

opponents. Although Johnson's acquittal did not decide the constitutionality of the Tenure of Office Act, it did confirm the soundness of the impeachment process; the Senate prevented the House of Representatives from wreaking its vengeance upon a president merely because it embraced policy positions at variance with those of the president. (In 1926, the Supreme Court pronounced the Tenure of Office Act unconstitutional in deciding a case brought under a different, but similar, statute.)

The historic impeachment proceedings conducted by the Committee on the Judiciary against Richard M. Nixon, the 37th President of the United States, marked the second time in nearly two hundred years of constitutional history that the House of Representatives considered articles of impeachment against a president. On June 17, 1972, agents of the Committee to Re-elect the President were caught burglarizing the headquarters of the Democratic National Committee for purposes of obtaining political intelligence (the "Watergate Break-in"). The first impeachment article alleged that by using the power of his office and acting through his subordinates and agents, Richard M. Nixon engaged in a plan or course of conduct designed to obstruct the investigation of the burglary and to cover up the existence and scope of the illegal activities, i.e., obstruction of justice.

The second article of impeachment charged that Nixon abused the powers of his office by disregarding his constitutional duty to "take care that the laws be faithfully executed." Included among the acts which formed the basis of this second article were misusing various federal agencies to gather political intelligence or to intimidate

Opening of the High Court of Impeachment in the Senate Chamber, March 13, 1868, for the trial of Andrew Johnson, ***from a sketch by James E. Taylor.*** **Frank Leslie's Illustrated Newspaper,** ***March 28, 1868. Library of Congress.***



House Judiciary Committee prepares to begin impeachment proceedings, May 16, 1974. Photograph by Geoffrey Gilbert. Washington Star collection, Martin Luther King Library, Washington, D.C.

and punish his political opponents; and failing to act when he had reason to know that his aides were trying to impede legislative, judicial and executive inquiries regarding the Watergate break-in.

Finally, Article III charged that, contrary to his oath of office, Nixon refused to comply with lawful subpoenas issued by the Committee on the Judiciary of the House of Representatives. The Committee believed that the subpoenaed items were fundamental in learning the extent of Nixon's knowledge of the above activities. More significantly, Article III charged that Richard M. Nixon violated the separation of powers doctrine by assuming the functions of the House in an impeachment inquiry and thereby attempted to nullify the Constitution's ultimate check on the misconduct of public officials.

From an historical and a constitutional perspective, the third article of impeachment may well have been the most important of all. It insisted that Congress had the power to hold public servants accountable for their misconduct. In essence, Article III confirmed the plenary authority of the U.S. House of Representatives to impeach, i.e., to investigate and indict. No reliance upon the judicial branch for enforcement of the House's subpoenas is needed; the House can enforce its own subpoenas by the impeachment process. In short, defiance of the House's request for information is an impeachable offense. The executive and judicial branches are required to be accountable—and answerable. Their refusal makes them—impeachable.

As a result of the overwhelming evidence that was presented against him and the certainty of his impeachment, conviction and removal from office, President Nixon resigned on August 9, 1974. Once again, the impeachment process rendered a just result.

Many provisions of the U.S. Constitution have been criticized. Active consideration is being given to possible amendments of various Articles and Sections of this basic law upon which our nation is founded. Only the impeachment authority appears to be immune from substantial criticism, and with good reason. In the dramatic—indeed, traumatic—events of 1974, the impeachment proceedings against Richard Nixon, the single most frequently heard comment was: "The Constitution works."

Robert McClory, a former Member of the U.S. House of Representatives from Illinois (1963–1983) and former Ranking Member of the House Judiciary Committee, is also a member of the Advisory Board of Project '87. Mr. McClory is "Of Counsel" with the Washington office of Baker & McKenzie. Randi S. Field, a Baker & McKenzie Associate Attorney, was Article and Note Editor of the *De Paul University Law Review*.

DOCUMENTS

Alexander Hamilton: Federalist

by JACOB E. COOKE

As the early American nation struggled to conduct its business under the Articles of Confederation, Alexander Hamilton emerged as one of the most vocal advocates of a stronger central government—so much so that some of his more extremist contemporary opponents believed that he secretly favored the establishment of a monarchy in America. But Hamilton was no closet monarchist. His enthusiasm for effective and efficient government may have led him to support some measures that alarmed others, but his belief in republican institutions was firm and consistent. More to the point, his diligent labors on behalf of the ratification of the new constitution written in Philadelphia in 1787 played a crucial role in its adoption.

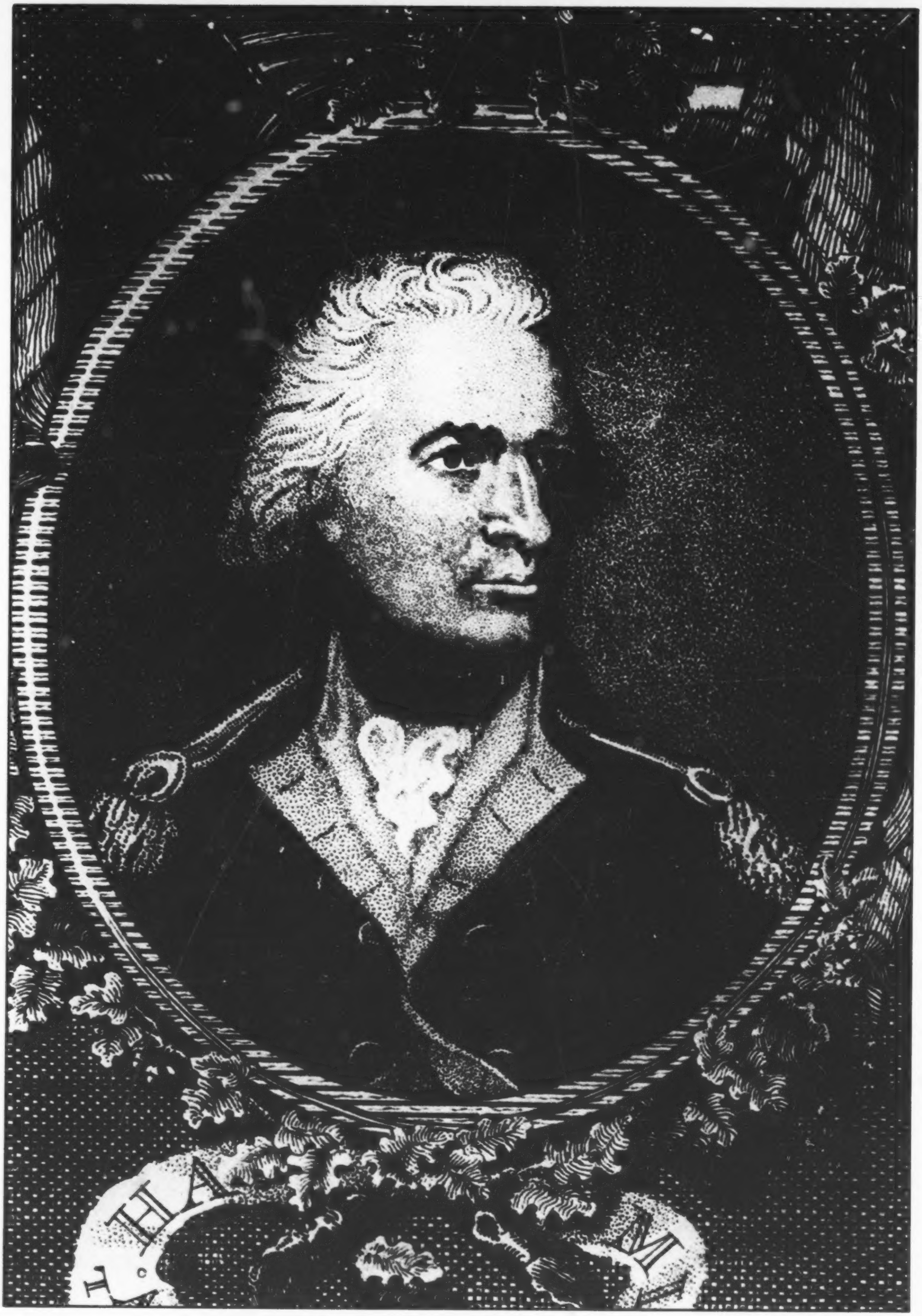
Hamilton's support of an effective, viable, central government began more than a decade before the Philadelphia Convention hammered out a constitution under which his goal could be achieved. His ideas were forged in the crucible of the American Revolution. The nationalism that he consistently championed is explained by his comparative freedom from parochial or local ties.

Born on the West Indian island of Nevis in 1755, Hamilton was the illegitimate child of Rachael Fawcett Lavien and James Hamilton. As a young man he moved with his parents to St. Croix where at the age of thirteen he was taken on as a clerk by the partnership of Beekman and Cruger, transplanted New Yorkers whose Christiansted-based firm carried on an extensive international trade. Hamilton quickly demonstrated such extraordinary ability—he was manifestly what we would now call a child prodigy—that Nicholas Cruger decided to provide his talented clerk an opportunity to receive a gentleman's education on the North American mainland. Arriving in 1772, Hamilton first attended a school in Elizabethtown (now Elizabeth, N.J.) and a year later, thanks to his remarkable precocity, enrolled in King's College (now Columbia University) where he began his studies in 1773-74.

Hamilton's decision to defend his adopted country in its dispute with Great Britain cut short his formal education. In March 1776 the New York legislature (bowing to the wishes of influential friends of the young West Indian) appointed him captain of a company of artillery, to be raised for the defense of the province. A year later, the single most important opportunity of his life presented itself when George Washington, the commanding general of the Continental army, chose him to be his aide-de-camp.

From the vantage point of Washington's headquarters, Hamilton could view the American war effort as a whole. He thus saw not only the deficiencies of the Continental army but also the weaknesses of the Continental Congress, principally its lack of powers to support its own army adequately and to invigorate the Union for which it fought. In 1780-1781 Hamilton wrote a number of letters that set forth his views on public policy during the Revolution, including most notably a sharp indictment of the weak Confederation government and the necessity of constitutional reform. They also prefigured his advocacy of an efficient, effective, and, above all, more powerful government during the debate at the constitutional and ratifying conventions and the interpretation of the new constitution that would inform his famous state papers as the secretary of the Treasury. The following excerpts are from a letter that Hamilton wrote to James Duane on September 3, 1780:

> *. . . I sit down to give you my ideas of the defects of our present system, and the changes necessary to save us from ruin. . . . The fundamental defect is a want of power in Congress. It is hardly worth while to show in what this consists, as it seems to be universally acknowledged, or to point out how it has happened, as the only question is how to remedy it. It may however be said that it has originated from three causes—an excess of the spirit of liberty which has made the particular states show a jealousy of all power not in their own hands; . . . a diffidence in Congress of their own powers, by which they have been timid and indecisive in their resolutions, constantly making concessions to the states, till they have scarcely left themselves the shadow of power; [and] a want of sufficient means at their disposal to answer the public exigencies and of vigor to draw forth those means; . . . .*
>
> *I shall now propose the remedies, which appear to me applicable to our circumstances, and necessary to extricate our affairs from their present deplorable situation.*
>
> *The first step must be to give Congress*



Alexander Hamilton, engraving by William Rollinson. National Portrait Gallery, Smithsonian Institution, Washington, D.C.

powers competent to the public exigencies . . . by calling immediately a convention of all the states with full authority to conclude finally upon a general confederation, stating to them beforehand explicitly the evils arising from a want of power in Congress, and the impossibility of supporting the contest on its present footing. . . .

The confederation in my opinion should give Congress complete sovereignty; except as to that part of internal police, which relates to the rights of property and life among individuals and to raising money by internal taxes. It is necessary, that every thing, belonging to this, should be regulated by the state legislatures. [In virtually all else] Congress should have complete sovereignty. . . .

***Papers of Alexander Hamilton*, II, 400-401, 406-408**

The ideas that he expressed in his private letter in September 1780 remained the pillars of Hamilton's political thought throughout the Confederation era. He expressed them publicly in a series of six newspaper articles that appeared intermittently from July 12, 1781 to July 4, 1782. In these essays, entitled "The Continentalist," Hamilton once again concentrated on the perils and pitfalls of government under a constitution as feeble and frail as the Articles of Confederation and the advantages to be derived from investing Congress with all the powers requisite to viable nationhood. The notion that he sought to controvert was the people's commitment to state sovereignty; the popular anxiety that he sought to allay was the threat posed to liberty by a powerful Union; the "noble and magnificent" vision that he shared was that of a "great Federal Republic."

No. I, July 12, 1781

. . . An extreme jealousy of power is the attendant on all popular revolutions, and has seldom been without its evils. It is to this source we are to trace many of the fatal mistakes, which have so deeply endangered the common cause; particularly that defect, which will be the object of these remarks, A WANT OF POWER IN CONGRESS. . . . In a government framed for durable liberty, not less regard must be paid to giving the magistrate a proper degree of authority, to make and execute the laws with rigour, than to guarding against encroachments upon the rights of the community. As too much power leads to despotism, too little leads to anarchy, and both eventually to the ruin of the people. These are maxims well known, but never sufficiently attended to, in adjusting the frames of governments. . . .

No. VI, July 4, 1782

There is something noble and magnificent in the perspective of a great Federal Republic, closely linked in the pursuit of a common interest, tranquil and prosperous at home, respectable abroad; but there is something proportionably diminutive and contemptible in the prospect of a number of petty states, with the appearance only of union, jarring, jealous and perverse, without any determined direction, fluctuating and unhappy at home, weak and insignificant by their dissentions, in the eyes of other nations.

***Papers of Alexander Hamilton*, II, 650-651; III, 106**

Events of the early 1780s seemed to bear out Hamilton's fears of sovereign states—"petty," "jarring," and "jealous"—but he refused to relinquish altogether his vision of "a great Federal Republic." It was no doubt for this reason that Hamilton agreed to serve as one of New York's delegates to the Continental Congress. For eight frustrating months (November 1782-July 1783), he valiantly but unsuccessfully attempted to secure adequate and permanent funds for the tottering Confederation government. Although he may have derived some solace from his emergence as an important public figure, both in New York and in national politics, Hamilton was disheartened by what he viewed as the shortsightedness of a majority of his countrymen and dismayed by the immediate future of his adopted country. In a letter of July 25, 1783, he shared his pessimism with his long-time friend John Jay:

We have now happily concluded the great work of independence, but much remains to be done to reach the fruits of it. Our prospects are not flattering. Every day proves the inefficacy of the present confederation, yet the common danger be-

Mann's Tavern, site of the Annapolis Convention, 1786. Courtesy of the Warren Collection, Maryland State Archives.

> *ing removed, we are receding instead of advancing in a disposition to amend its defects. The road to popularity in each state is to inspire jealousies of the power of Congress, though nothing can be more apparent than that they have no power; and that for the want of it, the resources of the country during the war could not be drawn out, and we at this moment experience all the mischiefs of a bankrupt and ruined credit. It is to be hoped that when prejudice and folly have run themselves out of breath we may return to reason and correct our errors.*
>
> ***Papers of Alexander Hamilton*, III, 416-417**

While awaiting such a revival and correction, Hamilton over the next few years focused his energy and attention on assuring the success of his law practice and thus the economic security of his growing family. But public affairs continued to be an overarching concern and he remained convinced that "the principal defects of the confederation," as he would reaffirm in *The Federalist*, "do not proceed from minute or partial imperfections, but from the fundamental errors in the structure of the building." In his view these "cannot be amended otherwise than by an alteration in the first principles and main pillars of the fabric." An opportunity to initiate the requisite job of reconstruction was occasioned by the well-known Annapolis Convention.

The initiative for calling this Convention was taken by the Virginia legislature, which appointed commissioners to join delegates from other states at Annapolis, Maryland, in September 1786 "for the purpose of forming such regulations of trade as may be judged necessary to promote the general interest." Although such remedial treatment was mild as compared to the drastic surgery that Hamilton believed to be necessary, he nevertheless accepted appointment as a member of the delegation from New York, hoping no doubt that an examination of the Articles might reveal their malignancy. Any hope at all soon appeared misguided as state after state displayed little interest. When the convention assembled in the Maryland capital only twelve delegates representing merely five states were present. That such an assembly might prove to be a giant and perhaps decisive step on the road to yet another convention empowered to establish an entirely new government would have appeared to require nothing less than a miracle.

But so it was. Once the convention was organized, its members "entered into a full communication of Sentiments & deliberate consideration of what would be proper to be done." They swiftly decided that while it would be improper to propose measures for a uniform commercial system—the purpose of the assembly—it would be appropriate to submit a general report to the several states. Drafted by Hamilton and adopted on September 14, the Address of the Annapolis Convention was not itself responsible for, but it did make possible, what has been described as the "Miracle at Philadelphia," the Constitutional Convention of 1787.

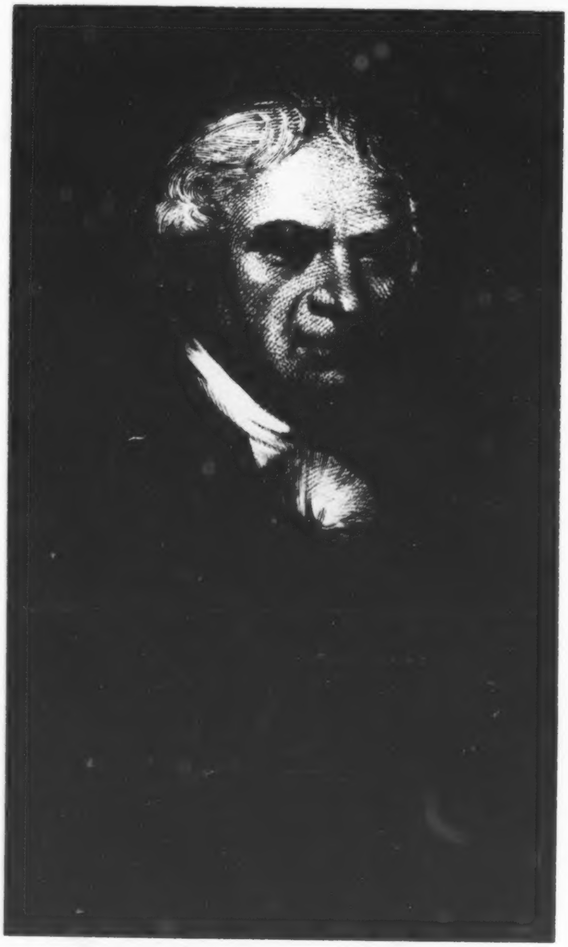
> *That there are important defects in the system of the Federal Government is acknowledged by the Acts of all those States, which have concurred in the present Meeting; [as is the fact] That the defects . . . merit a deliberate and candid discussion, in some mode, which will unite the Sentiments and Councils of all the States. . . .*
>
> *Your Commissioners, with the most respectful deference, beg leave to suggest . . . [that] the States . . . would themselves concur, and use their endeavours to procure the concurrence of the other States, in the appointment of Commissioners, to meet at Philadelphia on the second Monday in May next, to take into consideration the situation of the United States, to devise such further provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the exigencies of the Union. . . .*
>
> ***Papers of Alexander Hamilton*, III, 686-689**

George Clinton, New York's popular and perennial governor, talking about the Annapolis Address, remarked that "no such reform . . . was necessary; that the Confederation as it stood was equal to the purposes of the Union." Since most of his supporters in the New York legislature, a majority of that body's membership, agreed with him, one wonders why the New York Assembly bothered to send a delegation to the Philadelphia convention, much less to include in it Alexander Hamilton, the state's most articulate proponent of a powerful, genuinely sovereign national government. Whatever the reasons for Hamilton's selection, the Clintonians sought to checkmate any influence that he might exert by selecting as his fellow delegates two stalwart states-righters, Robert Yates and John Lansing, Jr. Thus effectively disenfranchised, Hamilton might reasonably have turned down the appointment. That he did not was probably due to his immodest belief that his persuasive oratory might influence decisions that his votes could not. Eloquent he indisputably was; whether persuasively so is another matter. The most important speech that he delivered at the Constitutional Convention did him more posthumous damage than anything else he ever said or wrote.

Hamilton took his seat in the Convention on May 18 and then remained virtually silent for almost a month. Perhaps exasperated that the Convention was not going fast enough and far enough toward embracing the kind of government that he envisaged, he finally decided to give the delegates a shove in the right direction by a proposal so far-fetched, so impossible of adoption by the American people, that any other plan considered by the Convention would seem moderate by contrast. On June 18 he took up most of an unusually hot day describing the ideal government toward which he believed that the Convention should aim: one branch elected for a short term, one branch to serve for life and an executive elected for life. James Madison recorded Hamilton's speech as follows:

> *Mr. Hamilton, had been hitherto silent on the business before the Convention. . . . The crisis however which now marked our affairs, was too serious to permit any scruples whatever to prevail over the duty imposed on every man to contribute his efforts for the public safety & happiness.*
>
> *He would first make a comparative examination of the two plans [already before the Convention]—prove that there were essential defects in both—and point out such changes as might render a national one, efficacious. . . . [The vast extent of the territory of the U.S.] almost led him to despair that a Republican Govt. could be established. . . . He was sensible at the same time that it would be unwise to propose one of any other form. In his private opinion he had no scruple in declaring, supported as he was by the opinions of so many of the wise & good, that the British Govt. was the best in the world: and that he doubted much whether any thing short of it would do in America. . . . In every community where indus-*

> *try is encouraged, there will be a division of it into the few & the many. Hence separate interests will arise. There will be debtors & creditors &c. Give all power to the many, they will oppress the few. Give all power to the few, they will oppress the many. Both therefore ought to have power, that each may defend itself agst. the other. . . . What is the inference from all these observations? That we ought to go as far in order to attain stability and permanency, as republican principles will admit. [Let the lower house of the legislature be elected by the people to serve for a comparatively short term.] Let one branch of the Legislature hold their places for life or at least during good behaviour. Let the Executive also be for life. . . . But is this a Republican Govt., it will be asked? Yes if all the Magistrates are appointed, and vacancies are filled, by the people, or a process of election originating with the people. . . .*



George Clinton, engraving by P. Maverick. Library of Congress.

James Madison, "Notes on the Debates in the Federal Convention," *Papers of Alexander Hamilton*, IV, 187, 188, 192, 193, 194.

Although Hamilton's speech was posthumously so interpreted as to make him the proponent of monarchy or aristocracy, it was not a final statement of his political philosophy. He would come to realize, as he argued only a few months later in *The Federalist*, that indivisible sovereignty was not indispensible to a vigorous and effective national government, that federalism could be tailored to the exigencies of Union and that republicanism was best suited to the temper and needs of the American people.

Soon after his controversial speech of June 18, Hamilton, who presumably decided that his ability to affect the outcome of the deliberations of the Constitutional Convention was at best marginal, returned to New York. Although he thereafter intermittently resumed his seat at the Convention and occasionally participated in its debates, his role was not a major one. On September 17 he was the sole New York delegate to sign the new frame of government. His reason for doing so was suggested some months later in *The Federalist*. "The truth is," he wrote in a passage that also indicated how far he had travelled since June 18, "that the General GENIUS of a government is all that can be substantially relied upon for permanent effects. Particular provisions, though not altogether useless, have far less virtue and efficacy than are commonly ascribed to them."

The Federalist was Hamilton's most important contribution to the adoption of the new constitution hammered out by what has aptly been called "the Great Convention." Of the bulky literature occasioned by the debate over ratification, it was also the most enduringly important. Having decided to publish a series of essays defending the proposed constitution, virtually clause-by-clause, Hamilton secured the aid of two brilliant collaborators, John Jay, a fellow New Yorker who had served as Secretary for Foreign Affairs under the Confederation government, and James Madison of Virginia, with whom Hamilton had served in the Continental

Congress in 1782-1783 and perhaps the most influential member of the Constitutional Convention. Jay wrote only five of the essays; Hamilton and Madison wrote the rest. Addressed to "the people of the state of New York" and written under the pseudonym "Publius," the articles were initially printed in New York City newspapers between October 1787 and August 1788 and published in book form in the latter year.

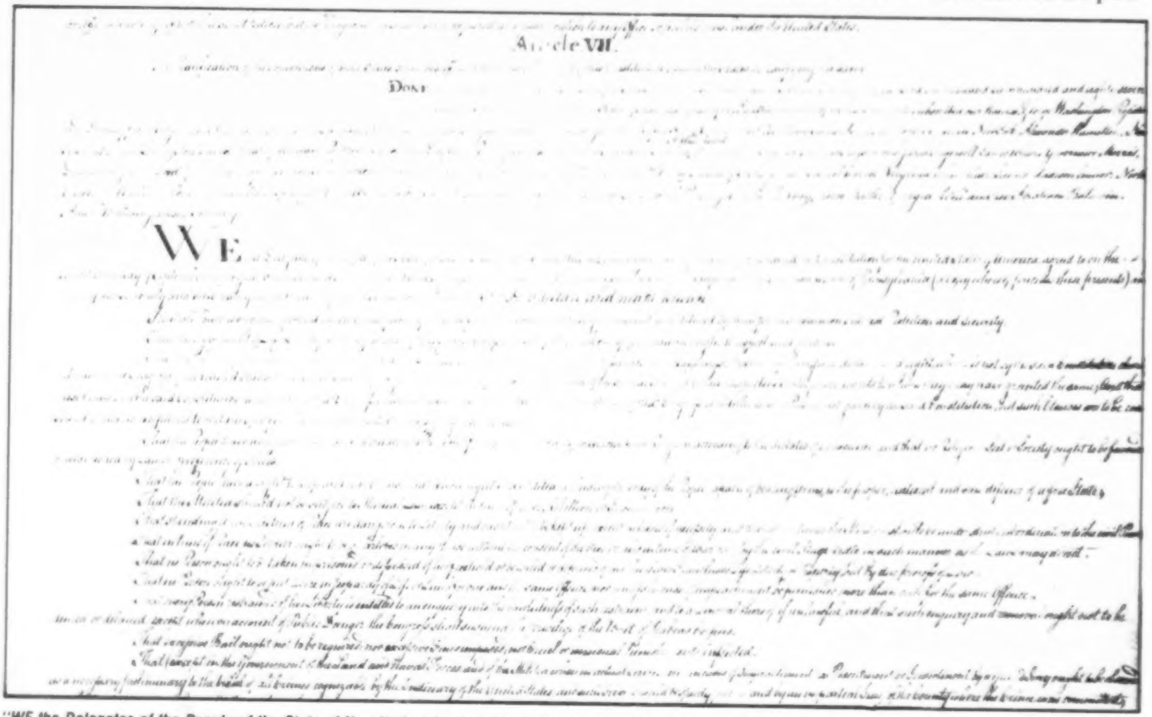
Hamilton's "Publius" essays are replete with richly textured arguments and illustrations and comprehensive explications of the Constitution. The following passages illustrate some of his major ideas.

The principal theme of *The Federalist* was the manifest inability of the Confederation government to deal with the pressing problems of the new nation.

> *. . . There are material imperfections in our national system, and . . . something is necessary to be done to rescue us from impending anarchy. The facts that support this opinion are no longer objects of speculation. . . .*
>
> *We may indeed with propriety be said to have reached almost the last stage of national humiliation. There is scarcely any thing that can wound the pride, or degrade the character of an independent nation, which we do not experience. . . . To shorten an enumeration of particulars which can afford neither pleasure nor instruction it may in general be demanded, what indication is there of national disorder, poverty and insignificance that could befall a community so peculiarly blessed with natural advantages as we are, which does not form a part of the dark catalogue of our public misfortunes?*

The Federalist, No. 15

How did the revamped Federal system proposed by the Constitutional Convention remedy the major defect of the Articles of Confederation: its pow-



"WE the Delegates of the People of the State of New York duly elected and Met in Convention having maturely considered the Constitution for the United States of America . . . and having also seriously and deliberately considered the present situation of the United States, Do declare and make known . . . ," beginning of New York State's document of ratification, July 26, 1788. National Archives.

erlessness to enforce compliance with the laws of the Union? Hamilton's answer—the operation of the laws of the national government directly upon the individual citizens of the country—was the Constitution's most important contribution to the theory and practice of federalism.

> *It seems to require no pains to prove that the States ought not to prefer a national constitution, which could only be kept in motion by the instrumentality of a large army, continually on foot to execute the ordinary requisitions or decrees of the government. And yet this is the plain alternative involved by those who wish to deny it the power of extending its operations to individuals. . . .*
>
> *. . . If it be possible . . . to construct a Federal Government capable of regulating the common concerns and preserving the general tranquility, . . . it must carry its agency to the persons of the citizens. It must stand in need of no intermediate legislations; but must itself be empowered to employ the arm of the ordinary magistrate to execute its own resolutions. The majesty of the national authority must be manifested through the medium of the Courts of Justice. . . .*
>
> ***The Federalist*, No. 16**

Hamilton's analysis of and prescriptions and predictions for specific provisions of the new charter of government (most notably those dealing with the executive and the Supreme Court) provided what would in time be viewed as a definitive commentary on the Constitution. But his most insistent theme (implicit as often as explicit) and one that he had emphasized for a decade was suggested by the word he used as a synonym for effective government: that word was "energy" (sometimes used interchangeably with "vigor").

> *. . . An enlightened zeal for the energy and efficiency of government will be stigmatized, as the off-spring of a temper fond of despotic power and hostile to the principles of liberty. . . . It will be forgotten, on the one hand, that jealousy is the usual concomitant of violent love, and that the noble enthusiasm of liberty is too apt to be infected with a spirit of narrow and illiberal distrust. On the other hand, it will be equally forgotten, that the vigour of government is essential to the security of liberty: . . . .*
>
> ***The Federalist*, No. 1**

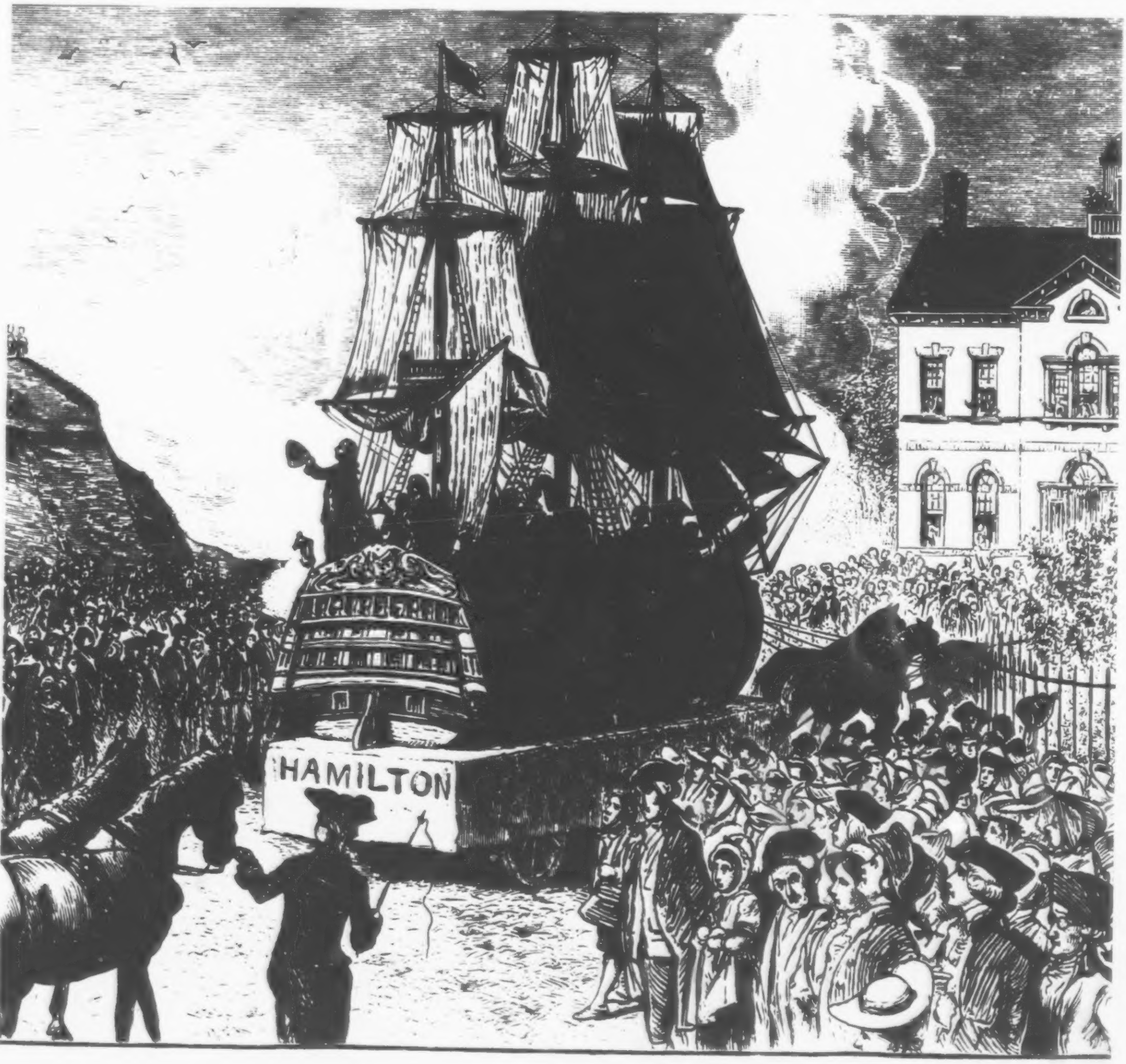
> *It was a thing hardly to be expected, that in a popular revolution the minds of men should stop at that happy mean, which marks the salutary boundary between POWER and PRIVILEGE, and combines the energy of government with the security of private rights. . . . The citizens of America have too much discernment to be argued into anarchy. And I am much mistaken if experience has not wrought a deep and solemn conviction in the public mind, that greater energy of government is essential to the welfare and prosperity of the community. . . .*
>
> ***The Federalist*, No. 26**

Precisely because it was in large measure a disquisition on political philosophy, *The Federalist* presumably had little effect on the great majority of delegates to the state ratifying conventions, including the one that convened in Poughkeepsie, New York on June 17, 1788. With the approval of New Hampshire some four days earlier, the requisite nine states had ratified the proposed constitution. It was now officially adopted. But the successful establishment of a new government was still problematic: it depended on ratification by New York and Virginia where opponents to the Constitution appeared to be in a majority and invincible. This was particularly true of New York where in the vote for delegates to the state convention the Antifederalists won all but four of the state's counties. Hamilton, who had been elected a delegate from New York City, was among the Federalist leaders who sought to reverse this antiunionist sentiment.

One all-important consideration, implicit from the outset of the convention proceedings, provided a glimmer of hope: Despite the Clintonians' distrust of a strong union, they were understandably troubled by the consequences of New York's self-imposed isolation from its sister states. Uncertain that such anxiety might in the end oblige the Clintonians to approve the Constitution, Hamilton chose to rely instead on the efficacy of his own eloquence. In speech after speech he tried to allay

Antifederalist fears of the national government's usurpation of power under the Constitution which he depicted as the only alternative to chaotic disunion and perhaps anarchy. Hamilton's performance at Poughkeepsie was impressive, particularly his persuasive refutation of his antagonist's arguments. To counter the Clintonians' insistence on the anti-democratic nature and centralizing drift of the new Constitution, Hamilton, for example, pointed to the "truly republican principles of the Constitution."

. . . We have been told, that the spirit of patriotism and love of liberty are almost extinguished among the people; and that it has become a prevailing doctrine, that republican principles ought to be hooted out of the world. Sir, I am confident that such remarks as these are rather occasioned by the heat of argument, than by a cool conviction of their truth and justice. . . . I [have not] discovered any diminution of regard for those rights and lib-



the Hamilton, float in New York City's ratification parade, from Martha Lamb, History of New York City. *Courtesy of The New-York Historical Society, New York City.*

> *erties, in defence of which, the people have fought and suffered. . . . the principles of republicanism are founded on too firm a basis to be shaken. . . . I am flattered with a hope, Sir, that we have now found a cure for the evils under which we have so long labored. I trust, that the proposed Constitution affords a genuine specimen of representative and republican government—and that it will answer, in an eminent degree, all the beneficial purposes of society.*

Papers of Alexander Hamilton, V, 44-45

But in view of the Antifederalists' focus on state sovereignty as the essential bulwark of political freedom, Hamilton's major purpose was to refute the argument that a viable central government would diminish or perhaps demolish state power and at the same time to insist on the supremacy of Federal authority should there be a conflict of interest or laws.

> *The state governments possess inherent advantages, which will ever give them an influence and ascendency over the national government; and will forever preclude the possibility of federal encroachments. That their liberties indeed can be subverted by the federal head, is repugnant to every rule of political calculation. Is not this arrangement then, Sir, a most wise and prudent one? . . .*
>
> *Gentlemen, in their reasoning, have placed the interests of the several states, and those of the United States in contrast. This is not a fair view of the subject. They must necessarily be involved in each other. . . . The local interests of a state ought in every case to give way to the interests of the Union: For when a sacrifice of one or the other is necessary, the former becomes only an apparent, partial interest, and should yield, on the principle that the small good ought never to oppose the great one. . . . There must be a perpetual accommodation and sacrifice of local advantage to general expediency. . . .*
>
> *[Nevertheless] Gentlemen indulge too many unreasonable apprehensions of danger to the state governments. . . . The state governments are essentially necessary to the form and spirit of the general system. . . .*

Papers of Alexander Hamilton, V, 26, 70

The debates in the New York Convention droned on day after day, even after news was received that Virginia had become the tenth state to ratify the Constitution. Nevertheless, the play being staged at Poughkeepsie was inexorably reaching a denouement that the most stalwart Antifederalists, even as they continued to act their self-assigned roles, must have dimly perceived. Finally, on July 26 the Convention, which at the outset had counted a majority of two to one against adoption, unconditionally ratified the new Constitution by a vote of thirty to twenty-seven. What was responsible? The most satisfactory answer was offered by Antifederalist leader Melancton Smith who explained that the frightening alternative to ratification would have been "convulsions" in the Southern section of the state, "faction and discord" in the rest.

Even before their state's ratification, the citizens of New York City had begun preparations for an elaborate parade to celebrate the formation of a new national government. It was held on July 23, three days preceding ratification by the Poughkeepsie convention. Although that expected event could, as has been indicated, be attributed to any number of abstract causes, to New York City Federalists it was due to one person: Alexander Hamilton. Thus it was that the grandest float in the City's victory march was an impressive replica of a sea-going vessel manned by thirty seamen, drawn by ten horses and named in honor of the man whose figure was carved on its prow: the *Hamilton*.

Sources:

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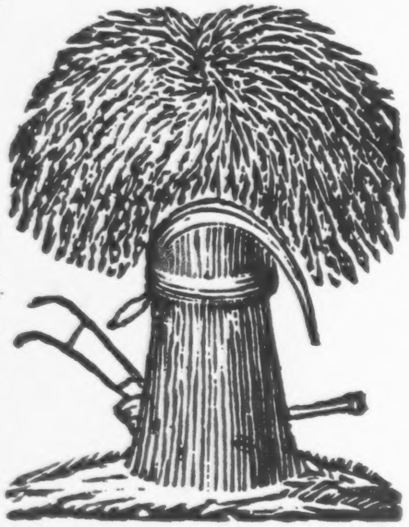
Jacob E. Cooke, ed., *The Federalist* (1961).

Jacob E. Cooke is John Henry MacCracken Professor of History at Lafayette College. He was associate editor of the initial fifteen volumes of *The Papers of Alexander Hamilton* (Columbia University Press, 1961-1969) and is the author of *Alexander Hamilton*, a biography published by Charles Scribner's Sons in 1982.

For the Classroom

THE WHISKEY REBELLION: A TEST OF FEDERAL POWER



*The lesson which follows has been designed for use in the high school classroom, in courses which teach American history and government. It is one of sixty lessons developed by Project '87 with a grant from the National Endowment for the Humanities. This lesson may be photocopied for classroom application with the attribution noted on page 1. It has been edited for inclusion in **this Constitution**.*

*The complete book of **Lessons on the United States Constitution** will be published in June. See the advertisement on p. 53 for information on how to order the lessons. The lessons were designed and developed by John J. Patrick of the Social Studies Development Center, Indiana University, and Richard Remy of the Citizenship Development Program, Ohio State University. Paul Finkelman of the State University of New York, Binghamton, served as consulting historical editor.*

*Project '87 would like to hear of other curriculum materials on the Constitution developed for all grade levels, but especially pre-collegiate. We will consider publishing samples in this section of the magazine. Please contact **this Constitution,** 1527 New Hampshire Avenue, N.W., Washington, D.C. 20036. Attention: Educational materials.*

In the 18 years after declaring independence, the United States could be proud of two great achievements. It had won freedom from Britain and had created a marvelous system of government, unlike any other. But 1794 brought troubles that threatened to undo these hard-won gains. Money was the root of the problem.

The new federal government had huge debts. Millions of dollars had been borrowed from private citizens and foreign governments. State governments had also borrowed from citizens. The new national government decided to take on all these debts, including those of the states; the total was about $80 million. In the 1790s, that was an almost unbelievable amount of money. Someone had to come up with a plan to pay back that money and keep the government from going bankrupt. That task fell to Alexander Hamilton, our first Secretary of the Treasury and an advisor to President Washington.

An Excise

An excise was one part of Hamilton's overall plan to pay our debts. An excise is an internal tax on the manufacture, sale or consumption of a commodity within a country.

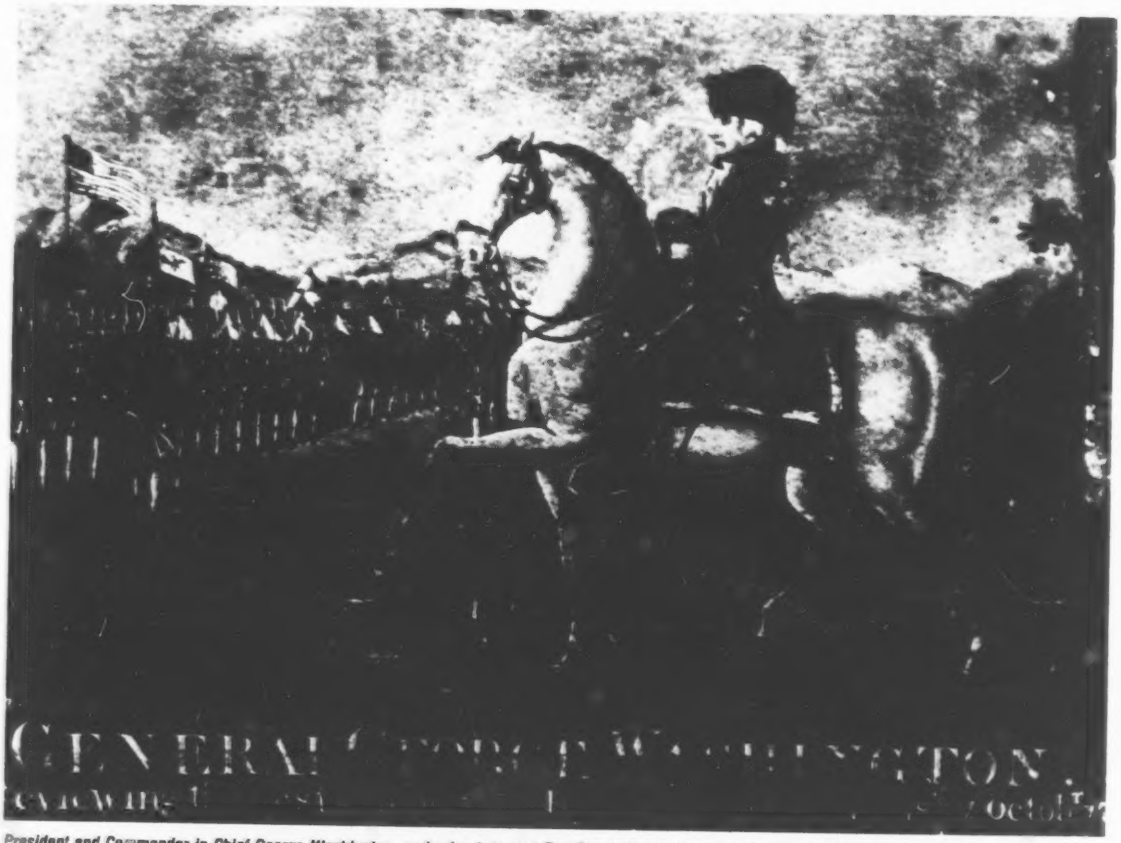
Hamilton realized that excises were unpopular. Britain's attempt to lay an excise (the Stamp Act of 1765) was repealed in the face of united colonial opposition. Yet Hamilton found other alternatives for raising money unappealing. If taxes were raised on property, the wealthy Easterners would complain. Without the support and commitment of America's wealthy class, Hamilton did not see how the nation would survive economically. If he raised tariffs (taxes on imports), smuggling would be encouraged and trade with foreign countries would slow down; this would also hurt America's industries, as well as its merchants. So Hamilton persuaded Congress to pass the Excise Act in March of 1791. Both Republicans and Federalists voted for the law which established a tax on stills and distilled liquor.

Farmers React to the Excise

The Farmer's Situation. Beyond the Appalachian Mountains was a frontier settled by farmers who grew many crops, including grains. Whatever extra grain they would harvest could buy other necessities of frontier life. Transportation was a real problem, though. It was too expensive to ship bulky grain by mule over the mountains and to the east; the Mississippi River, held by Spain, was closed to Americans. So the only answer was to use the grain to distill whiskey. Grain as whiskey was much more portable, and many western farmers maintained stills. The liquor became a kind of currency of its own when traded for axes and fabric and the like.

In western Pennsylvania, the Excise Act of 1791 hit the farmers of Washington County like a lightning bolt. It affected their only exportable product, and the duties were oppressively high—about 25 percent of the farmer's already small profits from the sale of the liquor. Moreover, cash with which to pay the tax was in short supply in the West, where whiskey, tobacco, and other products often circulated as currency. The farmers of Washington County, Pennsylvania, decided to defy the law. They would not pay the Whiskey Tax!

The Whiskey Rebellion Begins. In September of 1791, representatives of the farmers met in Pittsburgh to draft a protest to be sent to the president. Lacking agreement on a course of action, the meeting adjourned, but the protest grew. Local leaders in western Pennsylvania vowed to obstruct the operation of the law and outbreaks of violence and rioting took place in Pennsylvania and elsewhere. In response, President Washington issued a proclamation announcing the federal government's intention to enforce the law, but no official addressed the funda-



President and Commander-in-Chief George Washington, reviewing troops at Fort Cumberland, Maryland, October, 1794, in preparation for quelling the Whiskey Rebellion. Painting by Frederick Kemmelmeyer. Library of Congress.

mental grievance of the farmers—that the United States was taxing their only cash product and apparently giving them nothing in return. For three years farmers refused to pay the tax and regularly sent petitions and protests, which were ignored. President Washington was deeply troubled by this defiance of federal law, but he was also reluctant to use force to compel the farmers to pay the tax.

In July of 1794, John Neville (excise inspector for Washington County) and David Lenox (a federal marshal) tried to serve a summons ordering a farmer to appear in federal court in Philadelphia. At that moment, a group of armed farmers arrived, forcing a hasty retreat by these federal officials. Followed to his estate by the farmers, Neville found himself under siege. About one hundred farmers assaulted Neville's home. He defended the premises himself on the first day, but on the second, the number of assailants had grown to five hundred, and about a dozen militia arrived to help Neville, who escaped. The militia tried to defend the house, but in the end, they were overpowered by the farmer-distillers, who set fire to the barn, outbuildings, fences, and, finally, the house itself. One farmer, James McFarlane, was killed, and a number of men on each side were wounded. David Lenox was held captive for a while.

By August 2, 1794, five thousand whiskey-makers were assembled outside of Pittsburgh, led by David Bradford, a lawyer. Throughout the month, meetings took place in western Pennsylvania protesting the excise. The majority of the people in the region supported the farmer-distillers. Alexander Hamilton, who had advocated the use of force in 1792, now urged the president to suppress the protest by leading an army against the demonstrators.

The Federal Government Responds to the Whiskey Rebellion

Repeal or Enforce the Law? The Constitution and all laws made according to the Constitution were supposed to be "the supreme law of the land" (Article VI, paragraph 2). That principle was being challenged. The federal government had to exercise its constitutional duty to enforce the law. If it did not, it would appear to be as weak as the government under the Articles of Confederation. Hamilton urged the president to act quickly. He feared that if the president did not see that the law was enforced, the whole foundation of the national government would be undermined. He may even have looked forward to the conflict as a test of the authority of the Federal government over the states. If strong action were taken, the supremacy of the federal law and of the central government would be demonstrated, and the incipient rebellion in the West would be quelled. The only alternative would be to repeal the law; the government could not afford to have a law on the books that it could not enforce.

The President's Predicament. President Washington agreed with Alexander Hamilton that it was necessary to enforce the nation's laws. However, many considerations made speedy action difficult.

First, he feared that using troops against the western farmers would meet with a very unfavorable reaction from the public. Alexander Hamilton had many opponents, Thomas Jefferson among them, who claimed that Hamilton's heavy-handed approach showed his bias against the farmers in favor of urban, wealthy Easterners. Hamilton never really believed that common people could govern themselves. What he really wanted, they claimed, was to create an American monarchy. If the president followed Hamilton's advice, people would say that King George III had just been replaced by King George Washington. What would foreign countries think about us then? Therefore, Washington did not want to use force until public opinion supported his doing so.

Second, many public officials opposed using force, including the governor of Pennsylvania, Thomas Mifflin. Article IV, Section 4, of the Constitution states: "The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; *and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.*" (emphasis added) The governor of Pennsylvania had not convened the legislature to ask, nor had he himself asked, for federal assistance in dealing with the tax resisters. But Mifflin was a Republican, and Hamilton believed that the governor wanted to see the Federalists who were in national office embarrassed.

The president had another option: Article I, Section 8, Paragraph 15, of the Constitution allowed Congress "To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions," and Congress had passed the Militia Act of 1792 to implement this section. However, the act required that a federal judge certify that the court system was not functioning adequately before the president could nationalize the militia. Washington could not provide that evidence.

The President's Decision. Washington realized that the federal government could not move troops into Pennsylvania without the support of the state's government. Therefore, he arranged a meeting with Pennsylvania's governor and other state officials. The participants came to agreement that the federal government would delay military action until state officials could negotiate with the rebels.

On August 4, Supreme Court Justice James Wilson, a political ally of President Washington's, certified that the situation in Pennsylvania warranted nationalizing the militia. In the next two days, Washington put out a preliminary call to the militia and appointed a federal commission to negotiate with the rebels. On August 7, he also issued a proclamation ordering rebellious citizens to end their "treasonable acts" and announcing his intention to mobilize the militia. (Washington's proclamation appears at the end of the lesson.)

The commissioners appointed by Washington (which included two Pennsylvania state officials) left immediately for western Pennsylvania. Although they had authority to grant amnesty and to forgive unpaid taxes, the information they obtained led them to believe radicals controlled the farmers and were threatening violence and intimidation. Their reports convinced Hamilton and Washington to mobilize.

On September 9, the president ordered the militia to assemble to put down what he now saw as a real rebellion. Governor Mifflin of Pennsylvania cooperated fully with the president. Public opinion was now enthusiastically behind the president's actions. When 12,800 men had been assembled from four states, a larger force than he had ever commanded in the Revolution, Washington placed them under the command of General "Light-Horse Harry" Lee (father of Robert E. Lee, Confederate general during the Civil War).

The president accompanied his troops westward to Bedford, Pennsylvania, before returning to Philadelphia. This was the only time in American history that a president, as commander-in-chief, has ever taken the field with his army. Alexander Hamilton, in uniform, also rode with the troops. To their surprise, however, they were met with no resistance. No battles were fought. Leaders of this "rebellion" had vanished across the Ohio River, and only a handful of prisoners were taken. In the end, General Lee offered amnesty to all but 51 men; of these, only two were convicted of treason, and they were both pardoned by President Washington.

The Results: The Supremacy of Federal Law is Affirmed

Some Americans still objected to Washington's decision. Thomas Jefferson denounced the government's use of force against this so-called rebellion. His sympathies had always been with the farmers. He feared the power of wealthy city dwellers. He also believed that the new federal government (if too strong) would abuse its power. Not surprisingly then, Jefferson claimed that "an insurrection was announced and proclaimed and armed against, but could never be found." But Hamilton pointed to the danger of under-estimating civil disorder:

> Beware of magnifying a riot into an insurrection by employing in the first instance an inadequate force. 'Tis better far to err on the other side. Whenever the government appears in arms, it ought appear like a *Hercules*, and inspire respect by the display of strength. The consideration of expense is of no moment compared with the advantages of energy.

As the years passed, the conditions leading to the Whiskey Rebellion disappeared. The Mississippi River was opened to Americans in 1795 (Pinckney's Treaty), so farmers could now ship grain and did not have to convert it to whiskey. A victory by U.S. troops over the native Americans, which resulted in the Treaty of Greenville (also 1795), made the frontier safer and persuaded Western farmers that the national government did take their concerns seriously. The Excise Act was repealed when Thomas Jefferson became president. What did not disappear, though, was a key principle of our Constitution—the supremacy of the Constitution and federal laws made under it.

The principle of federal supremacy had been upheld in the Whiskey Rebellion. It showed that the federal government could enforce laws passed by Congress, even to the point of bringing troops under federal command into the state or states where the law was being ignored. As history records, though, there would be more challenges to federal supremacy as our nation grew through the 1800s.

Reviewing Facts and Main Ideas

1. Why did Alexander Hamilton believe an excise was necessary?
2. For what reasons were the farmers of western Pennsylvania opposed to the whiskey tax?
3. When farmers refused to obey the law, how did Hamilton think the national government should respond? Why?
4. What did Thomas Jefferson think about the use of force by the national government? Why?
5. For what reasons was President Washington reluctant to use force against the "rebels"?
6. How was the Whiskey Rebellion finally ended?
7. What important constitutional principle was supported by Washington's decision to put down the Whiskey Rebellion?

Analyzing a Document

Examine the document that follows. Use the information in the document to help you answer the following questions.

1. Washington claimed that the "rebellious" farmers of western Pennsylvania were committing acts of treason.
   a. How does he support that claim in his proclamation? (Check Article III, Section 3 in the Constitution to find the definition of treason.)
   b. Do you think Washington is justified in applying the term "treason" to the events of July 16 and 17? Why or why not?
2. How do we know that Congress must not have been in session on August 7, 1794?
3. Every law passed by Congress and signed by the president must, of course, be constitutional in order to be upheld. What leads you to believe that the law described in the proclamation *is* constitutional?
4. In the United States, no one is supposed to be above the law. What evidence is there that Washington is obeying the law he describes in the proclamation?

Using Decision-Making Skills

1. What was the occasion for Washington's decision?
2. What alternatives were open for President Washington in this case?
3. What were the likely consequences for each of the President's alternatives?
4. What were Washington's most important goals or values in this situation?
5. Why did Washington decide on the actions he finally took?
6. How would you judge Washington's decision in this case? Did he make a good decision? Explain your answer.

DOCUMENT

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA
A PROCLAMATION

Whereas combinations to defeat the execution of the laws laying duties upon spirits distilled within the United States and upon stills have from the time of the commencement of those laws existed in some of the western parts of Pennsylvania; and....

Whereas many persons in the said western parts of Pennsylvania have at length been hardy enough to perpetrate acts which I am advised amount to treason, being overt acts of levying war against the United States....

Whereas by a law of the United States entitled "An act to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions," it is enacted "that whenever the laws of the United States shall be opposed or the execution thereof obstructed in any State by combinations too powerful to be suppressed by the ordinary course of judicial proceedings or by the powers vested in the marshals by that act, the same being notified by an associate justice or the district judge, it shall be lawful for the President of the United States to call forth the militia of such State to suppress such combinations and to cause the laws to be duly executed. And if the militia of a State where such combinations may happen shall refuse or be insufficient to suppress the same, it shall be lawful for the President, if the Legislature of the United States shall not be in session, to call forth and employ such numbers of the militia of any other State or States most convenient thereto as may be necessary; and the use of the militia so to be called forth may be continued, if necessary, until the expiration of thirty days after the commencement of the ensuing session: *Provided always*, That whenever it may be necessary in the judgment of the President to use the military force hereby directed to be called forth, the President shall forthwith, and previous thereto, by proclamation, command such insurgents to disperse and retire peaceably to their respective abodes within a limited time;" and

Whereas James Wilson, an associate justice, on the 4th instant, by writing under his hand, did from evidence which had been laid before him notify to me that "in the counties of Washington and Allegany, in Pennsylvania, laws of the United States are opposed and the execution thereof obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings or by the powers vested in the marshal of that district;" and

Whereas it is in my judgment necessary under the circumstances of the case to take measures for calling forth the militia in order to suppress the combinations aforesaid, and to cause the laws to be duly executed; and I have accordingly determined so to do, feeling the deepest regret for the occasion, but withal the most solemn conviction that the essential interests of the Union demand it, that the very existence of Government and the Fundamental principles of social order are materially involved in the issue, and that the patriotism and firmness of all good citizens are seriously called upon, as occasions may require, to aid in the effectual suppression of so fatal a spirit:

Wherefore, and in pursuance of the proviso above recited, I, George Washington, President of the United States, do hereby command all persons being insurgents as aforesaid, and all others whom it may concern, on or before the 1st day of September next to disperse and retire peaceably to their respective abodes. And I do moreover warn all persons whomsoever against aiding, abetting, or comforting the perpetrators of the aforesaid treasonable acts, and do require all officers and other citizens, according to their respective duties and the laws of the land, to exert their utmost endeavors to present and suppress such dangerous proceedings....

Done at the city of Philadelphia, the
7th day of August, 1794, and of the Independence of the United States of America
the nineteenth.

G. Washington

LESSON PLAN AND NOTES FOR TEACHERS

Preview of Main Points

In this lesson, students view in some detail the circumstances and events of the Whiskey Rebellion of 1794. While a careful chronological account is presented, the focus is on President Washington's decision whether or not to intervene with force, a decision to be based on the arguments outlined in this account. The point is made that the principle of federal supremacy was a basic source of conflict in the new nation.

Connection to Textbooks

Many standard texts do mention the Whiskey Rebellion and some of them identify federal supremacy as the principle at issue. Unfortunately, treatment of this historical event is brief and superficial. This lesson improves textbook accounts by placing the Rebellion in a decision-making context. Viewing real political actors engaged in decision-making spotlights the human side of history. Student interest is stimulated by the drama that human dilemmas generate. The opposing viewpoints expressed in the aftermath of the Rebellion remind the student of the on-going philosophical conflict between Thomas Jefferson and Alexander Hamilton.

Objectives

Students are expected to:

1. explain the economic circumstances leading to imposition of the whiskey tax;
2. describe the reasons for opposition among whiskey distillers of western Pennsylvania;
3. enumerate the opposing arguments Washington weighed in arriving at his decision to use force;
4. make judgments about the president's characterization of farmers' actions based on documentary evidence;
5. identify links between events of the Rebellion and constitutional principles through documentary analysis;
6. make defensible judgments about Washington's decision.

Suggestions for Teaching the Lesson

The lesson is conceived of as an opportunity for in-depth study. Where textbook readings refer to the Rebellion, you can refer to that assignment as a lead-in to this case study. If your text omits this episode, any textual discussion of Washington's first term would be an appropriate starting place.

Opening the Lesson

- Begin the lesson by asking students to answer these questions: (1) What might happen to a government that proclaims laws, but does not strictly enforce them? (2) When, if ever, should the head of a government decide not to enforce a law?
- Use discussion of the preceding questions to introduce the case study about President Washington's decision

to put down the Whiskey Rebellion. Indicate that the president was faced with a decision in 1794 about whether or not to enforce an unpopular federal law.

Developing the Lesson

- Ask students to read the case study about Washington and the Whiskey Rebellion.
- Conduct a discussion of the questions following the heading "Reviewing Facts and Main Ideas." Make sure that students understand the main ideas about the origins and resolutions of this critical situation. Emphasize that Washington's decision upheld an important constitutional principle—the supremacy of the Constitution and federal law within the federal system of government.
- Extended excerpts from Washington's proclamation are provided as an additional resource for students. You might first have students check to see that the narrative account of events in the case study coincides with the account given by the president. Are there details in the Proclamation not provided in the narrative?
- The student might next find the particular constitutional passages referred to in the "Analyzing a Document" section and assess how well the proclamation is grounded in the Constitution. It is apparent, as well, that Washington laid out his justification for action very carefully in this document; you might have students assess the document's detail and the President's reasons for being so meticulous, particularly with respect to Congress' role in resolving the Rebellion.
- Use the questions under the heading "Analyzing a Document" to conduct a discussion of main ideas in Washington's "Proclamation."

Concluding the Lesson

- Have students use the questions under the heading "Using Decision-Making Skills" to guide their analysis of Washington's decision.
- Conduct a class discussion about Washington's decision. Discuss what would have happened to the government and the Constitution if Washington had made some other decision.
- Have students make judgments about Washington's decision.
- Conclude the lesson by presenting the following ideas to students.

The Whiskey Rebellion is not only linked in the past in Shays' Rebellion but may be linked as well to critical events in the decades to follow. The supremacy of federal law was challenged again by South Carolina's 1832 Ordinance of Nullification, declaring void the tariff acts of 1828 and 1832. This time, the threat of secession was attached to any use of federal force.

About 65 years after the Whiskey Rebellion, and one day after Ft. Sumter surrendered, President Lincoln issued a proclamation whose wording is remarkably similar to Washington's. (See the excerpt that follows.) Federal supremacy was again challenged by a rebellion, but the circumstances were considerably more complex and the problems more intractable. The consequences of Lincoln's decision were a good deal different from those of his predecessor, three score and seven years earlier. They were associated with the beginning of the tragic Civil War.

BY THE PRESIDENT OF THE UNITED STATES
A PROCLAMATION

Whereas the laws of the United States have been for some time past and now are opposed and the execution thereof obstructed in the States of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas by combinations too powerful to be suppressed by the ordinary course of judicial proceedings or by the powers vested in the marshals by law:

Now, therefore, I, Abraham Lincoln, President of the United States, in virtue of the power in me vested by the Constitution and the laws, have thought fit to call forth, and hereby do call forth, the militia of the several states of the Union to the aggregate number of 75,000, in order to suppress said combinations and to cause the laws to be duly executed....

Done at the city of Washington,
this 15th day of April, A.D. 1861,
and of the Independence of the
United States the eighty-fifth.

Abraham Lincoln

Suggested Reading

Flexner, James Thomas. *Washington: The Indispensable Man* (New York: The New American Library, A Mentor Book, 1974), pp. 315-323.

Morris, Richard B. *Great Presidential Decisions: State Papers That Changed the Course of History* (New York: Harper & Row, Publishers, Perennial Library, 1973), pp. 21-27.

Bicentennial Gazette

The Framers of the Constitution: Virginia

This description of the Virginia delegation to the Constitutional Convention is the second in a series of articles on each of the twelve participating states. It was written by Perry Frank.

Virginia, the largest and most populous state in 1787, sent an extraordinarily distinguished delegation of seven men to Philadelphia. They were George Washington, formerly commander-in-chief of the Continental Army and the most acclaimed man in America; James Madison, political philosopher who became the principal architect of the Constitution; Edmund Randolph, governor of Virginia; George Mason, Virginia statesman and states' rights advocate; George Wythe, legal scholar; John Blair, Virginia judge and legislator; and James McClurg, a prominent Williamsburg physician. Revolutionary patriots Patrick Henry and Richard Henry Lee were originally chosen as delegates, but both declined because of their deep suspicions of a stronger national government. Thomas Jefferson, who would certainly have been named as a delegate if available, was serving as minister to France. The ages of the Virginia delegates at the time of the Convention ranged from Randolph's thirty-three to Mason's sixty-two.

At the urging of Madison, the Virginia delegates used the time waiting for a quorum to arrive in Philadelphia to prepare the proposals known as the Virginia Plan. The plan became the agenda for the Convention debate, and much of the strongly profederal blueprint was ultimately incorporated into the Constitution. However, elements of the proposal proved divisive to the Virginia delegation. With backing from James Wilson of Pennsylvania and Alexander Hamilton of New York, Madison argued for a strong national government against states' rights advocates—including Mason—who distrusted so much central authority and objected to representation based on population alone.

Madison, Randolph, Mason, and Blair remained until the end of the Convention and attended virtually all the sessions; George Wythe left in early June, and James McClurg followed in July. Only Washington, Madison, and Blair among the Virginia delegates actually signed the Constitution; Mason and Randolph declined because of reservations about the document, while Wythe and McClurg had already left.

George Washington, considered the first citizen of his country in 1787, was born in 1732 into a family of landed Virginia gentry. His early education was casual, but he developed an interest in mathematics and surveying. In 1753 he began his military career as a major in the regiment that was fighting the French in Pennsylvania. By 1755 he had achieved the rank of colonel and was commanding the Virginia forces in defense of the colony's frontier. In 1759 he returned to Mount Vernon, where he settled down to manage his estate and assumed a seat in the House of Burgesses.

Washington supported early protests against British policies; because of his military experience, he became a Whig leader and represented Virginia in the First and Second Continental Congresses. He was appointed commander-in-chief of the Continental forces in 1775 and waged the long and debilitating war for independence which officially ended with the Treaty of Paris in 1783. Following the war, Washington resigned his command and returned to Mount Vernon.

Washington became impatient with the government under the Articles of the Confederation and advocated a stronger central authority. He hosted the Mount Vernon Conference in 1785 and sympathized with, but did not attend, the Annapolis Convention the next year. At the Constitutional Convention in 1787, Washington was unanimously chosen to be presiding officer on the opening day of the debate.

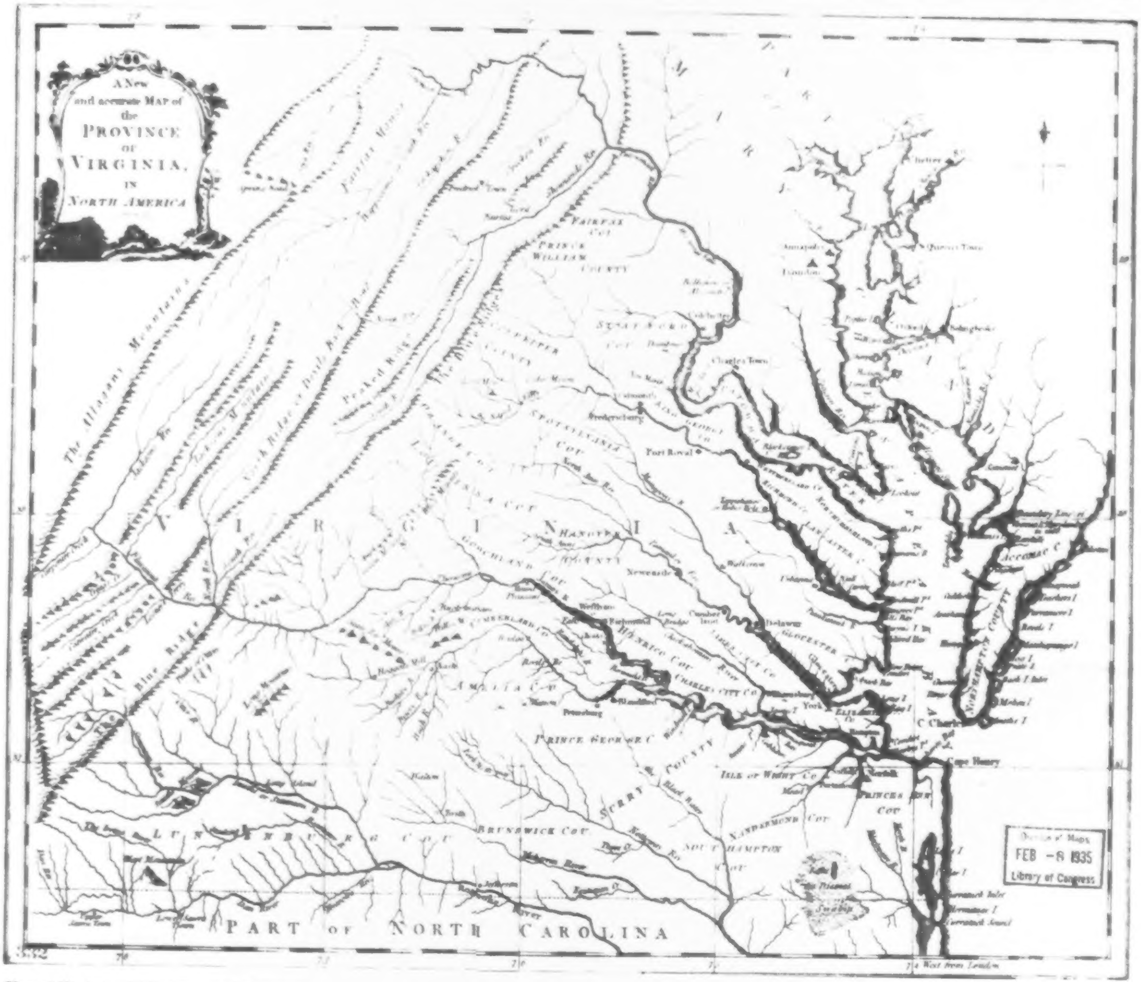
As president of the Convention, Washington lent dignity and authority to the proceedings, although he remained silent throughout the deliberations as he thought befitted his role. However, his strong profederalist sentiments were known and he voted with Madison and Blair on measures to strengthen the federal government. Imposing a strict rule of secrecy on the delegates, he was able to prevent advance word of the course of the debates to reach public or press, thus averting destructive influence and pressure. The general assumption that Washington would be the first president under the new system was a factor in securing the ultimate ratification of the Constitution.

As expected, the electoral college unanimously elected Washington the first president of the United States in 1789. During his two terms in office he provided a model of official decorum and moral rectitude. Washington retired to Mount Vernon in 1797 and died in 1799 at the age of 67.

James Madison was born in 1751, scion of an influential planter family. He studied government and law at Princeton, and after graduation in 1771 he remained for an additional year to read theology. He immersed himself in political philosophy and became an expert on theories of government.

A revolutionary patriot, Madison involved himself heavily in state and local politics. In 1776 he attended the Virginia convention and helped to frame the state constitution. Ill-health precluded military service, but in 1776–80 he served on the Council of State. During the 1780s he sat in both the Virginia legislature and the Continental Congress, and he was the guiding force behind the Mount Vernon Conference of 1785. He attended the Annapolis Convention of 1786, and, along with Alexander Hamilton, was instrumental in convening the Constitutional Convention the following year.

Madison can rightly be called the "father of the Con-


A New and accurate Map of the Province of Virginia, in North America
The Allegany Mountains
Blue Ridge
Fairfax Cou
Prince William County
Stafford Cou
Spotsylvania Cou
Port Royal
Fredericksburg
Hanover County
Goochland Cou
Henrico Cou
Charles City Co
Amelia Co
Prince George C
Surry County
Isle of Wight Co
Brunswick Cou
Nansemond Cou
Southampton Cou
Princess Ann Cou
Accomac Co
Northampton County
Cape Henry
Annapolis
Lunenburg Cou
Part of North Carolina

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Library of Congress

Map of Virginia, 1779. Library of Congress.

stitution" because it was he who developed the Virginia Plan which became the basis, albeit with many changes, of the document as approved. The plan called for a much stronger federal government, with a single chief executive, a bicameral legislature, representation according to population, and authority of the national government to veto state laws. He was extremely active in the debates themselves, taking the floor 150 times and serving on several committees. In addition, he kept a detailed journal of the proceedings, by far the most complete record of the Convention.

Following the Convention, Madison was important in securing ratification of the Constitution, guiding the proposal through Congress so that it could be placed before the states for approval as soon as possible. He led the ratification movement in Virginia, defending the Constitution against opponents Patrick Henry, George Mason, and Richard Henry Lee. With Hamilton and Jay, he authored *The Federalist*, the series of brilliant expositions of constitutional principles that influenced ratification in both Virginia and New York.

Continuing his public service in the new government, Madison served in the U.S. House of Representatives from 1789–97, where he helped to frame the Bill of Rights, to organize the executive branch, and to set up a system of taxation. In 1801, he became Jefferson's Secretary of State, and in 1809 he succeeded Jefferson as the fourth president of the United States. He presided over the War of 1812, which culminated in the Treaty of Ghent in 1814 and ushered in a period of jubilant nationalism.

After his retirement in 1817, Madison managed his estate and edited his journal of the Convention. In his final years, he spoke out against the rising sectional controversy and was active in the American Colonization Society, an organization devoted to resettlement of slaves in Africa. He died in 1836 at the age of 85.

Edmund Randolph, governor of Virginia at the time of the Convention, was born in 1753 into a wealthy and elite Virginia family. He studied literature and classics at the College of William and Mary and set up to practice law after he graduated in 1771. However, events overtook him and he became aide-de-camp to Washington in 1775. In 1776, he was elected delegate to the Virginia constitutional convention and, although its youngest member, served on the drafting committee along with Mason, Madison, and Henry.

Randolph became the first attorney general under the Virginia constitution and also served in the Continental Congress in 1779. In 1786 he succeeded Patrick Henry as governor of Virginia. He attended the Annapolis Convention of 1786 and was probably influential in convincing George Washington to participate in the Constitutional Convention the following year.

At the Convention in 1787, Randolph made important contributions. He opened the deliberations by introducing Madison's "Virginia Plan" and penned the first version of the Constitution while serving on the Committee on Detail; in that role, he was responsible for assigning the specific powers of Congress.

While Randolph was critical of the weak confederacy, he was leery of concentrating too much power at the national level. In order to dilute the effect he argued for a plural chief executive and other limitations on executive and legislative authority; he also advocated a second convention to be held after states had had a chance to propose their individual amendments.

Although opposing Washington and Franklin troubled him, Randolph declined to sign the Constitution, while reserving the right to support it later after further thought. He published his objections in 1788 but spoke for ratification in Virginia, drawing charges that Washington had promised him an office in the new government. In 1789 Randolph was appointed first attorney general of the United States, and in 1794 he succeeded Jefferson as Washington's secretary of state. He resigned after a difficult year amidst accusations of official impropriety.

Randolph returned to his Virginia law practice and subsequently defended Aaron Burr at his trial for treason. During his later years he was occupied with writing a history of Virginia. He died in 1813 at the age of 60.

George Mason, friend and neighbor of George Washington, was born in Virginia in 1725. His father died when he was 10, and he was trained in law by his uncle. Although never licensed as an attorney, he was often called upon for legal opinions and services. Early in his career he invested in the Ohio Company, an association which developed into a lifelong interest in the West.

Mason was active in county affairs and served in the House of Burgesses in 1759. However, he expressed distaste for the job, writing Washington that he was so vexed as to be "sometimes near fainting in the House." A member of the Virginia constitutional convention of 1776, he authored much of the state's constitution and the Declaration of Rights; he also took an active part in revising the Virginia statutes. In 1777, he attended the Continental Congress but then retired to his estate and did not participate in politics again until the constitutional debates of the next decade. Although absent from public life for ten years, he was the center of a circle that included Jefferson, Madison, Monroe, and Randolph.

Mason was an active participant in the Mount Vernon meeting of 1785, but he did not attend the Annapolis Convention the next year. At the Constitutional Convention in 1787, he attended every session, forcefully stating his views. Although he advocated a more effective confederation, he had serious doubts about the Constitution as proposed by fellow-delegate Madison in the Virginia Plan. His chief objection centered around the extension of the slave trade for another twenty years. He also found the document too susceptible to tyranny, finally supporting the rival New Jersey plan, which would have vested less power in the federal government. Like Randolph, Mason wanted a second convention to be held following state review.

Mason refused to sign the Constitution and joined Henry and Lee to oppose ratification in Virginia. He declined a nomination to the U.S. Senate and returned to his estate, where he died in 1792.

George Wythe was born on the banks of the Chesapeake in 1726. His father was a comfortable farmer, and his mother had studied classics. He was educated at home and at William and Mary grammar school; after reading law he was admitted to the bar in 1746.

Following several years of practice during which he was said to be indulging in "the amusements and dissipations of society," he took up a more serious study of law and became a premier legal scholar. He served in the House of Burgesses during most of the period from 1754–75. A signer of the Declaration of Independence, he became speaker of the Virginia House of Delegates in 1777. With Jefferson, Pendleton, Mason, and Lee he undertook a massive review of Virginia law and was subsequently appointed to high judicial posts in the state. Wythe occupied the first chair of law in America, established at the College of William and Mary in 1779.

At Philadelphia in 1787, Wythe attended the sessions regularly for the brief time he was there, and sat on the Rules Committee. He left Philadelphia June 4 to attend his dying wife. Upon his departure, he left £50 to be distributed as needed to delegates who ran low on funds.

Wythe strongly supported the Constitution and worked for its ratification in Virginia. Following the Convention he was chosen as a presidential elector three times, and in later years many government officials sought his counsel. A lifelong abolitionist, he emancipated his slaves upon his death in 1806, allegedly at the hand of a grand-nephew overeager for his inheritance.

John Blair was born into a prominent Virginia family in 1732. He graduated from the College of William and Mary, and after further study at London's Inner Temple he returned to Williamsburg to practice law.

In the 1760s and 1770s Blair held various state offices. An early patriot of the Revolution, he attended the Virginia constitutional convention in 1776 and sat on the committee which drafted the new constitution and Declaration of Rights. In 1778, he received the first of several high judicial appointments.

At the Convention in 1787, Blair attended regularly but did not participate in the debates or serve on any committees. However, he usually voted with Washington and Madison on key issues, helping to secure the federalist majority for the Virginia delegation. He supported ratification in Virginia.

Following the Convention, Washington named Blair associate justice of the Supreme Court. He resigned in 1796 and retired to Williamsburg, where he died in 1800.

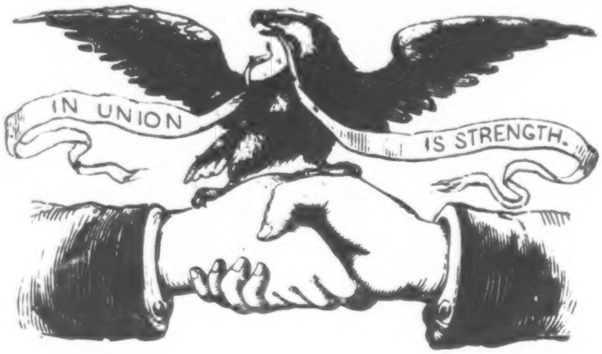
James McClurg, who was appointed to the delegation after Patrick Henry and Richard Henry Lee declined to serve, was born in Hampton, Virginia, in 1747. He graduated from William and Mary in 1762 and obtained his M.D. from the University of Edinburgh (Scotland) in 1770. After several more years of study in Europe, he returned to Williamsburg, where he became a prominent physician and served as physician general during the Revolution. From 1779 to 1783, McClurg occupied the chair of medicine at the College of William and Mary.

A rarity among Virginia gentlemen of the period, McClurg had no experience in politics. At the Convention, he attended regularly but served on no committees and spoke only three times. Perhaps feeling out of place, McClurg left Philadelphia in late July and returned to Williamsburg.

Following the Convention, McClurg continued his medical practice. He also served briefly on the Governor's Council and as director of the Bank of the United States. He died in 1823.

After a protracted and heated debate, Virginia became the tenth state to ratify the Constitution on June 25, 1788.

THE NATIONAL ENDOWMENT FOR THE HUMANITIES SPECIAL INITIATIVE FOR THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION



NEH Grants

Bibliographical Projects

American Antiquarian Society
Worcester, MA 01609
Project Director: Mr. John B. Hench
Project: The Conversion to MARC of Pre-1801 North American Imprints
Award: $265,000

Supports translation into machine-readable (MARC) format bibliographic information on AAS's collection of books, pamphlets and broadsides printed between 1640 and 1800 in the U.S., Canada, and the British West Indies.

Boston University
Boston, MA 02215
Project Director: Mr. John B. Armstrong
Project: Bibliographies of New England History
Award: $115,000

To support the preparation of a bibliography of printed works on Connecticut, the 6th volume in the 7-volume Bibliographies of New England History. It will join completed works on Massachusetts, Maine, Vermont, New Hampshire & Rhode Island. The final volume will cover New England in general.

Wayne State University
Detroit, MI 48202
Project Director: Professor Robert B. Winans
Project: Checklist of Book Catalogs in 18th Century American Newspapers
Award: $42,478

To support the preparation of a guide to book catalogs published as advertisements in 18th-century U.S. newspapers. This is one section of a tripartite project that will, when complete, provide information on all book catalogs that appeared in the U.S. from 1693 to 1800.

Conferences

Alaska Inst. for Research & Public Service
Anchorage, AK 99504
Project Director: Mr. James W. Muller
Project: The Political Theory of the American Constitution
Award: $29,422

University of California
Santa Barbara, CA 93106
Project Director: Prof. Walter H. Capps
Project: Religion in a Democratic Society: Tocqueville's Democracy in America
Award: $50,108

Cornell University
Ithaca, NY 14853
Project Director: Prof. Isaac Kramnick
Project: Individualism and the Republican Tradition: Anglo-American Social Thought in the Age of Revolution
Award: $56,788.53

University of Oklahoma
Norman, Oklahoma 73037
Project Director: Dr. Donald J. Maletz
Project: The American Constitution and Representative Government
Award: $48,072

University of Oklahoma
Norman, OK 73037
Project Director: Professor Richard S. Wells
Project: Civic Literacy in the Bicentennial Decade: A Program for Adult Learners
Award: $134,554

Rutgers University
New Brunswick, NJ 08903
Project Director: Prof. W. Carey McWilliams
Project: Federalists and Anti-Federalists
Award: $56,353

Rutgers University
New Brunswick, NJ 08903
Project Director: Prof. W. Carey McWilliams
Project: Religion and Politics
Award: $56,601

Virginia Polytechnic Institution & State University
Blacksburg, VA 24061
Project Director: Professor John A. Rohr
Project: Constitutional Studies in the Public Administration Curriculum
Award: $29,474

Research

Institute of Early American History & Culture
Williamsburg, VA 23185
Project Director: Dr. Thad W. Tate, Jr.
Project: An Uncivil War: The Southern Backcountry during the American Revolution
Award: $3,075

To support a conference on the southern backcountry during the American Revolution and thus encourage the study of political and social change in this region.

Thomas Jefferson Memorial Foundation, Inc.
Charlottesville, VA 22902
Project Director: Dr. William M. Kelso
Project: Monticello Black Life/Craft History Archaeological Project
Award: $174,800

To support the continued excavation and study of the buildings and material remains associated with the artisans and slaves living at Jefferson's plantation, Monticello.

University of Maryland
College Park, MD 20742
Project Director: Mr. Robert K. Fullinwider
Project: A Philosophical Study of Equality of Opportunity
Award: $42,000

To support research on the concept of equality of opportunity and its use in American law and policy. Philosophical literature and methods will be used to analyze various conceptions of equality of opportunity.

University of North Carolina
Greensboro, NC 27412
Project Director: Prof. David M. Olson
Project: Parliaments, Policy and Regime Support
Award: $9,000

To support a meeting of 23 scholars from 8 nations to explore how parliaments have furthered or impeded public support of their governmental regimes. Parliaments considered will include those of democratic and communist systems and of industrial and Third-World countries.

University of Oklahoma
Norman, OK 73019
Project Director: Professor Ronald M. Peters
Project: Study of Carl Albert and the Modern Speaker
Award: $73,240

To support a study of the Office of Speaker of the House of Representatives as represented in the person and papers of Speaker Carl Albert, the first study of the office since 1896.

Temple University
Philadelphia, PA 19122
Project Director: Mr. Daniel J. Elazar
Project: Political Theories of American State Constitutions
Award: $74,080

To support research for articles and a book-length volume on explicit and implicit political and philosophical theories in American state constitutions, focusing on six different constitutional patterns.

University of Virginia
Charlottesville, VA 22903
Project Director: Mr. William W. Abbot
Project: The Papers of George Washington
Award: $135,000

To support five volumes of The Papers of George Washington, The total project includes diaries, proceedings, journals and letters.

University of Wisconsin
Madison, WI 53706
Project Director: Professor Stanley I. Kutler
Project: American Legal History, 1870–1970
Award: $142,112.55

To support interdisciplinary research for working papers, monographs and articles on American legal history for the period 1870-1970.

Summer Seminars

Cornell University
Ithaca, NY 14853
Project Director: Prof. Isaac Kramnick
Project: The American Constitution: Its Origins and Evolution
Award: $125,035

To support a summer institute for 25 high school teachers on the history and development of the Constitution.

Harvard University
Cambridge, MA 02138
Project Director: Prof. Harvey C. Mansfield, Jr.
Project: The American Experience
Award: $57,449.21

To support a four-week summer institute for high school teachers on the meaning of the American Revolution and the "new political science" embodied in the Constitution which will include lectures and discussion of readings from Locke, Montesquieu, "The Federalist," and Tocqueville.

New College of the University of So. Florida
Sarasota, FL 33580
Project Director: Prof. Robert R. Benedetti
Project: Winthrop, Jefferson and The Supreme Court: Religion and Politics in America

To support a summer seminar for secondary school teachers.

Rutgers University
New Brunswick, NJ 08903
Project Director: Prof. W. Carey McWilliams
Project: Federalists and Anti-Federalists
Award: $68,193

To support a summer seminar for secondary school teachers: "Federalists and Anti-Federalists."

Stanford University
Stanford, CA 94305
Project Director: Prof. Jack N. Rakove
Project: Political Experience and Political Thought in Revolutionary America
Award: $55,476

To support a summer seminar for college teachers: "Political Experience and Political Thought in Revolutionary America."

STATE HUMANITIES COUNCILS UPDATE

PENNSYLVANIA HUMANITIES COUNCIL

401 N. Broad Street, suite 818
Philadelphia, PA 19108
(215) 925-1005

Thirty study groups on the U.S. Constitution will be held in Pennsylvania libraries and historical societies in 1985. Conducted by professors of history, government, political science, and jurisprudence, the groups will meet for six sessions, using as a text an anthology of readings prepared by constitutional scholars specifically for the groups. The topics for readings and discussion will include:

1. The Philosophical and Historical Origins of the Constitution
2. The Constitutional Convention: Philadelphia, May to September, 1787
3. The Federalist Triumph and the Bill of Rights
4. The Supreme Court's Interpretations and Shaping of the Constitution in the Nineteenth Century
5. The Constitution's Adaptation to Twentieth-Century Social and Economic Change
6. The Current Constitutional Issues and the Future of the Constitution

In addition to the anthology of readings, the groups will also have access to tapes from the telecourse "The Constitution: That Delicate Balance," prepared by Fred Friendly for Media and Society Seminars, Columbia University Graduate School of Journalism.

The study groups are part of the Council's three-year program for the Bicentennial of the Constitution. That program includes annual keynote lectures and conferences at Independence Hall on the history, interpretation, and future of the Constitution; newspaper supplements on those same topics written by Constitutional scholars for the general audience; teacher-training institutes; and traveling exhibits.

MARYLAND HUMANITIES COUNCIL

516 N. Charles Street
Suite 305
Baltimore, MD 21201
(301) 837-1938

The Maryland Humanities Council has made three grants for Bicentennial projects. They are:

"The American Revolution: The Unfinished Agenda"
(conference)
Recipient: School of Continuing Studies, The Johns Hopkins University
(Baltimore City)
Amount: $15,000

"Maryland and the Making of the Federal Constitution"
(seminar, field trip)
Recipient: South River High School
(Anne Arundel County)
Amount: $500

"Preparing for the Bicentennial of the U.S. Constitution"
(symposium)
Recipient: National Archives Volunteers Constitution Study Group
(Montgomery County)
Amount: $1,200

The Council is also planning to host a one-day conference in Annapolis on September 13, 1986 to commemorate the call to the Constitutional Convention. While emphasizing Maryland's role in the creation of the Constitution, it will also explore broader issues and include a special session on how institutions and teachers can talk about the Constitution. A portfolio of materials, developed at the Maryland State Archives, will include selected documents, a bibliography, biographies of Maryland delegates to the Convention and suggestions on ways to convey information about the Constitution. Satellite sessions are planned for other regions of the state.

Network of Scholars: Supplement

The initial list of scholars interested in Bicentennial programs appeared in the Fall, 1984 issue of ***this Constitution****; supplements to it have appeared in subsequent issues. Planners should get in touch directly with those whom they would like to have participate in their programs.*

KENTUCKY
Carl P. Chelf, Ph.D.
Department of Government
Western Kentucky University
Bowling Green, KY 42101
Constitutional development;
Constitution and public policy

NORTH CAROLINA
John E. Semonche, Ph.D., LL.B.
Department of History
University of North Carolina
Chapel Hill, NC 27514
Constitution and the Supreme
Court

MASSACHUSETTS
Margaret Horsnell, Ph.D.
Department of History
American International College
Springfield, MA 01109
Constitutional history;
federalism; civil liberties

William Kristol, Ph.D.
Kennedy School of Government
Harvard University
Cambridge, MA 02138
Political theory; public policy

NEW JERSEY
Jennifer Nedelsky
Department of Politics
Princeton University
Princeton, NJ 08544
Constitution's origins and
interpretation; private
property and the Constitution

FOREIGN
Shlomo Slonim, Ph.D., LL.B.
Department of American Studies
Hebrew University
Jerusalem, Israel
Constitutional law and history;
Constitutional Convention

ORGANIZATIONS and INSTITUTIONS

WE THE PEOPLE 200: COMMITTEE FORMED IN PHILADELPHIA

With a mandate from the Mayor of Philadelphia and the enthusiasm of the Superintendent of Independence National Historical Park, the "We the People 200 Committee" has begun planning for the two-hundredth anniversary of the Constitution. According to Hobart Cawood, chairman of "We the People 200," the committee is shaping the 1987 observance with a host of events for Philadelphia, and it will also be taking an active role in molding programs and events throughout the region and the nation, with several projects taking on an international scope. "The committee feels that almost two hundred years ago the City of Brotherly Love was the focus of the nation as the Convention convened at Independence Hall," Chairman Cawood noted. "When 1987 comes, Philadelphia will once again be host to the nation and to the world," he added.

Cawood has good reason to point out that Philadelphia is indeed the historical site for the drafting of the Constitution. As superintendent of Independence National Historical Park area, Cawood is charged with managing the area which includes the original buildings and sites where the Constitution was written and debated. With Independence Hall as the targeted site for numerous activities, the "We the People 200 Committee" will set its goals on establishing the observance throughout the region, emphasizing the Constitution as a "living document". The program and projects to be endorsed by the committee will reflect those goals.

Philadelphia Mayor W. Wilson Goode has pledged to promote the observance as "one of the most significant celebrations in the history of our country as well as significant to the City of Philadelphia." The resources of the City, as well as the National Park Service and numerous private sector corporations and institutions will back up that pledge as planning proceeds towards '87.

Fred M. Stein has been named executive director of the celebration and will direct the planning and implementation of the scores of programs that fall under the "We the People 200" umbrella. "We look forward to working with every project director across the country to bring about a cohesive, informative observance that will reap rewards for the citizens of not only the United States but throughout the world as it becomes apparent how significant this document has become," Stein remarked.

Although the celebration in Philadelphia will have a formal setting from May 25 to September 17, 1987, Cawood emphasized that there will be numerous projects, conferences, exhibits and special events taking place both before May 25 and after September 17, 1987. Chairman Cawood is asking all those persons and organizations planning Constitution-related projects to contact the "We the People 200" committee offices to assure a "full line of communication with which to publicize all events."

In 1982, speaking at an engagement at the First Bank of the United States in Independence National Historical Park, Justice Warren Burger stated that "Philadelphia will be a Mecca for freedom-loving people from throughout the world in 1987." The "We the People 200 Committee" will endeavor to assure that Justice Burger is correct.

The office of "We the People 200" is open daily at 313 Walnut Street, Philadelphia, PA 19106. Telephone numbers are 215-597-1787; 215-922-1987; and 215-592-1987.

DELAWARE HERITAGE COMMISSION PLANS PROGRAM FOR BICENTENNIAL

The Delaware Heritage Commission is planning a full program of activities focusing on Delaware Day, December 7, 1987, the Bicentennial of the date on which Delaware ratified the Constitution. Delaware was the first state to approve the new Constitution.

The Commission has determined on "We the People . . . Freedom's First" as the theme which will direct all activities during the coming years. A logo which will illustrate the theme is now in preparation. The Commission's efforts to have a special commemorative United States postage stamp for Delaware's ratification of the Constitution have already been successful.

The Delaware Heritage Commission names seven Constitutional Scholars annually from graduating seniors at Delaware High Schools. The Scholarship carries a $1,000 award for use at any post secondary institution. Students are screened for accomplishment in academics, citizenship, and activity and then invited to complete a project relating to the constitutional period. Those interested in applying should contact their school guidance counselors or the Delaware Heritage Commission.

The special events committee of the Commission has planned major observances of the 1987 year. They envision celebrations in the three counties on Separation Day, Independence Day and Delaware Day. The latter, which will be celebrated in Dover, will feature a reenactment of the ratification. Additional events will be encouraged in towns and by various other organizations.

The Commission has also approved a Challenge Grant Program. Applications are now being circulated to encourage towns and local groups and individuals to apply for seed money, to be matched on a dollar for dollar basis. Although such monies are strictly limited this year, the Commission hopes that in the future there will be more money to dispense.

The Commission's Newsletter began publication in 1985. The newsletter will be sent to several thousand interested people and organizations and will be a major effort at educating local groups and individuals about the constitutional period and informing them about coming programs.

Other publications are in process. The first volume of "The Votes and Proceedings of the House of Assembly of the Delaware State, 1770–1792," which has been in process for many years, is currently being copy-edited. All of it should be published before 1987. A number of other projects are currently being considered, including a documentary collection of revolutionary war materials, participation in the John Dickinson papers publication project, a popular history of Delaware in the 1780's, a Heritage Cookbook, children's books, reprints, and others.

Citizens and groups have submitted proposals to the Commission for projects for dramatic and musical programs, media presentations, art auctions, research and scholarly programs, and other projects. The Commission will be considering and acting upon these proposals during the coming year.

For further information, contact Claudia L. Bushman, Executive Director, Delaware Heritage Commission, 3rd floor, Carvel State Office Building, 820 N. French Street, Wilmington, DE 19801. Telephone: (302) 652-6662.

MARYLAND PASSES BICENTENNIAL RESOLUTION

On January 29, 1985, the Maryland General Assembly passed the following resolution concerning the Bicentennial of the Constitution.

RESOLUTION

For the purpose of appropriately recognizing and celebrating the 200th Anniversary of Maryland's role in the formation of the Constitution of the United States,

WHEREAS, September 11–14, 1986 is the 200th Anniversary of the Annapolis Convention, which met at the request of the Maryland General Assembly and issued the nation-wide call for a convention

> "to meet at Philadelphia on the second Monday in May next (1787); to take into consideration the situation of the United States; to devise such further provisions as shall appear to them necessary to render the Constitution of the Federal Government adequate to the exigencies of the Union; and to report such an act for that purpose to the United States in Congress assembled, as when agreed to by them and afterwards confirmed by the legislatures of every state," and

WHEREAS, on May 26, 1787, the General Assembly by an act signed into law by Governor William Smallwood, and sealed by "the Great Seal in wax Appendant," did appoint James McHenry, Daniel of Saint Thomas Jenifer, Daniel Carroll, John Francis Mercer, and Luther Martin, Esquires, as delegates to the Convention in Philadelphia, and

WHEREAS, on April 28, 1788 Maryland ratified the Constitution of the United States by Convention called for by resolution of the General Assembly, and

WHEREAS, between 1786 and 1788, Marylanders played important parts in the creation of the United States Constitution and its qualification through amendments, continuing a long tradition of written laws and constitutional provisions that traces its origin to the Maryland General Assembly and that first recorded session 350 years ago; be it hereby

RESOLVED that the State Archives oversee and ensure the proper recognition of Maryland's role in the formation of the United States Constitution, and be it further

RESOLVED that the State Archives create a citizens advisory council for celebrating the Bicentennial of the Constitution in Maryland to assist in the planning and coordination of Bicentennial events in Maryland.

Delaware Chronology, 1786–1788

John Dickinson's plantation in rural Dover, Delaware, is the focus of extensive archeological and archival research leading toward the restoration of the grounds and outbuildings. Photograph courtesy of the Division of Historical and Cultural Affairs, State of Delaware.

1786

21 Jan.	Virginia issues call for commercial convention to meet at Annapolis.
10 June	House of Assembly appoints committee to consider Virginia's call for commercial convention.
15–23 June	Legislature elects George Read, Jacob Broom, John Dickinson, Richard Bassett, and Gunning Bedford, Jr. delegates to convention at Annapolis.
11–14 Sept.	Annapolis Convention: Calls for convention to meet in Philadelphia in May 1787.
25 Oct.	House of Assembly receives report of Annapolis Convention.

1787

11 Jan.	Legislature receives Virginia act authorizing election of delegates to convention in Philadelphia in May 1787.
12 Jan.	House of Assembly submits report of Annapolis Convention to committee.
3 Feb.	Legislature elects George Read, Gunning Bedford, Jr., John Dickinson, Richard Bassett, and Jacob Broom delegates to Constitutional Convention.
21 Feb.	Confederation Congress calls Constitutional Convention to meet in Philadelphia in May to amend Articles of Confederation.
25 May–17 Sept.	Constitutional Convention, Philadelphia.
27–31 Aug.	Legislature meets to consider anticipated report of Constitutional Convention.
17 Sept.	Constitutional Convention adjourns *sine die.*
1 Oct.	Annual legislative election; riots prevent election in Sussex County.
15 Oct.	Election for legislature in Sussex County.
24 Oct.–10 Nov.	Legislative session.
24 Oct.	Constitution read to House of Assembly; committee appointed to report on Constitution.
25 Oct.	Committee reports resolutions calling state convention.
27 Oct.	Legislature passes act altering quorum in House of Assembly.
29 Oct.–7 Nov.	House of Assembly and Legislative Council investigate and void Sussex County election.
9–10 Nov.	Legislature adopts resolutions calling state Convention to meet on 3 December.
10 Nov.	Legislature adopts act altering place of election in Sussex County for year 1787; issues writs for new legislative election in Sussex County; adjourns.
26 Nov.	Delegates elected to state Convention; representatives and councillor elected in Sussex County.
28 Nov.	Sussex County petitions request Delaware Convention to void election of Sussex Convention delegates and to call new election.
3 Dec.	State Convention meets in Dover.
7 Dec.	Convention ratifies Constitution 30 to 0; adjourns *sine die.*

1788

22 Jan.	Delaware Form of Ratification read to Confederation Congress.
10–24 Jan.	Legislature investigates and validates Sussex County election of representatives and councillor on 26 November 1787.

Source: Merrill Jensen, ed. *The Documentary History of the Ratification of the Constitution*, vol III (1978), adapted by the Delaware Heritage Commission.

AMERICAN BAR ASSOCIATION
750 N. Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5728
Contact: Robert S. Peck

John Peter Zenger Anniversary

To commemorate the 250th anniversary of the trial of John Peter Zenger, the American Bar Association and a number of cooperating organizations will sponsor a series of community forums on contemporary free speech and free press issues. This series of forums will provide a body of experience in working together and in planning the meetings for the state and local organizations participating in a 1987 bicentennial forum series. Over 35 states have established planning committees to organize between one and four forums this fall.

Zenger was a German immigrant in colonial New York, known for his skill as a master printer though otherwise unschooled. His arrest, trial, and acquittal in 1734 on charges of seditious libel have made him a hero to those who treasure free speech and a free press.

The same questions raised in Zenger's day remain relevant today. Said U.S. Supreme Court Justice Hugo Black, concurring in the case of *New York Times* v. *Sullivan* (1964), "I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions or its officials."

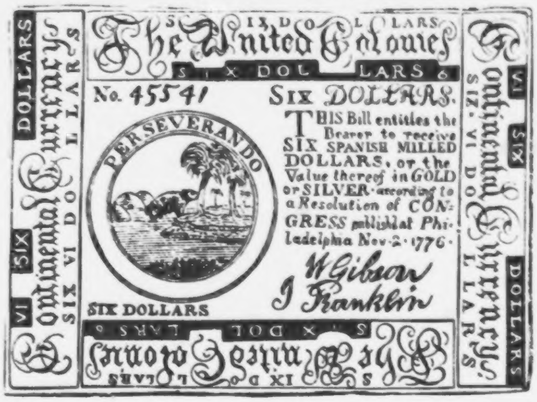
The 1985 forums will examine the United States' free speech/free press heritage and its relevance to contemporary life. In addition to the ABA, the participating organizations include the American Library Association, the American Newspaper Publishers Association Foundation, the National Association of Bar Executives, the National Community Education Association, the American Association of Adult and Continuing Education, the American Association of Community and Junior Colleges, the Society of Professional Journalists and the Office of Smithsonian Symposia and Seminars. The forums will be supplemented by a traveling exhibit, written materials, and other events.

Each locality will be able to choose from four basic forum formats: mock legislative hearing, town hall meeting, mock trial, and debate. The formats are designed to blend brief presentations with opportunities for audience participation. Organizers may also devise their own formats.

MARYLAND OFFICE FOR THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION
Maryland State Archives
Hall of Records
Box 828
Annapolis, MD 21404
(301) 269-3914
Contact: Gregory A. Stiverson

The Maryland Bicentennial Office is planning an active program to assist in the commemoration of the Constitution's Bicentennial. This includes: the development of materials for the Maryland Humanities Council Conference in September, 1986; publication of a volume of documents relating to Maryland's role in the formulation and ratification of the Constitution; and an exhibition of materials relating to the Annapolis Convention and to Maryland's ratification of the federal Constitution. The Office will also serve as a clearinghouse for research on the Constitution's Bicentennial and act as a depository for original and photocopied materials relating to it.

The Check Was in the Mail


The United Colonies
SIX DOLLARS
No. 45541
SIX DOLLARS.
THIS Bill entitles the Bearer to receive SIX SPANISH MILLED DOLLARS, or the Value thereof in GOLD or SILVER, according to a Resolution of CONGRESS published at Philadelphia Nov. 2. 1776.
PERSEVERANDO
W Gibson
J Franklin
SIX DOLLARS
Continental Currency.
SIX VI DOLLARS

Even immortals need their per diem. On April 12, 1787, George Mason informed Governor Edmund Randolph of Virginia that he—Mason—would need sixty pounds to defray his expenses as a delegate to the Constitutional Convention in Philadelphia. This was important to him, Mason added a bit apologetically, because he had been "disappointed in the Payment of several Sums for [Tobacco] sold." Should "our Stay in Philadelphia prove shorter than I expect, whatever Money may remain, more than my Due, shall be punctually returned."

This letter to Randolph crossed with a letter from the Governor offering an advance of *100* pounds. A bit awkward. Mason then wrote Randolph: "I have received your Favour.... I was unacquainted with the Sum allotted for each Deputy, & was afraid of exceeding it. Considering the Number of Deputies from the different States, the great Distance of some of them, & the Probability that we may be obliged to wait many Days, before a full Meeting can be obtained, we may perhaps be much longer from Home than I at first expected; I will therefore accept your very obliging Offer...." Any residue, he added, would be "punctually return'd to the Treasury."

Submitted by James MacGregor Burns

National Council for the Social Studies

AD HOC COMMITTEE ON THE BICENTENNIAL OF THE U.S. CONSTITUTION

National Council for the Social Studies has several programs, all designed to encourage teaching about the U.S. Constitution in social studies classrooms, grades K-12. Among the programs are two collaborative efforts: with the Association of American Historians and the Organization of American Historians to establish school and university collaboratives for year-long teacher inservice on teaching about the U.S. Constitution; and with the Speech Communication Association, the National Forensic League, the National Catholic Forensic League, and the National Student Activities Association to establish debate topics for 1986 and 1987 related to the U.S. Constitution. Other programs in the planning stages include a series of posters on the Bill of Rights, teacher workshops, a bibliography of resources for teaching about the Bicentennial, materials development, and distribution of information about programs and materials on the Bill of Rights. NCSS now distributes ***this Constitution*** to all its members as part of their regular membership benefits. For more information, write: NCSS, 3501 Newark Street, N.W., Washington, D.C. 20016. Telephone: (202) 966-7840

Independence National Historical Park

As part of its comprehensive commemoration of the Bicentennial, Independence Park has commissioned a play, with the support of a grant from the Eastern National Park and Monument Association. Entitled "A More Perfect Union," it will dramatize and commemorate the Constitution and its ratification. The play will be performed at the Park during the summer of 1987. For further information, contact Ronald Thomson, Independence National Historical Park, 313 Walnut Street, Philadelphia, PA 19106.

Division of Political History, Smithsonian Institution, Washington, D.C.

NATIONAL HISTORY DAY

National History Day looks forward to the Bicentennial of the Constitution with great enthusiasm. As in the past, the annual themes in 1986 and 1987 will be broad enough for students to research and present their papers, projects, and performances on a wide variety of topics. Still, the themes should encourage participating secondary school students to focus on the history and development of the Constitution and constitutional issues. The 1986 theme is "Conflict and Compromise in History"; in 1987 the theme will be "Rights and Responsibilities in History".

At present, forty-five states conduct History Day programs. Contest guides to thematic materials are distributed to teachers by district coordinators in late fall. Teacher workshops are held in many areas. The following spring, students from grades six through twelve attend competitive events in which their entries are evaluated by professional historians. College and university campuses and historical societies usually direct the programs and host the contests. Outstanding participants at the local level progress to state competitions and then to the national event, held in mid-June at the University of Maryland at College Park.

In the short period of time during which History Day grew from a small local effort to a highly respected undertaking, it has engaged tens of thousands of youngsters in the exciting exploration of historical subjects. Students have discovered the treasures that lie in family attics, on the shelves of libraries and local historical societies, in the memories of community members whom they have interviewed. They have learned to evaluate and utilize primary and secondary source materials and to express their findings in both traditional written and innovative visual and dramatic formats.

For the name of your state coordinator and for program materials, write: National History Day, 11201 Euclid Avenue, Cleveland, Ohio 44106.

Oliver Wendell Holmes, Jr. National Portrait Gallery, Smithsonian Institution, Washington, D.C.

JUSTICE HOLMES COMMEMORATION

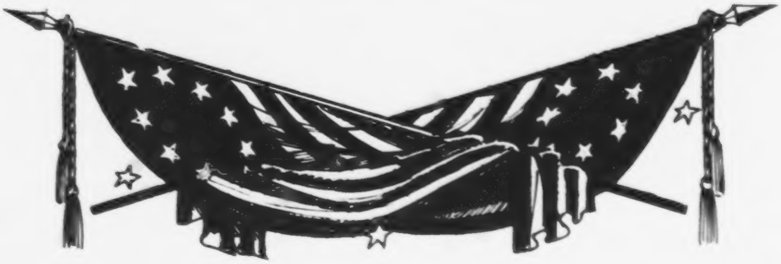
Justice Oliver Wendell Holmes, Jr. died on March 6, 1934 but he remains a living and enigmatic figure of wide general interest. To commemorate his death, the Stanford Humanities Center at Stanford University held an interdisciplinary conference on March 5, 1985. The objective of the conference was to explore the legacy of Holmes as a thinker, writer and jurist.

Conference speakers included John W. Burrow (Sussex University), Ronald M. Dworkin (Oxford University), Donald H. Fleming (Harvard University), Morton J. Horwitz (Harvard University), and Saul Touster (Brandeis University). Discussants included Robert A. Ferguson (University of Chicago), David A. Hollinger (University of Michigan), Dorothy Ross (University of Virginia), and Jan Vetter (University of California, Berkeley). For further information, write to: Morton Sosna, Associate Director, Stanford Humanities Center, Mariposa House, Stanford University, Stanford, CA 94305.

BICENTENNIAL ESSAYS ON THE CONSTITUTION

The American Historical Association, as a contribution to Project '87, is publishing a series of eleven pamphlets intended to provide students and teachers of American history with concise interpretive accounts of the most important aspects of American constitutional development. Edited by Herman Belz, three are now available: *Constitutional Development in a Modernizing Society: The United States, 1803 to 1917* by William M. Wiecek; *The Supreme Court and Judicial Review* by Kermit L. Hall; and *Congress, Parties, and Public Policy* by Morton Keller. Titles available in 1985-86 include: *Learning Liberty: American Constitutional Beginnings to 1803* by John Murrin; *The Constitution in the Twentieth Century* by Paul L. Murphy; *Civil Rights and Civil Liberties* by Michael Les Benedict; *The Constitution and Economic Change* by Jon Lurie; *Federalism in American Constitutional Development* by Harry N. Scheiber; *The Presidency and Public Administration* by John A. Rohr; *War Powers and Crisis Government in America* by Harold M. Hyman; and *Constitutional Dissenters and Varieties of Constitutionalism* by George M. Dennison. The essays may be ordered (pre-paid) from: Publication Sales Department, American Historical Association, 400 A Street, S.E., Washington, D.C. 20003; each pamphlet is $5.00.

SUBSCRIPTION INFORMATION



The National Endowment for the Humanities is underwriting the publication of ***this Constitution*** as a quarterly magazine so that it may be distributed free to organizations planning programs for the Constitution's Bicentennial. The officer of the organization who is responsible for planning programs is invited to write us and ask to be placed on the free mailing list; requests should include a short statement about the program being planned. Free subscriptions begin with the next issue after receipt of the letter. Institutions wishing to receive more than one copy may do so by subscribing for additional copies at the rates below.

Individuals and organizations who are not planning Bicentennial programs but who wish to receive the magazine may subscribe as follows:

Individuals	$10.00 per year (4 issues)
Institutions	$16.00 per year (4 issues)

(Individuals and institutions outside the United States please add $5.00 per subscription.)

Paid subscriptions received by November 1, 1985, will begin with issue no. 6 (Spring, 1985) and end with no. 9 (Winter, 1985).

Single copies (less than 10) of back issues can be purchased for $4.00 each. Each issue of the magazine will also be available for purchase at bulk rate.

Bulk rate (10 or more copies)	$1.75 each

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The Articles of Confederation: An Historical Note

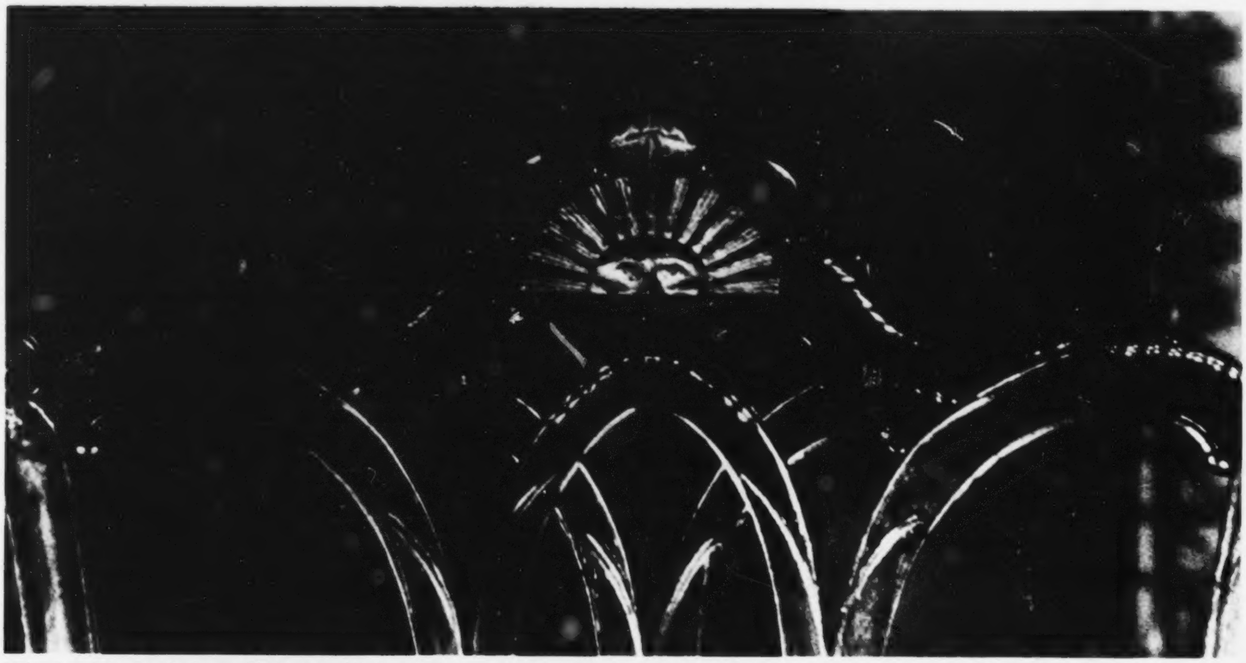
The Articles of Confederation, the first constitution of the United States, were adopted by the Continental Congress on November 15, 1777. The Congress recognized that a formal plan of union had to be established once the colonies had officially declared their independence of Great Britain and their status as a separate nation. But a long and difficult dispute over the western territories delayed acceptance of the document, which had to be ratified by all the states. Thus, the new government was not inaugurated until March 1781. Principally, like the Continental Congress, the Confederation Congress was to conduct foreign affairs.

The Articles granted a few specific powers to the the national government; it was empowered to conduct the war, to make treaties and exchange ambassadors with other nations, to coin money, to establish postal service and to appoint tribunals to settle disputes between the states. The states retained all powers not expressly delegated to the central government, including authority over commerce with other states and, in part, with other nations. The Articles further impeded effective action by requiring that nine of the thirteen states—each with one vote in the Congress—agree to treaties, and to legislation concerning raising, appropriating or coining money, creating and maintaining armies, and declaring war. The Articles provided for neither an independent executive nor a judicial branch and the Congress of the Confederation had virtually no power to enforce its will even where the Articles gave it jurisdiction. Amendment to the Articles could occur only by unanimous assent.

Despite these handicaps, the Confederation government achieved one remarkable success. As the guardian of the western territories, it established equitable and republican principles for their governance and provided for the admission of new states, on an equal footing with the original states, as the population increased. This sound federal land policy enabled the nation to grow in a secure and stable way and enhanced a feeling of nationhood. In addition, land sales, encouraged by government policies, provided the one source of revenue the Confederation government could depend upon.

Still, weaknesses in the Articles created trials at home and embarrassment abroad. The national government lacked an adequate base of revenue. Dislocations in foreign trade, which the Confederation was unable to improve, led to a depression in the 1780s which in turn confronted state governments with severe fiscal problems and radical demands for relief. When appeals for assistance to the Confederation Congress brought no help, a sense of unease took hold about the stability of governments in general. Meanwhile, interstate commercial disputes, also beyond the reach of the central government, led first to a conference in 1785 between Virginia and Maryland and then, at Virginia's invitation, to a convention in Annapolis in 1786.

Only five states sent delegates to the Annapolis meeting, however, and those who assembled decided that a full reform of the national government was required. The conferees called for another meeting, of all the states, in Philadelphia in 1787. The Congress of the Confederation endorsed the plan, but only "for the sole and express purpose of revising the Articles of Confederation." Despite the instruction, the document that emerged was a new constitution; its ratification was quickly accomplished. On October 10, 1788, the Congress of the Confederation transacted its last official business, and the nation prepared for the installation of the government under the new constitution. The Confederation period had come to an official close.



Rising Sun chair, used by George Washington while he presided over the Constitutional Convention. Independence National Historical Park Collection.

ARTICLE 6

No state without the consent of the United States in Congress assembled shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, or alliance or treaty with any king, prince, or state; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office, or title of any kind whatever from any king, prince, or foreign state; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

No two or more states shall enter into any treaty, confederation, or alliance whatever between them without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No state shall lay any imposts or duties which may interfere with any stipulations in treaties entered into by the United States in Congress assembled, with any king, prince, or state, in pursuance of any treaties already proposed by Congress to the courts of France and Spain.

No vessels of war shall be kept up in time of peace by any state, except such number only as shall be deemed necessary by the United States in Congress assembled, for the defense of such state, or its trade; nor shall any body of forces be kept up by any state in time of peace, except such number only as in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defense of such state; but every state shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition, and camp equipage.

No state shall engage in any war without the consent of the United States in Congress assembled, unless such state be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted: nor shall any state grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the kingdom or state and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such state be infested by pirates, in which case vessels of war may be fitted out for that occasion and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.

ARTICLE 7

When land-forces are raised by any state for the common defense, all officers of or under the rank of colonel shall be appointed by the legislature of each state respectively by whom such forces shall be raised, or in such manner as such state shall direct, and all vacancies shall be filled up by the state which first made the appointment.

ARTICLE 8

All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states in proportion to the value of all land within each state, granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled shall from time to time direct and appoint. The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several states within the time agreed upon by the United States in Congress assembled.

ARTICLE 9

The United States in Congress assembled shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article—of sending and receiving ambassadors—[of] entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever—of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated—of granting letters of marque and reprisal in times of peace—[of] appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed a judge of any of the said courts.

The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more states concerning boundary, jurisdiction, or any other cause whatever; which authority shall always be exercised in the manner following:

Whenever the legislative or executive authority or lawful agent of any state in controversy with another shall present a petition to Congress, stating the matter in question and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other state in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question: but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven nor more than nine names, as Congress shall direct, shall in the presence of Congress be drawn out by lot, and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges to hear and finally determine the controversy; so always as a major part of the judges who shall hear the cause shall agree in the determination: and if either party shall neglect to attend at the day appointed, without showing reasons, which Congress shall judge sufficient, or being present shall refuse to strike, the Congress shall proceed to nominate three persons out of each state, and the secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear to defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceedings being in either case transmitted to Congress and lodged among the acts of Congress for the security of the parties concerned: provided that every commissioner, before he sits in judgment, shall take an oath to be administered by one of the judges of the supreme or superior court of the state where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection, or hope of reward": provided also that no state shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more states, whose jurisdiction as they may respect such lands, and the states which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall on the petition of either party on the Congress of the United States, be finally determined as near as may be in the same manner as before prescribed for deciding disputes respecting territorial jurisdiction between different states.

The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective tests—fixing the standard of weights and measures throughout the United States—regulating the trade and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated—establishing and regulating post offices from one state to another throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office—appointing all officers of the land forces in the service of the United States, excepting regimental officers—appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States—making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States in Congress assembled shall have authority to appoint a committee to sit in the recess of Congress, to be denominated a "Committee of the States," and to consist of one delegate from each state; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction—to appoint one of their number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses—to borrow money or emit bills on the credit of the United States, transmitting every half-year to the respective states an account of the sums of money so borrowed or emitted—to build and equip a navy—to agree upon the number of land forces, and to make requisitions from each state for its quota in proportion to the number of white inhabitants in each state; which requisition shall be binding, and thereupon the legislature of each state shall appoint the regimental officers, raise the men, and clothe, arm, and equip them in a soldier-like manner at the expense of the United States, and the officers and men so clothed, armed, and equipped shall march to the place appointed, and within the time agreed on by the United States in Congress assembled: but if the United States in Congress assembled shall, on consideration of circumstances, judge proper that any state should not raise men, or should raise a smaller number of men than the quota thereof, and that any other state should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, clothed, armed, and equipped in the same manner as the quota of such state unless the legislature of such state shall judge that such extra number cannot be safely spared out of the same, in which case they shall raise, officer, clothe, arm, and equip as many of such extra number as they judge can be safely spared. And the officers and men so clothed, armed, and equipped shall march to the place appointed, and within the time agreed on by the United States in Congress assembled.

The United States in Congress assembled shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defense and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war to be built or purchased, nor the number of land or sea forces to be raised, nor appoint a commander-in-chief of the army or navy, unless nine states assent to the same: nor shall a question on any other point, except for adjourning from day to day, be determined unless by the votes of a majority of the United States in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances, or military operations, as in their judgment require secrecy; and the yeas and nays of the delegates of each state on any question shall be entered on the journal when it is desired by any delegate; and the delegates of a state, or any of them, at his or their request shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the legislatures of the several states.

ARTICLE 10

The committee of the states, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of nine states, shall from time to time think expedient to vest them with; provided that no power be delegated to the said committee for the exercise of which, by the Articles of Confederation, the voice of nine states in the Congress of the United States assembled is requisite.

ARTICLE 11

Canada acceding to this confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this union: but no other colony shall be admitted into the same unless such admission be agreed to by nine states.

ARTICLE 12

All bills of credit emitted, monies borrowed, and debts contracted by, or under the authority of Congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States and the public faith are hereby solemnly pledged.

ARTICLE 13

Every state shall abide by the determinations of the United States in Congress assembled on all questions which, by this confederation, are submitted to them. And the articles of this confederation shall be inviolably observed by every state, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterward confirmed by the legislatures of every state.

AND WHEREAS, It hath pleased the Great Governor of the World to incline the hearts of the legislatures we respectively represent in Congress to approve of, and to authorize us to ratify, the said Articles of Confederation and perpetual union: KNOW YE, That we the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said Articles of Confederation and perpetual union, and all and singular the matters and things therein contained: and we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States in Congress assembled, on all questions which, by the said confederation, are submitted to them. And that the articles thereof shall be inviolably observed by the states we respectively represent, and that the union shall be perpetual. In witness whereof we have hereunto set our hands in Congress.

Done at Philadelphia in the State of Pennsylvania the ninth day of July in the year of our Lord One Thousand Seven Hundred and Seventy-eight, and in the third year of the independence of America.

PROJECT '87

announces the publication of

LESSONS ON THE CONSTITUTION

Supplements to High School Courses in American History, Government and Civics

Lessons on the Constitution **features sixty lessons designed to enhance teaching about the Constitution in secondary schools. The lessons are designed to fit into existing curricula and to complement standard high school textbooks. Lesson plans for teachers accompany each of the sixty lessons, which are organized into chapters on the origins and principles of the Constitution, the principles of constitutional government, specific constitutional issues, and, last, digests of landmark Supreme Court cases, accompanied by student worksheets. These lessons are introduced with a chapter devoted to the text of the Constitution, a list of amendments to the Constitution proposed by Congress but not adopted, and selected essays from *The Federalist*.**

Lessons on the Constitution **was developed for Project '87 by John J. Patrick, Department of Curriculum and Instruction, Indiana University, and Richard C. Remy, Mershon Center, Ohio State University. The lessons have been field-tested by teachers and reviewed by scholars. Paul Finkelman, History Department, State University of New York, Binghamton, served as consulting historical editor.**

Development of the lessons was supported by a grant from the National Endowment for the Humanities. Scott, Foresman Publishing Company provided a contribution toward producing the manuscript. Core support to Project '87 from the William and Flora Hewlett Foundation provided additional administrative expenses.

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...do ordain and establish

this Constitution

for the United States of America.

A Bicentennial Chronicle

Fall 1985. No.8

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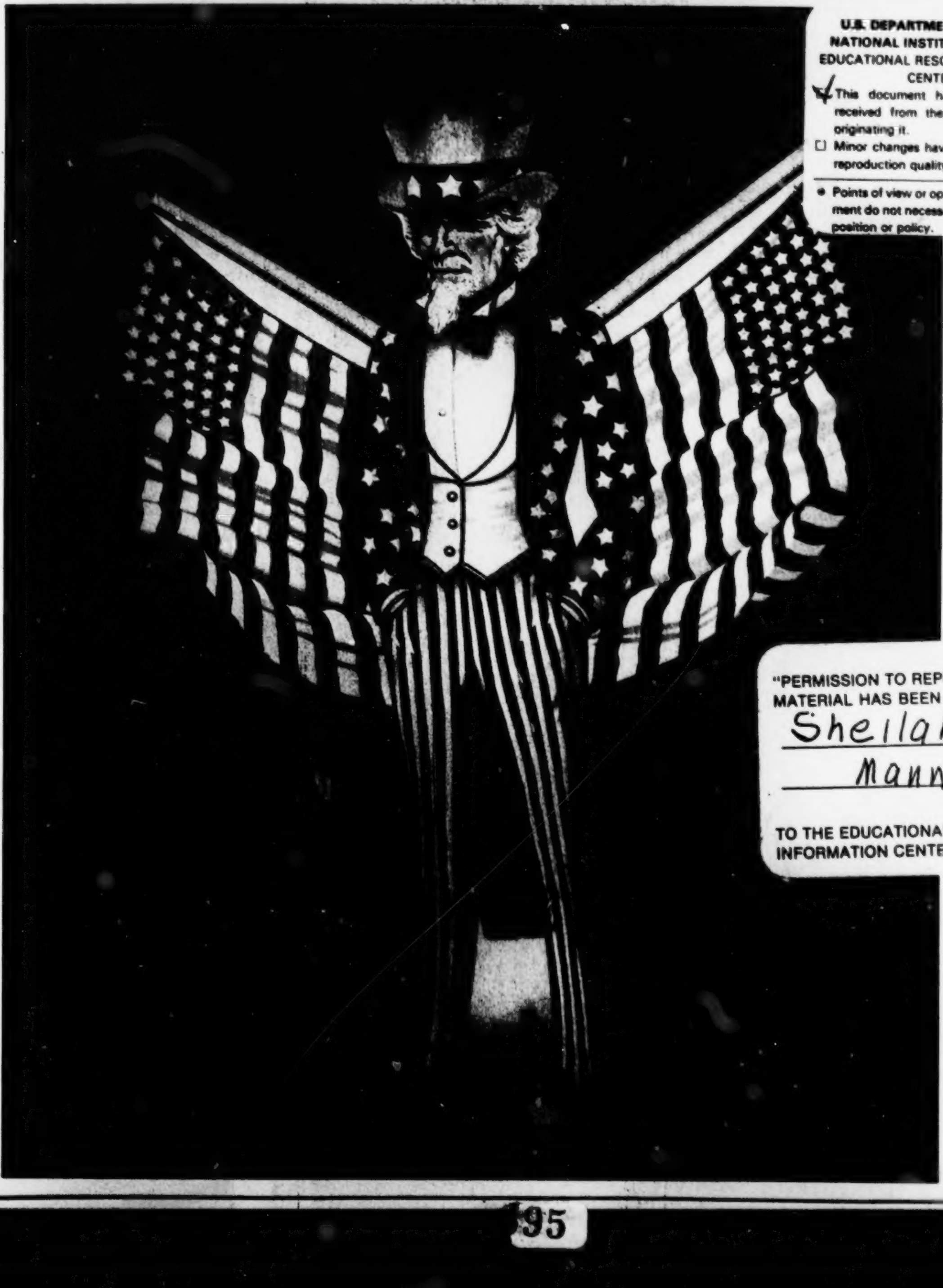

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Project '87

The Definitive Treaty of Peace

Signed at Paris, September 3, 1783

In the Name of the most Holy & undivided Trinity.

It having pleased the divine Providence to dispose the Hearts of the most Serene and most Potent Prince George the third, by the Grace of God, King of Great Britain, France & Ireland, Defender of the Faith, Duke of Brunswick and Lunebourg, Arch Treasurer, and Prince Elector of the Holy Roman Empire &ca and of the United States of America, to forget all past Misunderstandings and Differences that have unhappily interrupted the good Correspondence and Friendship which they mutually wish to restore; and to establish such a beneficial and satisfactory Intercourse between the two Countries upon the Ground of reciprocal Advantages and mutual Convenience as may promote and secure to both perpetual Peace & Harmony, and having for this desirable End already laid the Foundation of Peace & Reconciliation by the Provisional Articles signed at Paris on the 30th of Novr 1782. by the Commissioners empower'd on each Part, which Articles were agreed to be inserted in and constitute the Treaty of Peace proposed to be concluded between the Crown of Great Britain and the said United States, but which Treaty was not to be concluded until Terms of Peace should be agreed upon between Great Britain & France, And his Britannic Majesty should be ready to conclude such Treaty accordingly: and the Treaty between Great Britain & France having since been concluded, His Britannic Majesty & the United States of America, in Order to carry into full Effect the Provisional Articles abovementioned, according to the Tenor thereof, have constituted & appointed, that is to say His Brittanic Majesty on his Part, David Hartley Esqr, Member of the Parliament of Great Britain; and the said United States on their Part, John Adams Esqr, late a Commissioner of the United States of America at the Court of Versailles, late Delegate in Congress from the State of Massachusetts and Chief Justice of the said State, and Minister Plenipotentiary of the said United States to their High Mightinesses the States General of the United Netherlands; Benjamin Franklin Esqre late Delegate in Congress from the State of Pennsylvania, President of the Convention of the sc State, and Minister Plenipotentiary from the United States of America at the Court of Versailles; John Jay Esqre late President of Congress, and Chief Justice of the State of New-York & Minister Plenipotentiary from the said United States at the Court of Madrid; to be the Plenipotentiaries for the concluding and signing the Present Definitive Treaty; who after having reciprocally communicated their respective full Powers have agreed upon and confirmed the following Articles.

ARTICLE 1st

His Britanic Majesty acknowledges the sd United States, viz. New-Hampshire Massachusetts Bay, Rhode-Island & Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina & Georgia, to be free sovereign & Independent States; that he treats with them as such, and for himself his Heirs & Successors, relinquishes all Claims to the Government Proprietary & Territorial Rights of the same & every Part thereof.

ARTICLE 2d

And that all Disputes which might arise in future on the Subject of the Boundaries of the said United States, may be prevented, it is hereby agreed and declared, that the following are and shall be their Boundaries, Viz. From the North West Angle of Nova Scotia, viz. That Angle which is formed by a Line drawn due North from the Source of Saint Croix River to the Highlands along the said Highlands which divide those Rivers that empty themselves into the River St Lawrence, from those which fall into the Atlantic Ocean, to the Northwestern-most Head of Connecticut River: Thence down along the middle of that River to the forty fifth Degree of North Latitude; From thence by a Line due West on said Latitude until it strikes the River Iroquois or Cataraquy; Thence along the middle of said River into Lake Ontario; through the Middle of said Lake until it strikes the Communication by Water between that Lake and Lake Erie; Thence along the middle of said Communication into Lake Erie; through the middle of said lake, until it arrives at the Water Communication between that Lake & Lake Huron; Thence along the middle of said Water-Communication into the Lake Huron, thence through the middle of said Lake to the Water Communication between that Lake and Lake Superior, thence through Lake Superior Northward of the Isles Royal & Phelipeaux to the Long Lake; Thence through the Middle of said Long-Lake, and the Water Communication between it & the Lake of the Woods, to the said Lake of the Woods; Thence through the said Lake to the most Northwestern Point thereof, and from thence on a due West Course to the River Mississippi, Thence by a Line to be drawn along the Middle of the said River Mississippi until it shall intersect the Northernmost Part of the thirty first Degree of North Latitude. South, by a Line to be drawn due East from the Determination of the Line last mentioned, in the Latitude of thirty one Degrees North of the Equator to the middle of the River Apalachicola or Catahouche. Thence along the middle thereof to its Junction with the Flint River; Thence strait to the Head of St Mary's River, and thence down along the middle of St Mary's River to the Atlantic Ocean. East, by a Line to be drawn along the Middle of the River St Croix, from its Mouth in the Bay of Fundy to its Source; and from its Source directly North to the aforesaid Highlands, which divide the Rivers that fall into the Atlantic Ocean, from those which fall into the River St Lawrence; comprehending all Islands within twenty Leagues of any Part of the Shores of the United States, & lying between Lines to be drawn due East from the Points where the aforesaid Boundaries between Nova Scotia on the one Part and East Florida on the other, shall respectively touch the Bay of Fundy and the Atlantic Ocean, excepting such Islands as now are or heretofore have been within the Limits of the said Province of Nova Scotia.

continued on page 53

Source: *The Treaty of Paris: The Work of Peace* Educational Kit, Office of Elementary and Secondary Education, Smithsonian Institution, and the National Committee for the Bicentennial of the Treaty of Paris.

...do ordain and establish
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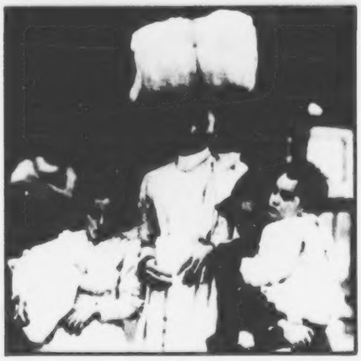
for the United States of America.

A Bicentennial Chronicle

No. 8 **Fall, 1985**



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Cover photograph: *Uncle Sam Poster, 1917. Division of Political History, Smithsonian Institution, Washington, D.C.*

this Constitution is published with the assistance of a grant from the National Endowment for the Humanities as part of its special initiative on the Bicentennial of the United States Constitution. Editorial offices are located at 1527 New Hampshire Avenue, N.W., Washington, D.C. 20036. All material in this publication may be photocopied if attributed as follows: "Reprinted from _this Constitution: A Bicentennial Chronicle_, Fall, 1985, published by Project '87 of the American Historical Association and the American Political Science Association." Project '87 would appreciate notification from those who photocopy material in this issue for use in presentations to other groups. Articles appearing in this magazine are annotated and indexed in _Historical Abstracts_ and _America: History and Life_. **© Copyright 1985 by the American Historical Association and the American Political Science Association**

this Constitution

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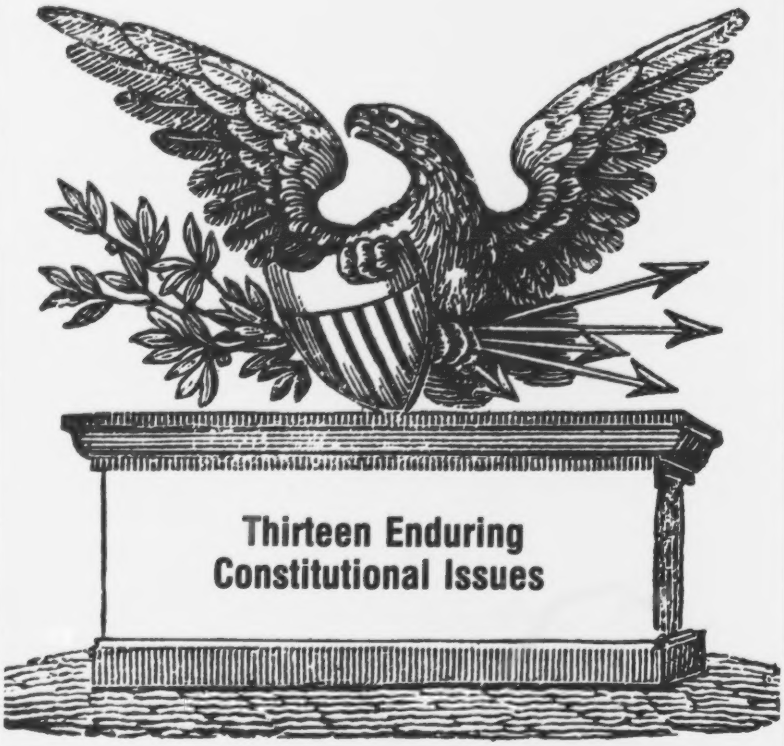
From the Editor:

Three articles in Number 8 of ***this Constitution*** explore the enduring issue of the rights of racial and ethnic groups under the Constitution. James Oliver Horton discusses specifically the status of free blacks under the Constitution before the Civil War. These Americans steadfastly defended their right to citizenship despite vigorous efforts to deny them. In "The Meaning of American Citizenship," Rogers M. Smith analyzes the differing philosophies that have motivated the granting of citizenship to Americans throughout two centuries. Then, in the documents section, Leonard Dinnerstein reviews Supreme Court decisions that determined the constitutional rights of immigrant groups as they arrived on American shores.

In this issue, ***this Constitution*** also inaugurates a three-part examination of the "Enduring Constitutional Issue" of presidential power in wartime. W. Taylor Reveley, III, begins the discussion by looking at the intention of the framers in "War Powers of the President and Congress: Who Decides Whether America Fights?" The next two issues of ***this Constitution*** will feature articles on the evolution of the War Powers in the nineteenth and twentieth centuries.

The document that ended America's first war, the Treaty of Paris, appears on the inside covers; the "For the Classroom" section offers curriculum materials to aid in teaching about the Treaty and about diplomacy. These materials were produced by the Office of Elementary and Secondary Education of the Smithsonian Institution and the National Committee for the Bicentennial of the Treaty of Paris.

In April 1985, a meeting at Mount Vernon marked the Bicentennial of the Mount Vernon Conference, whose historical significance was described in the article by Richard B. Morris, "The Mount Vernon Conference: First Step Toward Philadelphia," in ***this Constitution***, No. 6, Spring, 1985. Hosted by Project '87 and the Mount Vernon Ladies' Association, the conference brought together corporate and foundation executives with federal officers and others engaged in planning Bicentennial programs. Chief Justice Warren E. Burger, honorary chair of Project '87's advisory board, Secretary of Commerce Malcolm Baldrige and Governors Charles S. Robb and Harry Hughes addressed the gathering. The Bicentennial Gazette reports on this event, which recalled the crucial role of commerce in inspiring the convening of the Mount Vernon Conference and the creation of the new Constitution. We also include the remarks of Jack P. Greene on this occasion, a talk entitled "The Pursuit of Happiness: the Private Realm, Commerce, and the Constitution."



Thirteen Enduring Constitutional Issues

- National Power—limits and potential
- Federalism—the balance between nation and state
- The Judiciary—interpreter of the Constitution or shaper of public policy
- Civil Liberties—the balance between government and the individual
- Criminal Penalties—rights of the accused and protection of the community
- Equality—its definition as a Constitutional value
- The Rights of Women Under the Constitution
- **The Rights of Ethnic and Racial Groups Under the Constitution**
- Presidential Power in Wartime and in Foreign Affairs
- The Separation of Powers and the Capacity to Govern
- Avenues of Representation
- Property Rights and Economic Policy
- Constitutional Change and Flexibility

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WEEVILS IN THE WHEAT: FREE BLACKS AND THE CONSTITUTION, 1787-1860

by JAMES OLIVER HORTON

Standing before an Iowa religious convention in the 1850s, Sojourner Truth, women's rights advocate and antislavery speaker, delighted her audience with her analysis of the American Constitution. With a dry wit that was her trademark on the abolitionist circuit, this former slave, the first black woman antislavery speaker in the nation, compared the Constitution to the mid-western wheat which during the 1850s was suffering from the boll weevil blight. From a distance the countryside looked deceptively beautiful but on a closer look one might see the ravishes of the blight. The Constitution was much the same, said Sojourner—"I feel for my rights, but there ain't any there." As weevils besieged the wheat, prejudice and bigotry threatened to undermine constitutional guarantees. As Sojourner saw it, American civil rights and liberties were endangered. The Constitution had "a little weevil in it."

In the generations between the Revolution and the Civil War, black people struggled with the weevils in interpretations of the Constitution which denied them citizenship rights. Most blacks believed that their citizenship was protected by the Constitution and by the ideals expressed in the Declaration of Independence. The founding fathers did not specifically mention race as they set out the self-evident truths by which they justified national independence. Although they certainly did not include slaves among those referred to as "the people," they were ambiguous on the status of the free people of color.

Black Citizenship

There were several early indications that the federal government did not consider free blacks full citizens. Despite their significant presence in the American Revolutionary forces, the post-war national militia excluded blacks and early naturalization laws limited the process to white aliens. In the first two decades of the nineteenth century, blacks could not carry the federal mail or hold elective office in the District of Columbia.

Nor did the Constitution protect free blacks from limitations imposed by the individual states. From 1819, when Maine joined the union, until after the Civil War, every new state denied the vote to free blacks and many did not allow them to serve on juries or even to testify in court cases involving whites. Constitutional protections did not prevent states like Ohio, Illinois, Indiana, and Oregon or the territory of Michigan from barring free blacks or from requiring substantial bonds as a prerequisite to their emigration. The Northwest Ordinance, adopted by Congress in 1787, forbade slavery in this North-central region, but it did not assure the civil rights of free blacks in the area. Even in states like Massachusetts and Pennsylvania, which did not restrict black emigration, there was serious discussion of such action. Save for two votes in its constitutional convention of 1850, California would have barred blacks. Clearly weevils abounded.

The question of black citizenship was further complicated by the fact that although many states obviously precluded it, others did not. Before 1820, free black men in Massachusetts, New Jersey, Pennsylvania, New York, Maine, Vermont, Connecticut, Rhode Island, and New Hampshire voted on an equal basis with white men. Ironically, they lost that right in New Jersey, Connecticut, and Pennsylvania before the Civil War. In New York, black voters had to meet property ownership requirements that were removed for whites during the democratic reforms of the Jacksonian era. Yet Afro-American political participation in states where it was allowed lent legitimacy to the claim of free black citizenship.

Several federal actions also seemed to imply that, on occasion, the Constitution protected blacks. A few blacks received passports to travel abroad under the aegis of the United States during the 1840s and 1850s. At times the federal government also moved to safeguard the rights of free blacks at home as well. In response to the contentions of slaveholders that free blacks had a dangerous effect on slaves, in 1822 the South Carolina legislature passed the Colored Seamen's Act requiring the imprisonment of all free black seamen for the time that their ships remained in South Carolina ports. Moreover, the ship's captain had to pay the cost of the seaman's imprisonment, an amount he often deducted from the seaman's wages. If the captain refused, the seaman was sold into temporary slavery to compensate local authorities. Other southern states adopted similar laws. Since the sea offered a major source of employment for thousands of free blacks before the Civil War, this provision posed a major threat to the free black community. In response to protests by free blacks and northern white reformers, a congressional committee investigated these policies and determined that they violated the Constitution. The committee did not express an opinion on the question of black citizenship, however. In 1823 the Supreme Court supported congressional

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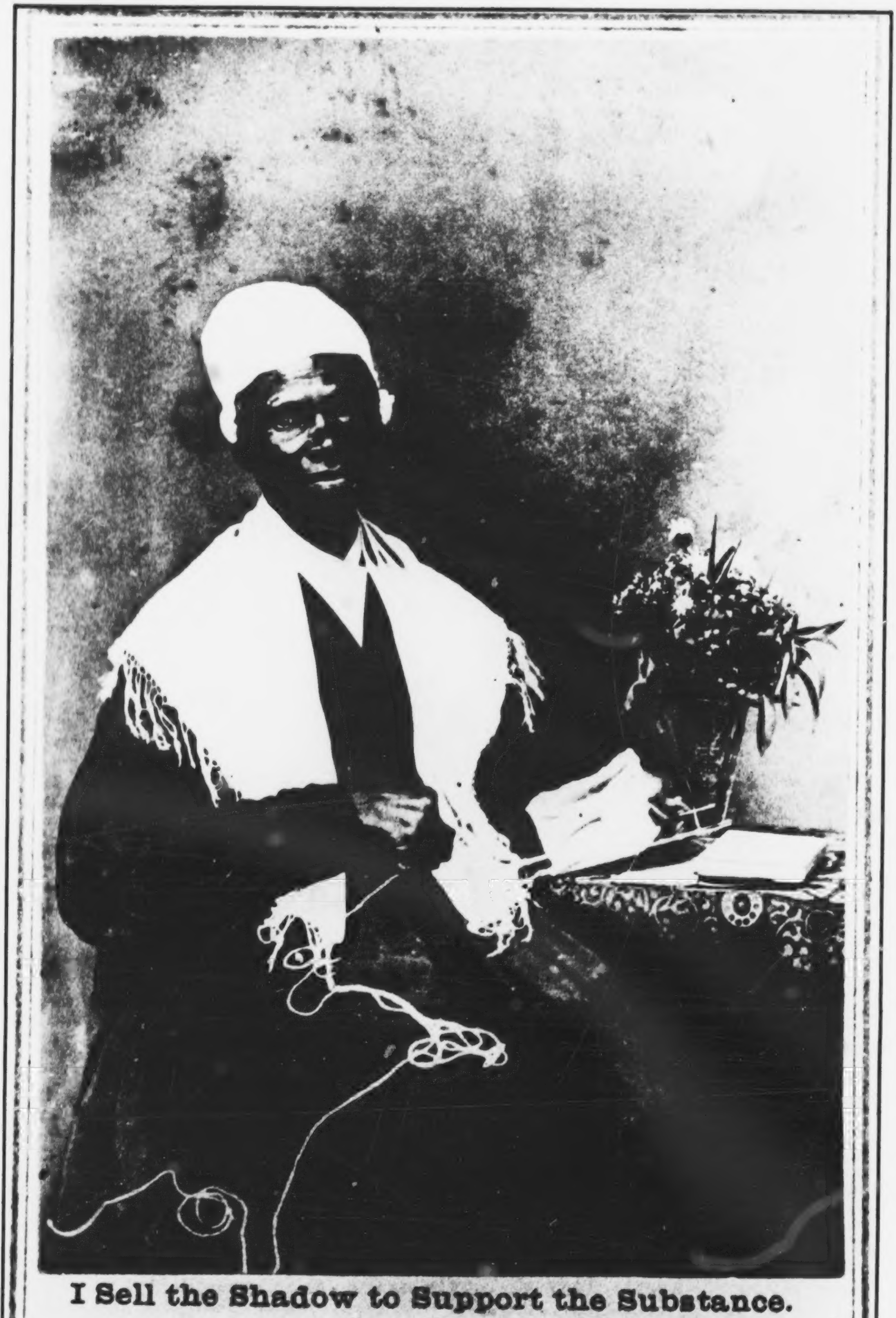
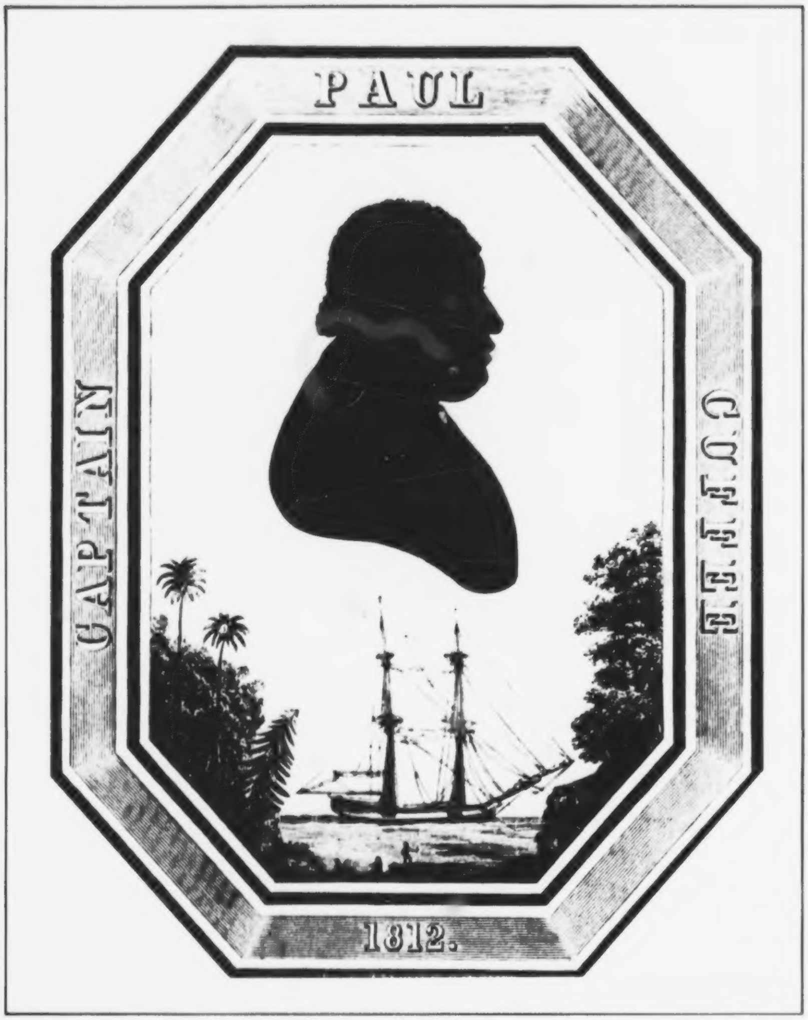
The author is indebted to Paul Ruden, Joseph Mclaughlin, Paul Finkelman, and Spencer Crew who read and offered valuable advice on this manuscript at various stages of its preparation.


I Sell the Shadow to Support the Substance.
SOJOURNER TRUTH.

Sojourner Truth, *photograph by unidentified photographer. National Portrait Gallery, Smithsonian Institution, Washington, D.C.*



Paul Cuffe, *wood engraving by Mason and Maas. National Portrait Gallery, Smithsonian Institution, Washington, D.C.*

judgment by declaring such laws unconstitutional. (Despite this ruling, several southern jurisdictions continued the practice until the Civil War.)

Although officials interpreted the Constitution inconsistently as it applied to free blacks, Afro-Americans insisted on their fundamental right to its protections. They had stood with other patriots against "British tyranny" and when Thomas Paine, Samuel Adams and other white patriots declared that Americans would never be slaves, blacks agreed wholeheartedly. Throughout the Revolution, as five thousand of them served in the cause of American liberty, blacks continued their call for the abolition of slavery. A group of 19 "natives of Africa freeborn" in Portsmouth, New Hampshire, reminded white patriots that "public and private tyranny and slavery are alike detestable" and that "the God of nature gave [blacks] life and freedom, upon terms of the most perfect equality with other men."

Afro-Americans drew allies from the ranks of Quakers, who had opposed slavery for a generation before the Revolution, and from more recent converts, who saw an inconsistency between emerging American principles and American slavery. Abigail Adams wrote to her husband John of her discomfort with Afro-American bondage. "It has always seemed a most iniquitous scheme to me," she wrote, "to fight ourselves for what we are daily robbing and plundering from those who have as good a right to freedom as we have." Abigail Adams did not stand alone in her opposition to slavery. In northern states where the institution was less economically important than in the rich plantation areas of the South, the anti-slavery movement grew during the post-Revolutionary period, attracting such notables as Benjamin Franklin of Pennsylvania, John Jay, Alexander Hamilton and Aaron Burr of New York, and Moses Brown of Rhode Island.

Blacks and their white allies used the language of the Constitution to prod the conscience of the nation. This strategy succeeded in the North because slaveholders there had less economic and political power. In the South, such arguments moved a few masters to individual acts of emancipation but found little legislative support. By 1804 slavery, which had been practiced in all thirteen colonies, was abolished or set on the road to abolition by gradual emancipation plans in all northern states, isolating that institution in the South. There it remained until uprooted by civil war.

The legal position of southern-free blacks during the antebellum years was a complicated one. Living in the midst of slavery, free blacks in the South were an enigma to the slaveholding society. They were always viewed as suspect and potentially dangerous to the institutions of slavery. The liberty extended to southern free blacks was minimal and did not include the right of protest. So precarious was their freedom that on the eve of the Civil War, South Carolina seriously debated enslaving its free blacks. Nowhere in the North did blacks face that kind of official action.

In the North, blacks were especially equipped to demand their rights from the new government. During the colonial period slaveholding in that region was on a small scale. Except for the great plantation-like estates of the Hudson valley in New York and the

> *Throughout the nineteenth century, free blacks continued to employ the language of the Revolution and the structure of democracy in the formation of their community institutions and in the strategy of their antislavery and civil rights protests.*

Narragansett region of Rhode Island slaveholdings averaged about two slaves each. Under these circumstances newly imported Africans were often isolated from one another but they came into regular contact with whites. Unlike slaves on the large plantations of the South who maintained a variety of African traditions well into the nineteenth century and beyond, northern slaves made a more rapid transition from African to Afro-American, quickly learning the language and the customs of their captors. Northern blacks did not forget African cultures and traditions; rather, they modified and combined them with those of Europe. Northern Afro-American culture became the practical blend of Western culture and the many different cultures of Africa.

Thus northern blacks on the eve of the Revolution knew well the rhetoric and the ideals of American liberty, and they used the instruments of democracy to communicate their requests to governmental authority. Time and again, slaves petitioned the courts and the legislatures for their freedom. Astutely they appealed to American political and religious ideals in their message. "We expect great things," wrote one group of slaves to the Massachusetts General Court, "from men who have made such a noble stand against the designs of their fellow men to enslave them." Throughout the northern states slaves pressed for their freedom during the 1770s and 1780s using the language of America's independence movement. Their message was simple. Slaves asked no more from the new nation, "this free and Christian country," than slaveholders had demanded from the Old World—freedom.

Northern blacks also used this tactic in their campaign for civil rights after they won freedom. For two years, between 1778 and 1780, John and Paul Cuffe, two free black ship merchants of West Port, Massachusetts, refused to pay their land taxes so long as their home state did not allow blacks to vote. In the state courts and at local town meetings they argued in strong language calculated for effect. They would not submit to "taxation without representation." Their action encouraged the state to redraft the 1778 version of its constitution which contained no bill of rights and restricted voting by race. The final constitution, adopted in 1780, did not limit black voting and was later interpreted as prohibiting slavery.

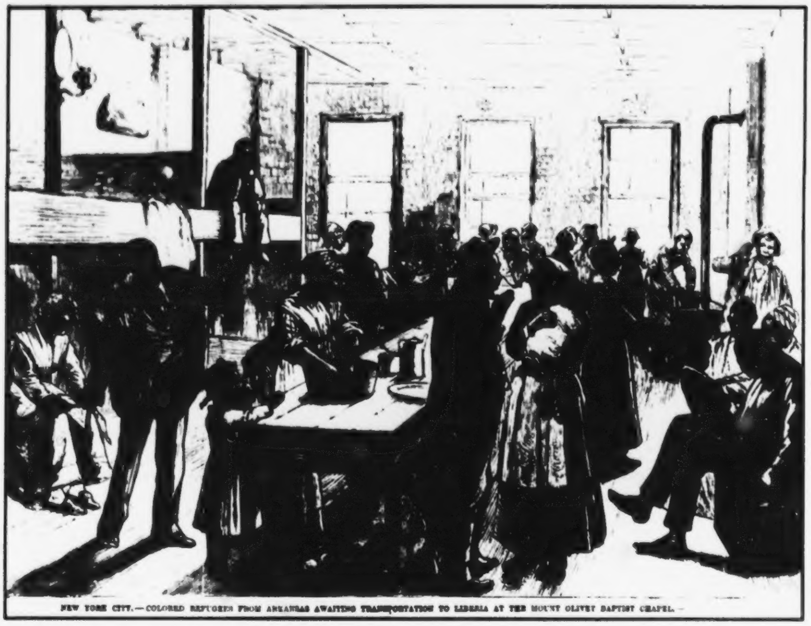
Black Organizations

Throughout the nineteenth century, free blacks continued to employ the language of the Revolution and the structure of democracy in the formation of their community institutions and in the strategy of their antislavery and civil rights protests. As northern blacks emerged from slavery, they established many mutual aid and benefit societies. Long before the federal government provided aid to the poor, Afro-Americans depended upon these organizations during times of crisis and economic hardship. For a people restricted by racial discrimination to the least reliable and lowest paying jobs, the work of these organizations proved indispensable in providing aid to widows and dependent children, workman's compensation and unemployment insurance, and basic charity services. Although state and local governments sometimes aided needy whites, they often ignored blacks or gave them diminished benefits. Usually, blacks relied on their own communities or on the support of progressive whites who were committed to the abolition of slavery and to the improvement of the condition and the welfare of the "free people of color." In Philadelphia and New York, for example, Quakers operated schools and charity agencies for blacks.

These groups were established on the democratic model. They set forth their principles and purposes in organizational constitutions or similar documents in words reminiscent of the Constitution. "We, the African Members" began the *Laws of the African Society* founded in Boston in 1796. "We, the Subscribers . . . , do form ourselves into an Association, for the benevolent purpose of raising funds . . . to aid and assist the widows and orphans of deceased members . . ." read the *Constitution of the New York African Clarkson Association* in 1825. The opening of the *Constitution and By-Laws of the Brotherly Union Society* in Philadelphia in 1833 contained similar language. These documents were divided into "articles" and often prefaced by "preambles." They provided for democratic functions including the election of officers (presidents, vice presidents, secretaries, and treasurers) and for policy decided by majority vote of the membership.

Black Voters

Afro-American community organization extended to political associations. Like other Americans of the period, blacks sought ways to consolidate and exercise political influence. Such influence was slight but it did exist in the early years of the nineteenth century in states where blacks held the franchise. Afro-American voters were not overwhelming in numbers but in some cases they could affect the outcome of important elections be-



NEW YORK CITY.—COLORED REFUGEES FROM ARKANSAS AWAITING TRANSPORTATION TO LIBERIA AT THE MOUNT OLIVET BAPTIST CHAPEL.—

Woodcut in Leslie's, *April 24, 1880. Library of Congress.*

cause of their strategic location. In New York City, for example, one opponent of suffrage for blacks lamented that "the votes of three hundred Negroes in the city . . . decided the election [1813] in favor of the Federal party, and also decided the political character of the legislature of this state." He no doubt exaggerated the impact of the black vote, but his point remained.

Aware of the important role Federalist party members had played in the antislavery campaigns of the late eighteenth and early nineteenth century, free blacks organized to support the party at the polls. The Federalist party, as a result of its unpopular stance in opposition to the War of 1812, lost power and passed from the political scene before the 1820s. Black voters, left with little support against growing Democratic opposition to their political rights, shifted their allegiance to the Whig Party and later the Liberty Party, Free Soil Party, and finally the Republican Party on the eve of the Civil War. Sophisticated in the ways of democratic politics, blacks operated through a variety of groups, striking political alliances where possible, in the expression of their collective will as American citizens.

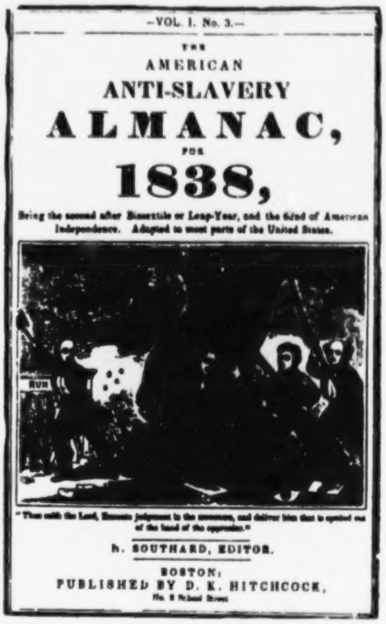
The courting of black votes by Whigs and Free Soilers in Providence, Rhode Island during the 1848 presidential election exemplified the recognition of the strategic positioning of black voters in that state. The Whig candidacy of Zachary Taylor, a Kentucky slaveholder, for president strained traditional Afro-American support for that party. The choice offered by the Free Soil party proved no less complicated. Although the free soilers sought to prevent the spread of slavery to the western territories, a policy enthusiastically endorsed by blacks, their presidential candidate was former Democratic President Martin Van Buren, of New York, who had strong ties to the slaveholding South and in the past had supported slavery in Washington, D.C.

Afro-Americans organized on both sides. Frederick Douglass, powerful abolitionist and former slave, lent his prestige to the Free Soil campaign, urging that Van Buren's promise to support the abolition of slavery in the District of Columbia in the future be taken as a sign of his conversion to "free soil" principles. Conversely, many local Providence black leaders and several black newspapers encouraged Afro-Americans to stay with the Whigs. At election time, the Whigs carried the day with Taylor receiving almost all the city's black vote which accounted for at least one third of the Whig victory margin in the county of Providence. Thus, politicians and parties at all levels recognized black citizenship when blacks political participation brought them rewards. Unfortunately, such recognition was rare.

Colonizationism

Assertions of Afro-American citizenship faced a severe challenge from the activities of the American Colonization Society. Founded in 1816, this group sought to encourage the colonization in western Africa of free blacks and slaves subsequently freed. The most liberal colonizationists hoped that if they could assure southern masters that free blacks would be settled outside the country, more would consent to manumit their slaves. Other colonizationists saw the plan as an opportunity to rid the nation of troublesome free blacks. Although colonization never attracted wide support among free blacks, some expressed a willingness to emigrate to Africa. Early in the nineteenth century, ship merchant Paul Cuffe advocated African emigration and even transported a group of 38 blacks to the West African colony of Sierra Leone in 1815. Cuffe's efforts encouraged such white colonizationists as Henry Clay, Daniel Webster, Supreme Court Justice Bushrod Washington, Francis Scott Key, and others to establish their society a year later.

Despite the interest of many blacks in Providence, Philadelphia, and Boston, most free blacks disapproved of colonization. In several mass meetings before 1820, Philadelphia blacks took the lead in protesting the plans of the new society. The colonizationist's acquisition of territory in West Africa which became the society's colony of Liberia in 1822 heightened the interests of many southern free blacks but nearly all northern blacks remained opposed. So strong was the opposition among northern blacks that when John Russwurm, cofounder of *Freedom's Journal*, the nation's



—VOL. I. No. 3.—

THE
AMERICAN
ANTI-SLAVERY
ALMANAC,
FOR
1838,

Being the second after Bissextile or Leap-Year, and the 62nd of American Independence. Adapted to most parts of the United States.

RUM

"Thus saith the Lord, Execute judgment in the morning, and deliver him that is spoiled out of the hand of the oppressor."

N. SOUTHARD, EDITOR.

BOSTON;
PUBLISHED BY D. K. HITCHCOCK,

Division of Political History, Smithsonian Institution, Washington, D.C.

first black newspaper (New York City, 1827), became a supporter of colonization the resultant hostility forced him to leave the paper.

Black opposition to the American Colonization Society had complex sources. It included great suspicion of the motives of an organization which counted some of the most prominent slaveholders in the country among its membership. Blacks feared the unstated motive behind colonization plans—to remove free blacks from the nation, thus silencing the most vocal opponents of slavery and making slaveholdings more secure. Beyond these suspicions, blacks also resented the notion, implicit in the colonization program, that they had no right to American citizenship. "This is our home," declared a speaker at a Philadelphia meeting, "and this is our country. Beneath its sod lie the bones of our fathers; for it some of them fought, bled, and died. Here we were born, and here we will die."

The Colonization Society portrayed its aims as enlightened philanthropy which realistically addressed the nation's race problem. Supporters of colonization believed it impossible that blacks could find acceptance as fellow citizens by white Americans and saw African colonization as the only humane alternative. Afro-Americans disagreed—"Our condition can be best improved in this our own country and native soil, the United States of America," wrote a black abolitionist in the pages of the *Liberator* in 1831. Most free blacks argued that they would never willingly relinquish rights for which they paid dearly in the Revolution and again in the War of 1812.

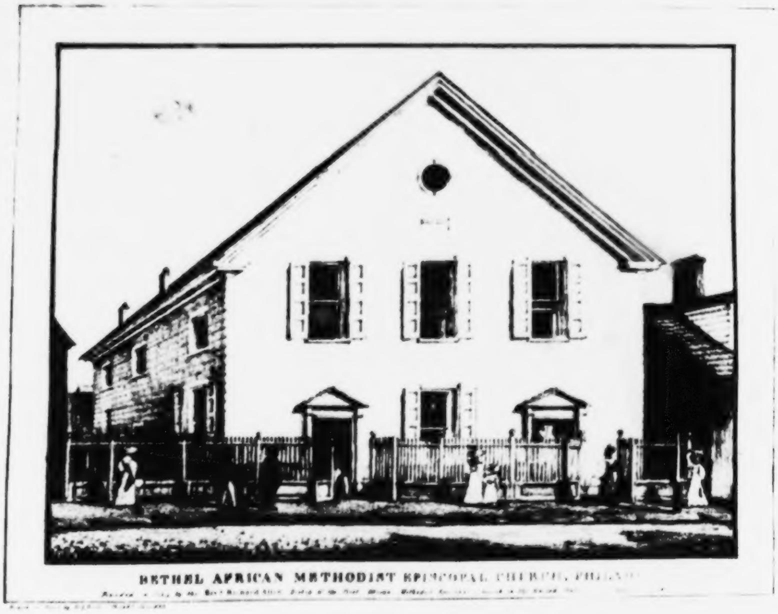
In their anti-colonizationist struggle, which continued throughout the pre-Civil War years, free blacks constantly appealed to the Constitution and the Revolutionary ideals which they insisted guaranteed their freedom and civil rights. Beginning in the early 1830s, Afro-Americans met in national conventions to discuss and organize a response to the growing influence of the "Slave Power" and to colonizationist plans. On September 20, 1830, approximately thirty delegates representing five states met in Philadelphia's Bethel Church for five days to propose strategies for dealing with the problems of black America. In the first line of the convention proceedings, these delegates proclaimed a commitment to the spirit of the Declaration of Independence. The next year, delegates resolved that the Declaration and the Preamble of the Constitution be read at the opening of each convention. They asserted: "Truths contained in the former document are incontrovertible and ... the latter guarantees in letter and spirit to every freeman born in this country all the rights and immunities of citizenship."

'Slaveholder's Document'

Although this commitment to the Constitution and the Declaration was sorely tested, it never broke, though revered Afro-American leaders and white allies challenged the notion that these documents protected black rights and opposed human bondage. The Constitution endorsed the apprehension and return of fugitive slaves to masters even when slaves managed to escape into free states or territories. It had also allowed the continuance of the African slave trade to American dealers until 1808. Indeed, the adoption of the Constitution had hinged upon a series of compromises which granted additional national representation to slave owners according to the extent of their slave holdings. The Constitution itself, not simply the actions of proslavery national officials, sustained slavery.

By the 1830s, white abolitionist editor William Lloyd Garrison moved to this position and took a radical stand against the Constitution. On several public occasions, he denounced and burned copies of it as a "slaveholder's document." Some blacks, following Garrison's lead, also attacked the Constitution as pro-slavery. Until the late 1840s, Frederick Douglass disdained it "as a most foul and bloody conspiracy against the rights of three millions of enslaved and imbruted men." Douglass supported Garrison's antipolitical stand reasoning that "until the government and the Constitution were replaced by institutions which would better answer the ends of justice, no true friend of liberty in the United States could [in good conscience] vote or hold office."

At the American Anti-Slavery Society's meeting in New York in 1844, black delegate Thomas Van Renslear called on blacks to "have nothing to do with the government [of the United States]; and as regards the Constitution, ... have nothing to do with that instrument." Other blacks in Massachusetts again challenged the government on the grounds of "taxation without


BETHEL AFRICAN METHODIST EPISCOPAL CHURCH, PHILAD

Bethel African Methodist Episcopal Church, Philadelphia. *Free Library of Philadelphia.*

representation." In defiant language one black Bostonian urged his fellows to exert economic pressure in the fight for civil rights: "Let every colored man, called upon to pay taxes to any institution in which he is deprived or denied its privileges and advantages, withhold his taxes, though it may cost imprisonment or confiscation. Let our motto be—No privileges, no pay." By the end of the 1840s, a growing number of blacks agreed. "The government does not protect my rights, and I will not support such a government," said black abolitionist Charles Lenox Remond in 1847. "Show me a Constitution which protects the rights of all men and I'll sustain that."

Despite such pronouncements by Garrisonian abolitionists, most free blacks continued to assert their rights as citizens under the Constitution. When in 1837 Pennsylvania considered a state constitution which deprived blacks of the right to vote, Afro-Americans argued in petitions to the legislature that they were citizens both of the state and the nation. Afro-American citizens of Pennsylvania reminded the leaders of their state that "among all the rights of a Republic none are so sacred, and among all the safeguards of the liberties of freemen none are so powerful, as the right of suffrage." To deprive black people of that right after all they had done for the state and the nation, they charged, was an affront to democratic principles and an "insult and mockery to the Almighty Creator of all things and Judge of all men." These appeals did not succeed in preventing the disenfranchisement of blacks in the state, but the claim that such discrimination was a violation of the federal Constitution and an insult to God's plan for human development became the standard argument echoed throughout the 1840s.

In 1843 the state convention of Afro-Americans in Michigan passed a resolution to that effect, but there also were dissenting delegates. A year later New York blacks convened a state gathering to argue in similar tones for the extension of the vote to Afro-Americans in that state. At the end of the decade, black Ohioans used the appeal to God and the principles of the founding fathers to bolster their drive for an extension of civil rights in their state. In all these actions minority voices argued the inappropriateness of such appeals and that the Constitution offered no protection for their race.

The debate among blacks continued into the 1850s, but during that pre-Civil War decade most came to believe that interpretations of the Constitution as not protecting black rights perverted its Revolutionary ideals. In the spring of 1850, Afro-American abolitionist Henry Bibb addressed a meeting of Boston blacks denouncing the failure of the federal government to fulfill its obligation to all Americans. He called upon his listeners to participate in the move to "correct the public sentiment [and] get the Constitution and the people right." Even Douglass reversed his anti-Constitution position during these years, focusing his condemnation not on that document but on those who, for their own purposes, would subvert it. The Bible is not a "bad book" simply because it was used for evil, he said. "The slaveholders of the South, and many of their wicked allies in the North, claim the Bible for slavery; shall we therefore fling the Bible away as a pro-slavery book?" He believed not—"It would be as reasonable to do so as it would be to fling away the Constitution."

Eve of Civil War

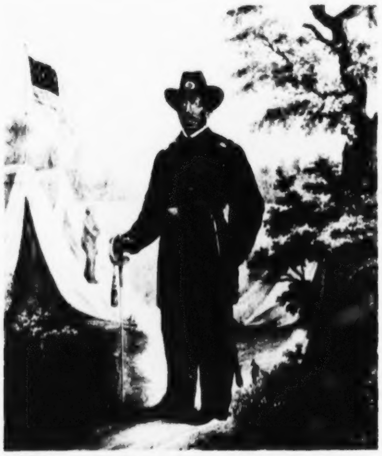
Yet even as most blacks argued for this stand during the 1850s, Afro-American protests became more strident after Congress passed the fugitive slave law of 1850. The new law not only made the retrieval of fugitive slaves easier but, because one captured as a runaway could not testify in his or her own defense, it also endangered the liberty of free blacks. Angry and discouraged with the prospects of ever forcing whites to recognize their citizenship rights, a sizable minority of blacks again turned to the notion of African colonization.

The emergence of Liberia as an independent nation in 1848 renewed Afro-American interest in African emigration. The leadership of militant blacks like Dr. Martin R. Delany of Pittsburgh replaced the moderate to conservative white leadership of the earlier American

Colonization Society making the possibility more acceptable. Starting in 1850, several black organizations like the Liberian Agricultural and Emigration Society (1851) and the African Civilization Society (1858) attracted a considerable following. Yet emigration continued as a distinctly minority position. Most blacks elected, as Dr. John Rock of Boston explained, to "remain in this country and try to make it worth living in." On the eve of the Civil War, blacks continued to debate the wisdom of leaving the American land of their birth for the African land of "their opportunity." Most held fast to their rights as Americans.

The events of the late 1850s, however, made claims of black citizenship constitutionally moot. In *Dred Scott* v. *Sanford* (1857), the Supreme Court held that Scott remained a slave even though he had lived for a number of years, with his master's consent, outside a slave state. The court had, seven years earlier, rendered a similar judgment in the case of *Strader* v. *Graham* (1850). More disheartening, however, was Chief Justice Roger B. Taney's conclusion that Afro-Americans, slave or free, were not citizens of the United States and were not entitled to the protections of the Constitution. Although like opinions had been expressed by members of the federal government, never before had the highest court made such a clear statement on the matter.

Blacks debated the *Dred Scott* ruling until the outbreak of the Civil War. Some considered it "illegal." Others asked what else might be expected from a court which represented "pro-slavery doughfaces" and "Democratic slave-breeders." That blacks continued to vote in five New England states and in New York (with property requirement restrictions) further complicated the issue as did the support they received in their denunciation of the court decision from white allies, many of them state or federal government officials.



Martin Robinson Delany*, lithograph by unidentified artist. National Portrait Gallery, Smithsonian Institution, Washington, D.C.*

By the mid-1860s, this debate had become a constitutional dead letter, as the Civil War changed the mood of the Congress and ultimately changed the wording of the Constitution. First in the Civil Rights Act of 1866 and then in the Fourteenth Amendment, ratified in 1868, black citizenship was finally guaranteed. Although, as would soon become clear, these guarantees did not ensure the protection of their constitutional rights, blacks were at last irrefutably American citizens. For most black Americans, these acts provided the formal constitutional recognition of a status they had never doubted was their due.

Throughout the antebellum period, blacks drew upon America's most cherished ideals in their struggle against slavery and for civil rights. They argued for the fair application of constitutional rights irrespective of color. They demanded no more and determined to accept no less. Within the American context, the concept of racial equality seemed a radical one. Yet most blacks willingly pressed their demands within the moderate bounds of the American constitutional framework. They accepted movement in evolutionary steps towards equality through the popularly sanctioned routes of education, hard work, and respectability. They resented having to "prove" their fitness for citizenship, but most consented to do that required of them, but of no other native-born American.

Most Afro-Americans maintained a reverence for America's promise as set forth in its statement of purpose. Although there may have been disagreement on whether the Constitution protected black rights, blacks always insisted on their right to citizenship by virtue of their birth, their commitment to the ideals of the American Revolution and their service in the struggle to achieve and protect American freedom. A century later, the struggle to achieve the reality of America's promise continues.

Suggested additional reading:

Curry, Leonard P., *The Free Black in Urban America, 1800-1850: The Shadow of the Dream* (1981).

Cottrol, Robert J., *The Afro-Yankees: Providence's Black Community in the Antebellum Era* (1982).

Dick, Robert C., *Black Protest: Issues and Tactics* (1974).

Franklin, John Hope, *From Slavery to Freedom: A History of Negro Americans* (1979).

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Sweet, Leonard I., *Black Images of America, 1784-1870* (1976).

James Oliver Horton is associate professor of history and American civilization, George Washington University; Director of the Afro-American Communities Project at the National Museum of American History of the Smithsonian Institution; co-author with Lois E. Horton of *Black Bostonians: Family Life and Community Struggle in an Antebellum City* (N.Y., 1979) and co-editor with Steven J. Diner of pilot volumes for *City of Magnificent Intentions: A History of the District of Columbia* (Washington, D.C., 1983). He is currently writing a history of free blacks in the antebellum North.

The Meaning of American Citizenship

by ROGERS M. SMITH

What does it mean to say, "I am an American citizen?" The law supplies dry technical answers: the statement means that one falls under a constitutional or statutory category conferring full membership in the American polity. The chief ones are, with minor exceptions, birth within the United States, which confers citizenship under the Fourteenth Amendment, plus birth to American parents overseas, and naturalization, categories regulated by federal statutes.

Yet in saying these words, most Americans surely mean to express more than their juridical status under national law. They are professing their sense of belonging to a unique nation, with a heritage of great deeds and tragic flaws, a shining set of ideals, vast resources, and a singularly commanding and demanding position in today's world. For many the sentence is also a revelation of their sense of self, of who, for better or worse, they feel themselves to be at the deepest emotional level. It has, then, much more than a merely legal meaning. It is at bottom a statement of political and personal identity that evokes complex, powerful, and often contradictory ideas and sentiments, for Americans and non-Americans alike.

But while the laws regulating American citizenship have never captured all the rich significance of the status, neither have they been immune to these broader political and personal meanings. Because being a United States citizen has stood for different things to different Americans at different times, the constitutional provisions, legislative statutes, and judicial decisions governing civic membership have blended several distinguishable and evolving conceptions of what American citizenship means.

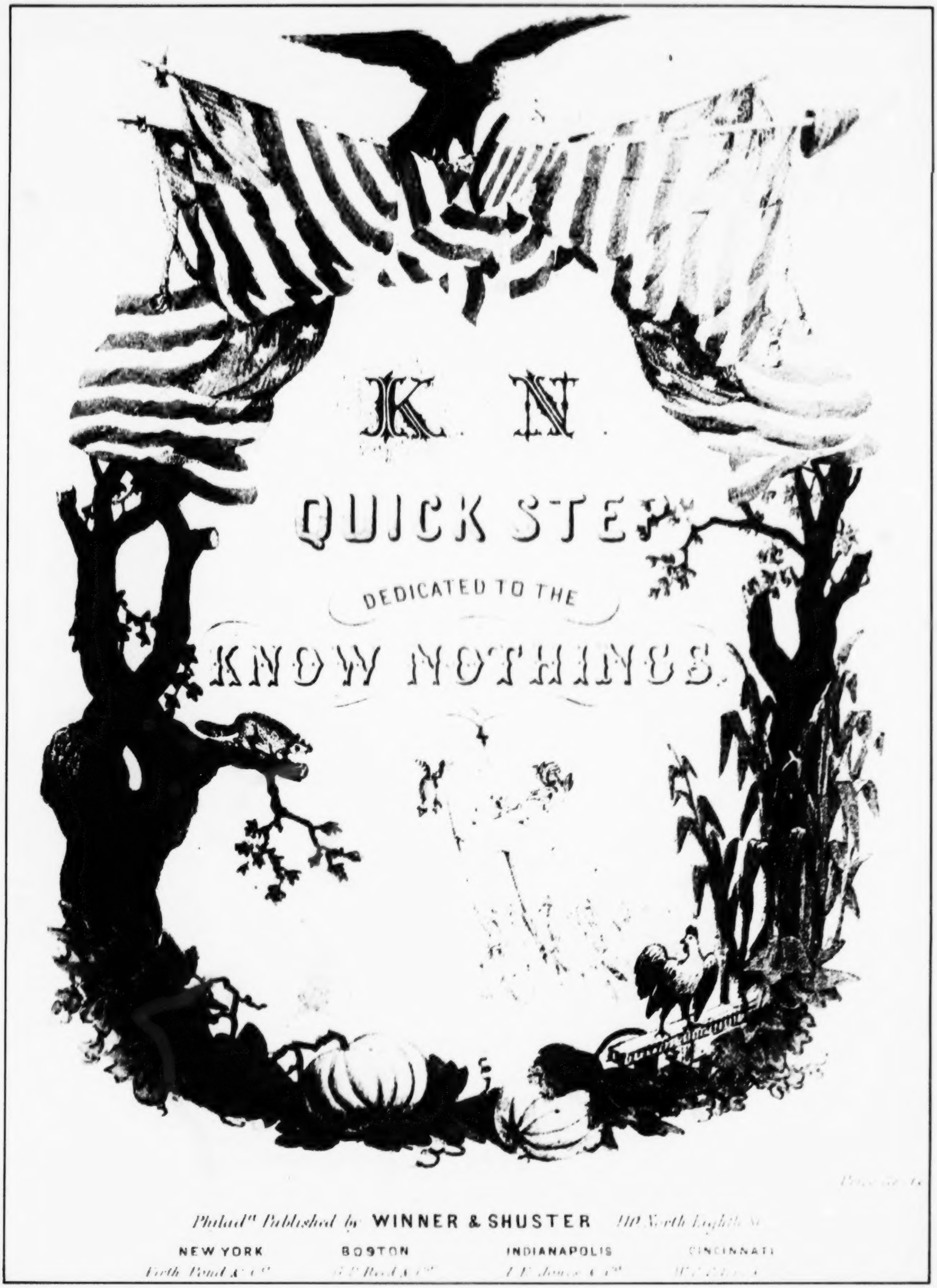
"Blended" may be a deceptively soothing word. America's changing citizenship laws have been produced by recurring, often bitter contests between partisans of rival notions of American civic identity—a historical drama that is entering a momentous new phase in our own time. To over-simplify for clarity, there have been three basic conceptions or "ideal types" of American citizenship that the nation's laws have always combined, though in strikingly different mixtures. Scholars have termed these conceptions "liberal," "republican," and "nativist."

Concepts of Citizenship

The "liberal" conception derives from the emancipating spirit of the eighteenth-century Enlightenment and from the political experience of the middle classes in England and America, who fought in that era against restrictive feudal economic and political prerogatives and against intolerant religious and intellectual orthodoxies. The liberal citizen believes that all persons should have freedom from any imposed political status, religious creed, or economic position, and equal opportunities for the pursuits they find most meaningful—political activism or private family life, spiritual perfection or material enrichment. In the great revolutionary and constitutional documents of eighteenth- and nineteenth-century America, these beliefs were presented as rationally discoverable natural or divine rights to "life, liberty, and property" or "the pursuit of happiness." In the twentieth century, liberals no longer hold their truths to be self-evident, and so they stress even more the right of all to pursue their preferred beliefs in a fruitful plurality of communities and associations. But in both its older absolutist and its modern relativistic phases, the liberal tradition has conceived of citizenship, in America and in all nations, as properly a matter of choice, not inheritance or prescription, and as involving at root only a duty to abide by the laws of regimes in which human rights are honored and a multitude of private and public activities flourish.

The republican conception reflects the new form of government and of civic life that formed the goal of many leading seventeenth- and eighteenth-century revolutionaries in England and America, who often signed their writings with names of their Roman republican heroes, such as Cato, Cicero, and Publius. Republican citizens are convinced that they cannot be truly free, and cannot have dignity, unless they participate actively in the political devisions that shape the common life of their people. They value popular, or republican, institutions that promote extensive democratic participation; small, relatively homogeneous political communities, in which citizens feel themselves to be a great civic family; and a public morality of civic virtue, of services and sacrifices on behalf of the common good—even if this means the abandonment of many personal aspirations and "liberal" private pursuits.

The nativist conception was not so visible until the late nineteenth and early twentieth centuries, when the nationality the American revolutionaries created came to seem natural to later generations, and to be threatened by new immigrants and other social changes. Yet from early on, Americans often identified membership in their political community not with freedom for personal liberal callings or republican self-governance, but with a whole array of particular cultural origins, customs, and traits—with northern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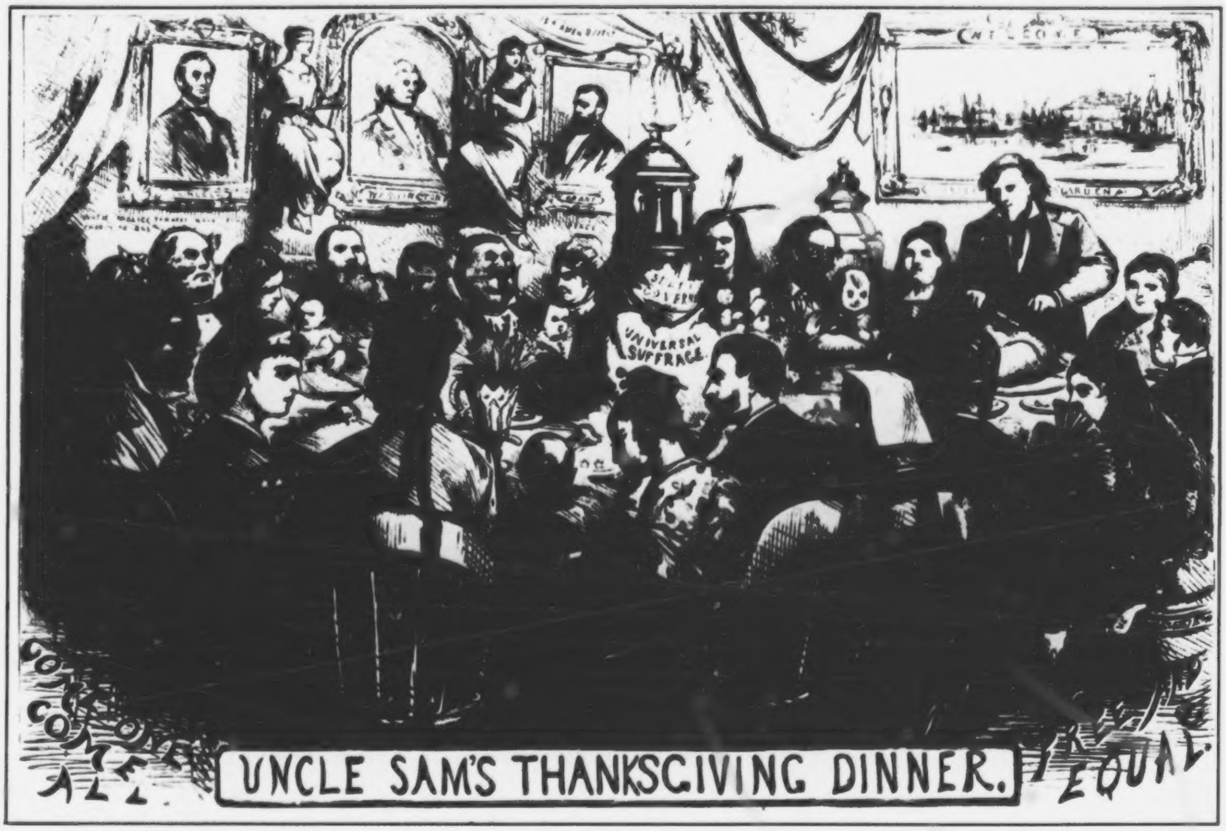

COME ONE COME ALL.
UNCLE SAM'S THANKSGIVING DINNER.
FREE AND EQUAL.
UNIVERSAL SUFFRAGE
SELF GOVERNMENT
WELCOME

"Uncle Sam's Thanksgiving Dinner," Harper's Weekly, *November 20, 1869. Library of Congress.*

European, if not English, ancestry; with Christianity, especially Protestantism, and its message for the world; with the white race; with male leadership and female domesticity; and with all the customary economic and social arrangements that came to be seen as the true, traditional "American way of life." In the first *Federalist* paper, John Jay described Americans as a Providentially-guided "band of brethren," "descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs"—an account by a wealthy Anglo-Saxon Protestant that ignored the considerable ethnic, regional and religious diversity Americans already displayed.

But while nativism has often been cruelly narrow-minded, at its heart are genuine feelings of affection, belonging and loyalty that Americans might today express as love for their land of "baseball, hot dogs, apple pie and Chevrolet." These are feelings born of deep human needs to affirm one's origins, needs captured memorably by Sir Walter Scott: "Breathes there a man with soul so dead/Who never to himself has said/This is my own, my native land!" It is questionable whether any country's laws of membership can or should be so liberal as to leave no place for such nationalistic sentiments. They have, in any case, always had great influence on America's citizenship provisions.

In their unmixed, archetypical forms, these three conceptions are in tension. For a pure liberal, the republican and nativist conceptions are too intolerant of human variety and privacy. For a pure republican, the liberal conception licenses selfish egoism, while nativists are patriotic enough, but may not value political participation enough. Nativists believe that only their conception really captures who they are; so while they may cherish liberal ideals and republican institutions because they are American, they will not allow them to shield "un-American" trends that endanger the particular communal order they take as definitive of their very identity.

None of these conceptions has ever won exclusive sway in American law. From the founding to the present, they have waxed and waned, always exerting some discernible influence. Painting broadly, we can describe three eras in which particular combinations have been especially predominant in the nation's governing policies, laws, and judicial decisions.

'Liberal Republican' Citizenship

The first era, from the birth of the nation through roughly the 1880s, was the period in which the three were best harmonized. It can nonetheless be termed the era of "liberal republican" citizenship, for these two elements were most pronounced. During the American Revolution, liberals, republicans, and incipient nativists were united by the belief that the cause of liberty required throwing off English monarchy and establishing an American republic dedicated to securing inalienable human rights. That liberal goal argued for open immigration and easy naturalization policies which would make America an

The cosmopolitan belief that American membership should be available to all who professed liberal principles did not persuade those who found their community identity threatened by the alien newcomers, now from southern and eastern Europe and China, who were transforming America's urban vistas.

"Asylum" for the "oppressed and persecuted of all Nations and Religions," as George Washington urged repeatedly in the 1780s. Liberal policies basically prevailed for the first third of the nation's history—but only when tailored to nativist and, particularly, republican concerns.

Thomas Jefferson, for example, originally feared extensive immigration of the unrepublican offspring of Europe, who would make the American public "a heterogeneous, incoherent, distracted mass," incapable of self-government. While he later decided that the young republic needed new population to fill the Western agrarian lands that would preserve rustic republican virtues, he always urged the prompt "amalgamation" of newcomers into the pre-existing society. Similarly, in the early nineteenth century nativists proclaimed the Anglo-Saxon race peculiarly suited for liberty and self-government. But so long as the nation clearly needed more inhabitants, citizens of English stock were confident that they could bestow their innate virtues on other European peoples by assimilating them into the mold of that purified new Anglo-Saxon creation, the American.

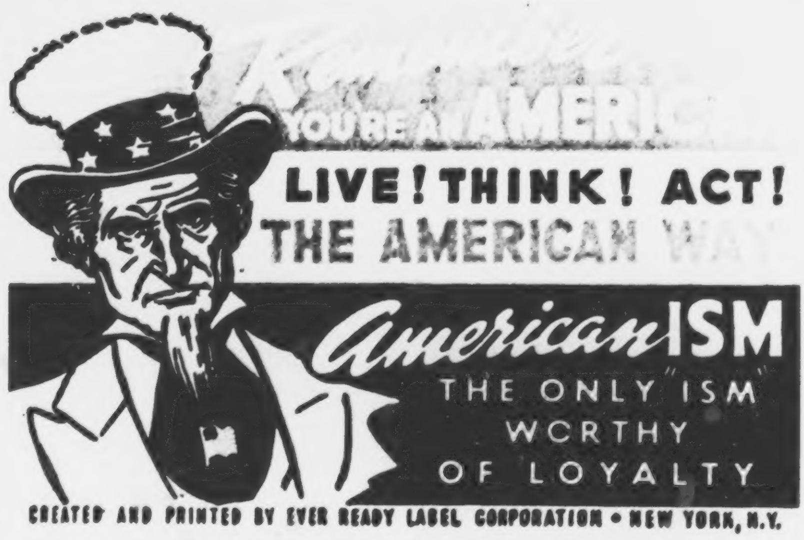
Even so, republican and nativist concerns did produce major restrictions on eligibility for citizenship. Both the unreconstructed feudal elite of Europe and the "uncivilized" non-European masses were excluded. Under federal law, naturalization was available only to those who surrendered their unrepublican aristocratic titles, and only to whites. Applicants also had to spend a period in residence, usually five years, to imbibe republicanism, and then swear allegiance to the principles of the Constitution. The states, as the chief repositories of republican powers of self-government, were constitutionally entitled to maintain an exclusive and homogeneous body of citizens if they so chose, and most denied rights of citizenship to blacks and to those most worthy of the title, "Native Americans." Women were disfranchised citizens, confined to the role of "republican mothers," which meant they were to teach civic virture to their sons. Even so, in the years when the national experiment in republican government required rapid population growth, American citizenship was easier to obtain than virtually any in the world. Once the Civil War extended the liberal rights of the Declaration of Independence, and citizenship, to American blacks, persons of African descent (but not other nonwhites) were also made eligible for naturalization.

But as the West started to fill, and immigration increased and diversified during the nineteenth century, both republican and nativist tenets were invoked to justify new, restrictive citizenship laws. The cosmopolitan belief that American membership should be available to all who professed liberal principles did not persuade those who found their community identity threatened by the alien newcomers, now from southern and eastern Europe and China, who were transforming America's urban vistas.

'Republican Nativism'

In the 1840s and 1850s, the nativist "Know-Nothings" urged exclusion of the foreign-born and Catholics from public office and a requirement of 21 years of residence prior to naturalization. Their efforts failed, but they made familiar an alliance of republican and nativist arguments that would be used to defend every restrictive policy thereafter. Free republican institutions, they insisted, required intelligent citizens, accustomed to self-government, and united by the fraternal feelings bred by a common faith and customs. Republicans and nativists further contended that those born to different races and raised under despotic governments and religions generally lacked the ability and upbringing to grasp the principles of free government, and to exercise political power responsibly. Certain groups must therefore be denied access to full American citizenship if the republic and its unique Christian civilization were to be saved. In the late nineteenth century, the nation's officials repeatedly recited these claims as they instituted new limits on immigration and naturalization and created legal categories of second-class citizenship. Thus commenced a harsh era of "republican nativism" that would reach its nadir in the 1920s and extend through the Second World War, leaving shameful legacies that seem almost ineradicable.

The treatment of Asian immigrants provides an example of "republican nativism" in action. For a variety of motives, economic, political, and xenophobic, the Chinese were portrayed as habituated to despotism, dishonesty and disease: even crusading journalist Horace Greeley claimed their "heathenish propensities" would mean the end of "republicanism and democracy." In the 1880s and 1890s, immigration of Chinese labor was first partly curtailed, then banned entirely. The U.S. Supreme Court upheld these anti-Asian views when it confirmed the new immigration restrictions in the famous *Chinese Exclusion Case* of 1889. The Court contended in nativist fashion that "differences of race" which made assimilation "impossible" meant that the Chinese were a danger to American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Americanism poster. Division of Political History, Smithsonian Institution, Washington, D.C.

morals, institutions, indeed "the preservation of our civilization." Beginning in the early twentieth century, Japanese applicants for naturalization also began to be rejected on the ground that they were non-white, a position the Supreme Court eventually affirmed in 1922.

Similarly, after America's burgeoning nationalism turned to aggressive imperialism during the Spanish-American war, the Filipino and Hispanic inhabitants of the nation's new Pacific and Caribbean colonies were denied full citizenship because the different "religion, customs, laws, and modes of thought" of "alien races" made it impossible to rule them according to "Anglo-Saxon principles" of "free government" (as the Supreme Court held in regard to Puerto Ricans in 1901.) The flagging liberal legacy of belief in human equality was of little help in opposing the prejudices of these years, for this was the heyday of "Social Darwinism," and the thesis of the inferiority of non-white races claimed to be more "scientific" than the old ideals of the Declaration of Independence and the egalitarian abolitionists.

Prodded by Henry Cabot Lodge and the handful of Boston bluebloods who comprised the Immigration Restriction League, the nation also repeatedly considered, and in 1917 adopted, a literacy test for immigrants that was chiefly aimed at excluding southern Europeans. Further, it added more ideological requirements for naturalization designed to ban the newest threats to republican government, Europe's radical socialists and anarchists. These restrictive developments culminated in the landmark immigration and naturalization laws of 1921 and 1924. They created the patently racist national quota system, which limited European immigrants to 3 percent of the number of foreign-born of each nationality present in the United States at the time of the 1910 census, thereby favoring northern Europeans, and banned completely all those ineligible for naturalization, including virtually all Asians.

The menace of foreigners to republican institutions was a constant refrain of the supporters of these measures, but republican arguments continued to serve in another important way to further nativist ends during this era. The constitutional traditions of federalism and states' rights, originally generated by republicanism's advocacy of small, self-governing, homogeneous political communities, retained great vitality at least up to the New Deal. Thus even after more egalitarian principles were enshrined in the Constitution via the equal protection clause of the Fourteenth Amendment, traditionalists could still argue that the states must be permitted to decide for themselves who should exercise political power and on what terms. The federal judiciary repeatedly invoked deference to the states' republican powers of self-determination to justify acquiescing in direct and indirect denials of political and civil equality to women and blacks. The pattern was evident as early as *Bradwell* v. *State* (1872), where the Supreme Court upheld Illinois' refusal to permit a qualified woman to practice law. Justice Joseph Bradley wrote a notorious concurrence in the case that drew on the arsenal of nativist justifications for ethnic discriminations. Bradley argued, in parallel fashion, that "nature" and the "divine ordinance" supported permanent legal relegation of women to the "domestic sphere." The majority of the Court, however, relied on the republican contention that the practice of law, like the ballot, was a privilege of state citizenship, which states could bestow in any way they thought beneficial. This republican "states' rights" argument subsequently served as a chief justification for innumerable state actions that effectively disfranchised and segregated blacks in the late nineteenth and early twentieth centuries, making a mockery of their constitutionally equal citizenship.

The Revival of 'Liberal' Citizenship

But beginning in the Progressive era, the more cosmopolitan, liberal conception of American citizenship was revived in somewhat altered form. President Woodrow Wilson articulated it deftly in a 1915 address to newly naturalized citizens, who had just sworn allegiance to the United States. Wilson told the new Americans that they had vowed loyalty "to no one," only to "a great ideal, to a great body of principles, to a great hope of the human race." He urged them to think of America, but to "think first of humanity," so as not to divide people into nationalistic "jealous camps."

The true prophet of the new lib-

Can feelings of allegiance to one's roots, the fuel of American nativism, be made to serve a healthy patriotism, or must they generate parochial perspectives that can only produce bigotry in a society that is now ineradicably heterogenous?

eral conception of citizenship generated by Progressive thought was, however, Horace Kallen, a Jewish philosopher influenced by the pragmatism of William James and John Dewey. Like Dewey, Kallen was disgusted by the harsh Americanization movement of World War I, which included public and private efforts to strip recent immigrants of "alien" characteristics virtually overnight. He argued in opposition that the true ideal of American identity was "cultural pluralism": the United States should be a "federal republic" in form, but a "democracy of nationalities" in fact, a commonwealth of numerous organic communities that would cooperate voluntarily in the "enterprise of self-realization" within culturally distinctive, but mutually respectful, ancestral groups. Kallen thus added to Wilson's emphasis on shared liberal ideals the contention that needs for a "native" community should be met by memberships in smaller ethnocultural bodies. This did not mean that Kallen's interpretation of American citizenship was less cosmopolitan than Wilson's. For Kallen, that citizenship was "no more than citizenship in any land with free institutions" that permitted heterogeneity while encouraging cultural cross-fertilization. In his important 1924 summary of his views, *Culture and Democracy in the United States*, Kallen wrote that the enlightened citizen, educated by the experience of diversity, would be "essentially a citizen of the world."

Wilson's liberalism, and its elaboration in Kallen's cultural pluralism, did not forestall the inflamed xenophobia of World War I and the postwar period. In fact, Wilson himself came to urge repressive measures against native dissidents and aliens alike, to safeguard "morale" for the war effort. The chief monuments of the nation's rising nativism, the bigoted immigration laws of the 1920s and the second-class citizenship accorded blacks, women, and other minorities, continued to predominate in American law and public policy through the Depression and the Second World War. But in the wake of that conflict with racist totalitarian regimes, liberal egalitarian forces gained new vigor in American life.

In the 1950s, most leaders of ethnic groups, immigrant organizations, and social reform movements came to accept some form of cultural pluralism, of equality among autonomous but cooperative ethnocultural groups, as the proper ideal for American life. Slowly, they gained successes in re-shaping American laws and policies to accord with this modern liberal conception. In 1952, Congress passed the McCarran-Walter Act, which finally abolished all overt racial requirements for naturalization, though the national quota system was largely maintained, and as part of the Cold War, federal powers to deport ideologically undesirable aliens were increased. Shortly thereafter, the Supreme Court struck down racial segregation, and later in the decade Congress adopted tentative legislation on behalf of black voting rights.

The 1960s marked the real ascendancy of the liberal notion of "cultural pluralism" as the dominant conception of civic identity in American public law. The historic 1964 Civil Rights Act promoted social equality for blacks and also for other minorities and women; the Voting Rights Act of 1965 furthered their political equality, and the 1965 Immigration and Naturalization Act at last terminated the discriminatory national quota system. New governmental programs were created to address the special needs of ethnocultural minorities, such as educational curricula more attuned to the nation's varied cultural heritage, bilingual ballots and governmental publications, and federally sponsored affirmative action programs in hiring and school admission policies. In the early 1970s, many of these initiatives were extended, by legislative amendments and by judicial decisions that broadened remedies against discrimination for all citizens and that provided almost equal protection to aliens as well.

Those measures could not, however, succeed in erasing the marks past policies had left on American institutions, social practices, and popular beliefs. Efforts to do so, moreover, increasingly encountered resistance. The tense struggle over desegregation, especially in northern cities, remains an ongoing national dilemma. Affirmative action measures, and the spread of representative quotas, explicit or implicit, within political parties and governmental administrative proceedings, have produced mounting acrimony. Concerns about the social changes that might result from the Equal Rights Amendment grew so strong that it was defeated, at least for the present.

The return to more open immigration since 1965 has led to an unprecedented influx of Asian and, especially, Spanish-speaking newcomers, heavily concentrated in a few regions, where they sometimes constitute local majorities. In consequence, many are again expressing fears that native American citizens are losing jobs to aliens, and that our political institutions and expanded social programs are being rendered unworkable by strangers in the land who cannot or will not participate in them responsibly. Recent controveries over bilingualism, refugee policies, amnesty for

Judge in chambers swearing in a new citizen, New York City, February 8, 1916. Library of Congress.

illegal aliens and education for their children, all reveal that the sorts of anxieties many Americans experienced prior to the closing of the immigration doors in the 1920s have not disappeared, but only slumbered in the intervening years. Their re-awakening has already had an impact on the actions of legislators, judges, and immigration officials, who show signs of a new hardening toward the claims of aliens, refugees, and domestic ethnic minorities. The Supreme Court has recently broadened the range of public employments that states may limit to citizens; the Immigration and Naturalization Service has resurrected near-punitive confinement for refugees awaiting processing; and federal officials have stopped advocating affirmative action programs and sweeping desegregation measures.

To be sure, few in public life today would defend the explicitly racist and chauvinistic nativism that pervaded American public discourse in the first quarter of this century. But immigration, ethnic, and racial questions are once again visibly central to America's public life; and so it is impossible to avoid the fear that the nation will see heightening ethnic conflicts in the years ahead. These consequences of the post-war move toward public policies promoting "cultural pluralism" raise anew some disturbing and unsolved questions. Can Americans hope to meet their needs for a sense of meaningful civic identity and national community if citizenship in the United States rests only on the cosmopolitan ideal of shared commitment to liberal principles, and so means no more than membership in any land with free institutions? Or must liberal policies always prove counterproductive, thrusting people back into their more communitarian subgroups, and generating not tolerance and openness but bitter ethnocultural rivalries? Will these quarrels, in turn, generate a disaffected citizenry that limits its political participation to agitation on behalf of special group interests, leaving more remote than ever the republican ideal of a vigorous public actively cooperating for the common good? Can feelings of allegiance to one's roots, the fuel of American nativism, be made to serve a healthy patriotism, or must they generate parochial perspectives that can only produce bigotry in a society that is now ineradicably heterogeneous?

These painful and perplexing issues will probably continue to be addressed in American law through some combination of liberal, republican and nativist views. Whether any new combination can be found that will seem legitimate, meaningful, and satisfying to Americans is a further question, however—one that the nation will be unable to avoid as it ponders the significance American citizenship should be given in public policies and adjudication during the American Constitution's third century.

Suggested additional reading

Milton Gordon, *Assimilation in American Life* (1964)
Louis Hartz, *The Liberal Tradition in America* (1955)
John Higham, *Strangers in the Land: Patterns of American Nativism, 1860-1925* (1966).
James Kettner, *The Development of American Citizenship, 1608-1870* (1978)
J.G.A. Pocock, *The Machiavellian Moment* (1975).

Rogers M. Smith is assistant professor of political science at Yale University and the author of *Liberalism and American Constitutional Law* (forthcoming, Harvard University Press, fall 1985). He is currently writing on the concept of citizenship in the American constitutional tradition.

War Powers of the President and Congress: Who Decides Whether America Fights?

by W. TAYLOR REVELEY, III

How does the Constitution divide control over war and peace between the president and Congress? That question has troubled Americans from George Washington's administration to Ronald Reagan's. Controversy today over Lebanon, Grenada and Nicaragua replays hundreds of similar arguments in times past. The president and Congress have struggled for almost two hundred years over the war powers. They have quarreled, for instance, about the extent to which the Constitution gives each branch control over remaining neutral in the wars of other nations, stationing our troops on foreign soil, deciding when to send American forces into combat, setting military strategy and tactics and making peace.

War power developments of the last twenty years have been unusually important. Spurred by the combination of Vietnam and Watergate, Congress took two unprecedented steps in the early 1970s. For the first time in American history, Congress used its appropriations power to force the president to withdraw from a major conflict. The final legislation, passed in 1974, banned the use of federal funds for any "military or paramilitary operations" "in," "over" or "off the shores of" the whole of Vietnam, Laos and Cambodia. Also, despite Richard Nixon's bitter veto, Congress adopted the War Powers Resolution of 1973, which established procedure for how the president and Congress are to go about deciding whether to fight. No such procedures had previously existed. The constitutionality of some of them remains unclear.

Not unclear is that the United States needs to improve the ways in which it decides when and how to use its military abroad. That need existed in 1789. It is even more acute today because of the radical change since 1789 in our capacity and will to use force abroad and in the potential consequences of doing so. With this background, we turn to the origins of the war powers in the text of the Constitution, its framers' and ratifiers' debates, and events during Washington's presidency.

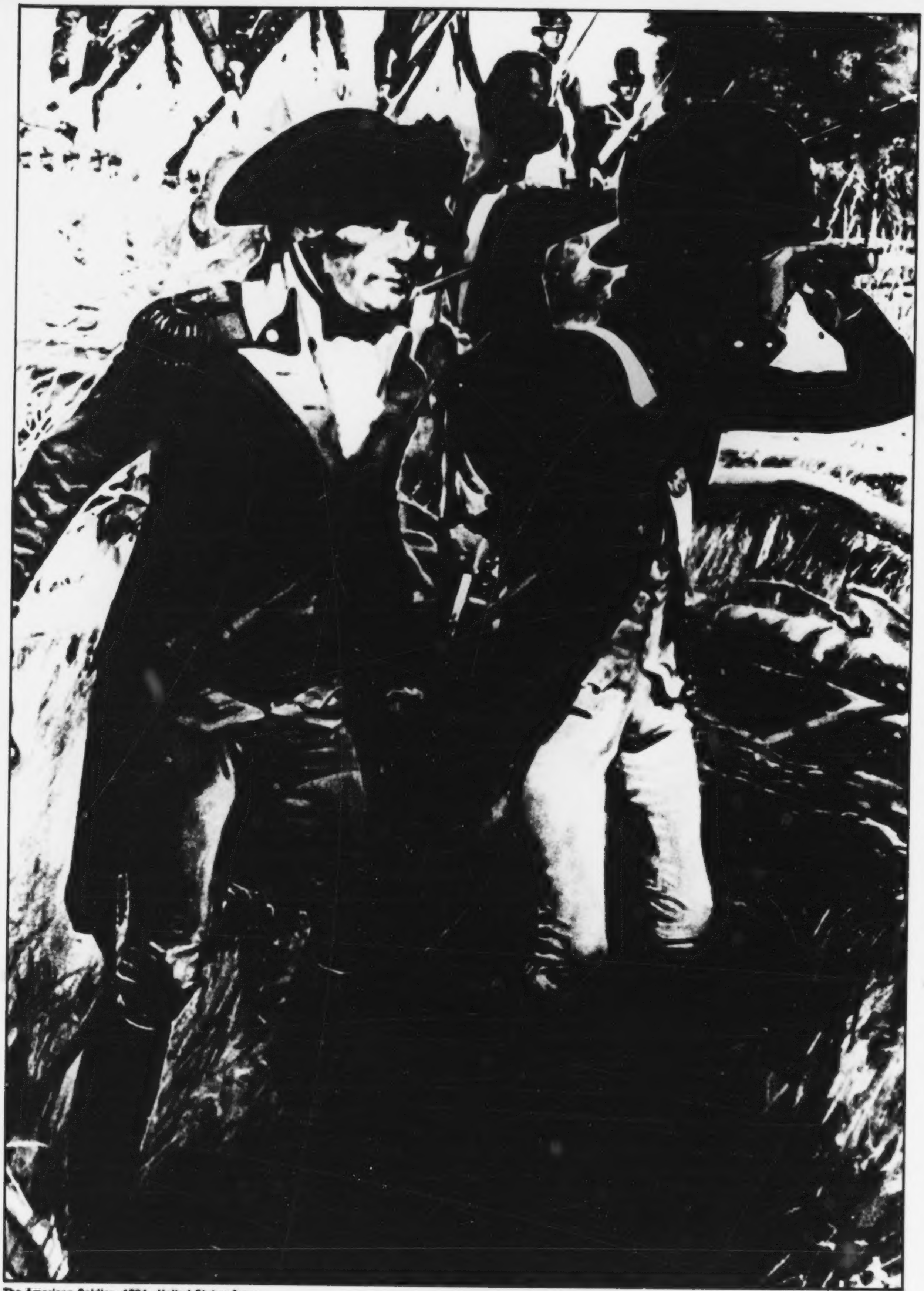
The Allocation of War Powers

The text of the Constitution is not very helpful in resolving most disputes about the war powers. Many of its crucial provisions are vague. What are the implications, for example, of Congress' power "to make rules for the government and regulation" (Article I, Section 8, clause 14) of the military and of the president's "executive power" (Article II)? The Constitution also gives certain prerogatives to the president and others to Congress that can be read as conflicting. Competition is most intense between "Congress shall have power to declare war" (Article I, Section 8, clause 11) and "the president shall be commander in chief of the army and navy of the United States" (Article II, Section II, clause 1). In addition to ill-defined, often competitive provisions, there are numerous gaps in the Constitution's war power provisions. It says nothing directly, for instance, about which branch controls deploying ships on the high seas, stationing troops on foreign soil, or declaring neutrality in other nations' struggles.

The debates of the Constitution's framers and ratifiers do help clarify some uncertainties. But these men did not spend much time on questions of war and peace. When they did, they emphasized state versus federal authority, not congressional versus executive. Danger to America from state excesses in foreign affairs had helped bring the Constitutional Convention to Philadelphia in 1787. Since colonial days the states had been reluctant to bear their fair shares of military burdens unless actually attacked, but willing themselves to provoke Indians, European powers, and their sister states. Separate diplomatic activity by them and their violations of national treaties were frequent. This disunity and provocative behavior invited foreign aggression. Jefferson wrote Washington early in the Philadelphia Convention about the need "to make our states as one to all foreign concerns," and Madison concluded that "if we are to be one nation in any respect, it clearly ought to be in respect to other nations."

The skimpy attention given congressional and executive war powers in 1787-88 resulted from the short shrift given foreign affairs as a whole. The only aspects that received real attention were war and treaties. Emphasis went to treaties because peace was expected to be the customary state for the new nation. America would avoid aggressive war abroad and enjoy in turn "an insulated situation" from the great powers of Europe. In Alexander Hamilton's words: "Europe is at a great distance from us. Her colonies in our vicinity will be likely to continue too much disproportioned in strength to be able to give us any dangerous annoyance. Extensive military establishments cannot in this position be necessary to our security." This placid view of foreign relations precluded any focused look at the use of American force abroad, except for defensive naval action to protect the Atlantic coast and American commerce.

In fact, what the framers and ratifiers feared most was that the executive would use the military



The American Soldier. 1794. *United States Army.*

It is not likely that most of those who voted in the federal and state conventions for the Constitution's war power provisions had a clearcut, common "intent" about their meaning.

for tyrannical purposes at home, possibly to make himself a hereditary prince, not that he would use it for dangerous foreign adventures. Debate centered on whether it was safe to allow the president to command troops personally in the field, whether he might use standing armies to overthrow the republic, and whether he should be allowed to pardon traitors since their crimes might be efforts to help him seize power. Indeed, for some of the framers and ratifiers, the demons lurking in military matters were not even executive, but rather congressional: The legislators were said to hold both the purse and the sword, and thus were feared as incipient military despots. For these constitutional delegates the remedy was an America wholly dependent on state militia, state officers, and state military appropriations.

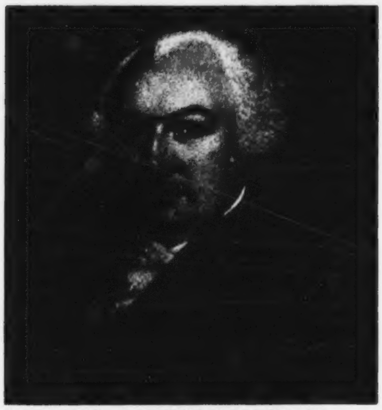
In short, the problems and assumptions of 1787-88 did not anticipate all of ours. They were those of a small, divided people eager for national unity but fearful of federal tyranny. Domestic rebellion and foreign invasion were their "war" concerns. More important for them were safeguards against a military coup at home than military preparedness during peace. Greatly more than we, they valued state authority over national, legislative power over executive. They preferred peace and political isolation to a world made safe for America. The institutional arrangements developed in 1787-88 reflected these values and needs. A small, elite branch of Congress (the Senate) was planned as a full participant with the president in whatever American diplomacy might arise. State militia were to be the backbone of national defense and Congress the arbiter of military policy, by governing the very existence of American armed forces and their commitment to conflict. The states and president would serve as interim defenders against sudden attack, pending opportunity for congressional decision; and the executive would act as first general and admiral when the legislators voted to fight.

The framers and ratifiers did intend a more effective national executive than had previously existed, influenced by their understanding of European practice and political theory, by prior legislative excesses in America, and by the dismal executive record of Revolutionary and Confederation legislatures. They wanted presidential aid in conducting negotiations, gathering intelligence, and in framing recommendations. They hoped to obtain an executive check on foolish or venal legislators, and they wanted the president to execute national policy. But with rare exception the framers and ratifiers did not mean to surrender congressional control over setting American policy and providing tools for its implementation. Their model was Parliament's seventeenth-century steps to curb the British king, and throughout their debates ran a persistent fear of executive despotism.

More specifically, the 1787-88 debates show that the country was meant to be able to fight without a formal declaration of war, but not without prior congressional approval unless America was suddenly attacked. The framers and ratifiers also meant for the country to be able to use armed force on a limited basis, as well as for general hostilities. Defensive or retaliatory use of force, the sorts expected for America by the men of 1787-88, tended in that era to be undeclared, limited engagements. In addition, the word "declare" was used loosely by the framers in ways equating it with "begin" or "authorize." Their grant of authority to Congress "to declare" war almost certainly was intended to give Congress control over all involvement of American forces in combat, except in response to sudden attack on this country.

In case of sudden attack, the text of the Constitution suggests that the framers expected state militia to bear the major brunt until Congress could act. Thus, the states are permitted to "engage in war" without prior congressional authorization if "actually invaded, or in such imminent danger as will not admit of delay" (Article I, Section 10, clause 3). The only equivalent authority for the president comes not from the Constitution itself, but rather from a brief, confusing debate during the Philadelphia Convention that ended with the framers substituting the word "declare" for the word "make" in the Constitution's provision empowering Congress to declare war.

But if Congress could now "declare" rather than "make" war, it is not likely that the substitution implied much gain in the president's power. George Mason with his presidential phobias voted for the substitution, and the change later went through the ratification controversies unmentioned by the most rabid foes of the executive. The substitution may have been designed simply to prevent Congress from asserting control over the *conduct*, as well as the *initiation*, of a conflict. More likely, even if the change was intended to authorize emergency military action by the president, no mention was made of his defending against *imminent* attack, much less of his defending anything abroad. Most happily viewed for presidential war power, then, the framers' substitution of "declare" for "make" permits executive response to ongoing physical attack



Gouverneur Morris, ***pastel by James Sharples. National Portrait Gallery, Smithsonian Institution, Washington, D.C.***

on American territory—conceivably, also, preemptive strikes by the president against impending attack—until Congress can decide what further steps should be taken.

The commander-in-chief clause, in turn, received little attention during the ratifying conventions. It was viewed as a modest grant of authority. Hamilton's limited "first general and admiral" interpretation reflected the consensus. During hostilities the president would set strategy and tactics, and his authority would inevitably grow during military crisis. But he would not commit America to hostilities except by signing authorizing legislation; and he would not make peace except as a participant with the Senate in the treaty process. Those who fought the commander-in-chief clause did so for fear that the president would use the army at home to make himself a tyrant. The Federalists replied with the need for single command during war, a lesson of the Revolution, and with the danger of placing it in an ambitious general rather than a civilian with a fixed term of office. They said that only the rare president would personally command troops and, anyway, there would be none for him to command unless Congress provided them.

Strong evidence exists that the framers and ratifiers expected the Senate, no less than the president, to govern those aspects of American foreign relations not committed to Congress as a whole. As the Constitution was being drafted, the Senate was given sole responsibility over treaties and ambassadors until the last two weeks of the Philadelphia Convention, when the president was suddenly joined with the Senate in dealing with both. The executive's capacity to receive foreign diplomats was ignored during the Philadelphia debates and dismissed as meaningless during the ratification process, and there was no suggestion that "the executive power" of Article II, Section I conveyed authority over anything, other than the matters expressly assigned to the president by the Constitution.

But the 1780s were two hundred years ago, and we cannot know what the framers and ratifiers would have said in light of today's realities. What if they had realized that peace and isolation would not be America's customary condition; that the hazards, pace, and complexity of international affairs would burgeon, along with the country's capacity and need to influence events abroad; that treaties would not be the guts of our foreign relations; that the Senate would never be able to keep up with the president in diplomacy; that state militia could not replace federal forces; that the regular military would grow huge and stand during peace, little restrained by the need for Congress to raise and fund it; and that the loyalty of naturalized citizens, the navigation of the Mississippi River, and other issues vital in the late 1700s would quickly fade?

We have only a sketchy idea, in any event, of what the constitutional delegates did say during the drafting and ratifying conventions of 1787-88. The surviving records of their debates are often skimpy and confusing.

Further, fifty-five men participated in the four months of deliberation in Philadelphia, and many more took part in the state ratifying conventions. Interpretation of specific language varied among delegates. Because the Philadelphia Convention met in secret and its participants said little about it during the ratification process, delegates to the state conventions knew little about the views of the framers. It is not likely that most of those who voted in the federal and state conventions for the Constitution's war power provisions had a clearcut, common "intent" about their meaning.

George Mason, ***marble relief by Gaetano Cecere. Architect of the Capitol Collection. Library of Congress.***

Finally, the framers may have drafted with deliberate ambiguity, as a means of producing agreement among fractious delegates. Gouverneur Morris, very influential in drafting the final version of the document, explained that "it became necessary to select phrases which, pressing my own notions, would not alarm others." For men whose overriding objective was ratification of a constitution promising a more viable union, the precise meaning to be given ambiguous but generally acceptable language could await resolution in practice.

Objectives

In short, conclusions about the framers' and ratifiers' intent must be viewed with a cold and suspicious eye. Still, they do seem to have had certain basic objectives in mind. These objectives remain as compelling now as in 1787-88. They are:

First, to ensure national defense. The Constitution empowers Congress to tax, to "provide for the common defense," and to call out the militia to "suppress insurrections and repeal invasions." Habeas

Washington's eight years as president provided the country with one of its richest troves of war power precedent. The president soon began to dominate American communications with other governments and the setting of our foreign policy, including determination when and how to negotiate treaties and whether to become involved in foreign conflicts.

corpus may be suspended "when in cases of rebellion or invasion the public safety may require it." The states are guaranteed federal protection against invasion and permitted to fight without congressional authorization if in acute danger. Many congressional powers run to the care and tending of the national military, and the president is made commander in chief to ensure its effective use, including response to sudden attack. The Constitution flatly seeks the physical safety of the country. The defensive advantage of American unity proved a prime selling point for the document during its struggle for ratification.

Second, to hinder use of the military for domestic tyranny. The framers and ratifiers were adamant that the war powers not encourage federal trampling on state and individual rights. The Constitution limits the purposes for which Congress may use state militia and provides that "a well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." It limits congressional army appropriations to two years, makes the commander in chief a civilian, and narrowly restricts suspension of habeas corpus.

Third, to hinder the use of the military for aggression abroad. Naively even for their own times, the framers and ratifiers anticipated peace for America. Exhausted by the Revolution, aware of the country's weakness, and inclined toward peace in principle, they hoped to avoid the perils of conflict unless they were unavoidably thrust upon the nation.

Fourth, to create and maintain national consensus behind American action for war or peace. The framers and ratifiers knew the burdens imposed on the country's prior military and diplomatic efforts by internal bickering. Based on experience during the Revolution and Confederation, they knew that if most citizens do not at least acquiesce in national policy, the country plunges into controversy, with grim impact on its effectiveness.

Fifth, to ensure democratic control over war and peace policy. Many of the framers and ratifiers felt public judgment was uninformed, irrational and fickle. Similar fears were voiced about the House of Representatives as against the Senate and president. Because popular wisdom was thought to be especially lacking in foreign affairs, steps were taken to leave American diplomacy to the Senate and executive, neither of whom was directly elected by the voters under the 1787-88 arrangements.

Nonetheless, consent of the governed was crucial to the framers and ratifiers. They feared the Senate and president precisely because of their separation from the people. Accordingly, the most fundamental war and peace decisions—whether to enter hostilities—were placed squarely under congressional control, and the House was awarded special power over federal money: one of the most basic tools of war.

Sixth, to encourage rational war and peace decisions. When to negotiate or fight, what to concede or demand, present the best-intentioned politicians with difficult choices as they try to protect America. The importance of rational decisions figured in the constitutional delegates' opposition to Confederation government and in their concern for an institutionally elite Senate and executive. They wanted informed, well-considered policy on war and peace.

Seventh, to permit continuity in American war and peace policy, when desirable, and its revision as necessary. Continuity leads to national credibility and predictability, both important to assure allies, deter enemies, and produce agreements with other countries. The framers and ratifiers worried about prior harm from the states' disruption of American foreign policy and from the inconsistency of Confederation Congresses. In matters of war and peace they recognized that discontinuity is safer by choice than by internal disarray and that a timely change in policy often has importance equal to its timely initiation. During the earliest years under the Constitution, the country backed away from military alliance with France, a step traumatic but calculated to avoid destruction of the fledgling republic in European struggles.

Eighth, to ensure American capacity to move toward war or peace rapidly or secretly when necessary, flexibly and proportionately always. There is often a need for speed and secrecy in negotiations and in the conduct of action, occasionally also in its initiation or termination. Flexibility (the capacity to act in a manner responsive to emerging circumstances) and proportionality (the avoidance of too little or too much reaction) are always vital to matters as intolerant of error as war and peace. The Constitution's text reflects concern for speed and secrecy in the provisions for anti-invasion action by states and for withholding sensitive congressional action from the public. The debate in 1787-88 on the reflexes of the Senate and executive showed a keen appreciation of the objectives in question, as did the substitution of "declare" for "make" in the declaration-of-war clause so as to permit emergency action by the president to defend the country.

George Washington, engraving by Charles Saint-Memin. National Portrait Gallery, Smithsonian Institution, Washington, D.C.

Ninth, to permit action for war or peace that has not yet been blessed by national consensus or democratic control. Sometimes public opinion of the moment is seriously wrong about how best to defend the country. To a limited extent, the constitutional delegates did expect the president and Senate in particular to act despite public opinion if essential in their view to the national interest.

Tenth, to permit the efficient setting and executing of war and peace policy. Consistent failure on either count undermines the wisest attempts at action. Bumbling national government invited constitution making in 1787-88. Effective federal action in military and foreign affairs was a basic objective of the framers and ratifiers.

A strain of incompatability does run among these ten war power objectives. Even if the national government were still a one-house assembly with both legislative and executive powers, it could not pay equal attention at once to speed and secrecy on the one hand and consensus and democratic control on the other. This incompatibility becomes more pronounced when the legislative and executive branches are separate, as they have been since 1789, each with a different ability to achieve the same objectives. For instance, a bow toward Congress as best to serve consensus and democratic control turns a back on the president and his comparative advantage for speed and secrecy. Which interests are to be preferred, since all cannot be sought with *equal* importance *at once?* The country has struggled mightily for an answer for almost two centuries.

President Washington

With George Washington's inauguration, the United States quickly faced the vague language, grants of competing authority, and outright gaps in the war power provisions of the Constitution. Answers to many questions were needed if the new government was to operate. During a revolt at home might the president appear in the field, leave the seat of federal government to do so, and wield the pardon power to hasten peace? Might the executive wage war on threatening Indians without prior congressional approval? Which branch was to decide whether the United States would recognize the revolutionary French regime? Which was to interpret the Franco-American alliance and act on whether America would remain neutral in the ongoing European conflict? How were our military and diplomatic establishments to be created, organized and administered? And what was to be the relationship among the president, Senate, and House in treaty making, in controlling official channels of communication with other nations, and in otherwise setting American diplomatic and military policy?

On these and other scores, Washington's eight years as president provided the country with one of its richest troves of war power precedent. The president soon began to dominate American communications with other governments and the setting of our foreign policy, including the determination of when and how to negotiate treaties and whether to become involved in foreign conflicts. The Senate never grasped the diplomatic role expected for it during the constitutional conventions. The president also took the lead in setting American military policy, though with greater deference to Congress than on the diplomatic front. At times, however, Washington chose to fight without clearly having prior congressional authorization. And during the Whisky Rebellion of 1794, the president did appear in the field, at the head of the national forces, using both his presence on horseback and his pardon power to quell the revolt.

The legislators, in turn, set up diplomatic and military establishments through which the president could work his will (a federal army of 840 men when Washington took office had grown to 7,108 when he left). Congress often provided the president with sweeping delegations of authority over diplomatic and military matters. It acquiesced in his withholding from Congress of certain sensitive information, and it agreed that the president alone might remove (and thus control) senior executive officials, though their appointment required the consent of the Senate. While Congress did wield far more influence over American war and peace in the late 1700s than it does now, its influence even then paled in comparison to the congressional dominance anticipated by the framers and ratifiers. Indeed, the first eight years of experience under the Constitution split the war powers between the president and Congress in ways more similar to their division in 1985 than to the division sketched by the constitutional conventions in 1787-88.

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DOCUMENTS

The Supreme Court and the Rights of Aliens

by LEONARD DINNERSTEIN

The United States has always been "a nation of immigrants." It is quite striking, therefore, to note how little attention the Founding Fathers gave to the subject when preparing the fundamental law of the new nation in 1787. When the framers met to write a constitution, they saw little reason to restrict the relatively small number of Europeans who arrived periodically and contributed to the nation's wealth. Moreover, they could not imagine that in a land as large as the United States immigration would ever constitute a problem or a source of concern. The young republic needed to bring people in, not keep them out.

Statements regarding immigrants appear in Article I in the Constitution. Section 8, clauses 3 and 4, read, in part, that the Congress shall have the power "to regulate commerce with foreign nations, and . . . to establish an uniform rule of naturalization." Section 9, clause 1, begins, "the migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight." The latter section, now obsolete, served to permit the importation of slaves for twenty years after the adoption of the Constitution.

From these brief statements, and from the Supreme Court's assumption of the power to interpret the meaning of the Constitution in *Marbury* v. *Madison* (1803), there has developed an elaborate body of immigration law which gives Congress practically unlimited authority to decide who may enter the United States and under what conditions they may remain. In that land that proudly proclaims its immigrant heritage, the Supreme Court, over the years, has consistently allowed Congress and the executive branch of the federal government the right to admit, exclude or banish non-citizens on any basis they chose including race, sex, and ideology. As Justice John Paul Stevens put it in 1976, "in the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." (*Matthews* v. *Diaz* (1976)). Although virtually any regulations in regard to immigrants and aliens have been tolerated if made by the federal government, similar activities by state governments have been carefully scrutinized, and frequently rejected, by different majorities of the Supreme Court.

The two categories of foreigners—immigrants and aliens—are not interchangeable. Immigrants are people who enter the United States legally and indicate that they plan to spend a considerable amount of time in this country. They can become citizens through the process of naturalization, a series of steps prescribed by Congress, including residence requirements, examinations, and loyalty oaths. Citizens have rights under the Constitution not accorded to non-citizens. Thus, once immigrants achieve citizenship, they receive additional constitutional protections, although not necessarily the identical safeguards of people born in this country. For example, naturalized immigrants may be stripped of their citizenship and deported to their native country for certain crimes. Aliens include immigrants as well as others who enter the United States legally or otherwise, who work, study, or visit for a specified or indeterminate period of time, or who accompany people so engaged. They are, by definition, not citizens of the United States and therefore do not have the same constitutional protections as citizens. The Supreme Court is often called upon to determine exactly which constitutional protections noncitizens do have. In this article, we will deal only with the rights of aliens, that is, non-citizens.

The Supreme Court justices handle several categories of immigrants and aliens. They decide whether established federal and state laws and policies are constitutional and within the province of either law-maker or administrator to carry out. Many times, however, the justices refrain from indicating their personal views of the reasonableness or appropriateness of any given action, arguing that it is not within their purview to do so as long as a constitutional basis exists for the decision and there is a compelling government interest for the action. Although the court has shown great deference to Congress in this area of law, still citizens and aliens alike have access to a judicial system that tries to keep governmental actions within the bounds of our constitutional framework.

Immigration did not loom as a major constitutional issue during the first century of the federal government. To be sure, laws concerning naturalization were passed in 1790 and 1795, and fear of the "radical" French in our midst led Congress, in 1798, to authorize President John Adams to deport any foreigners found guilty of seditious activities. Adams never used the authority granted to him, which expired in 1800, and the fear of foreigners soon abated. Aside from these bills, however, Congress merely required that accurate statistics of

Italian family at Ellis Island ca. 1910, Dixon Collection, Library of Congress.

immigrant arrivals be recorded—and customs officials began doing so in 1820.

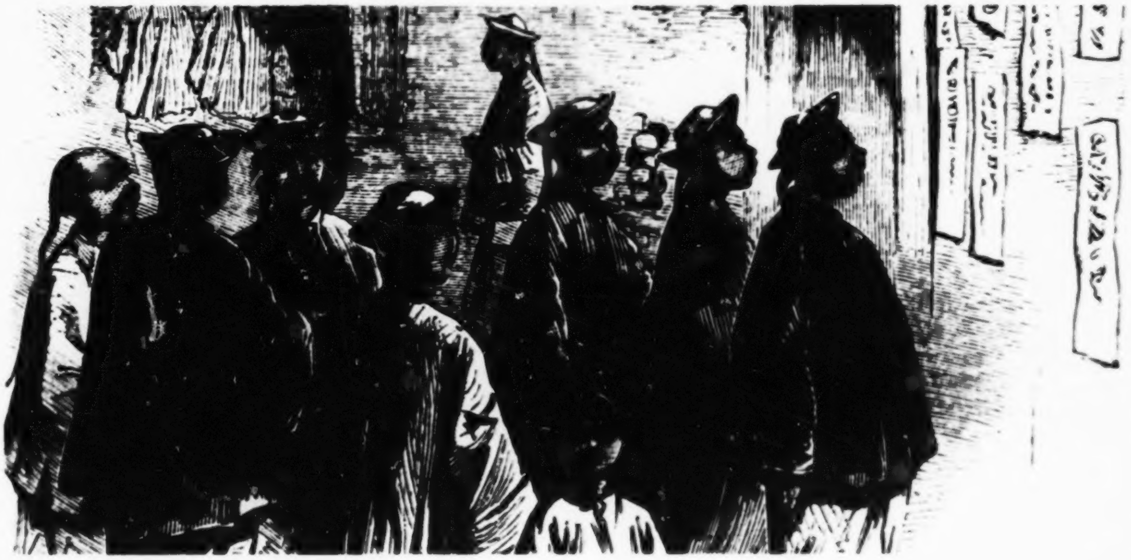
In the 1830s and 1840s, a large surge of Irish refugees escaping the potato famine at home descended upon American shores. New York State and Massachusetts tried to limit immigration by passing laws regulating and taxing passenger shipping companies. In both 1849 (the *Passenger Cases*) and 1876 (*Henderson* v. *New York*) the Supreme Court rejected these attempts. In the latter case, Justice Samuel F. Miller declared that the regulation of immigration was the exclusive right of Congress, and he particularly emphasized that "whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall."

Congress and the Rights of Aliens, 1882-1921

The *Henderson* decision came at a time when several states were beginning to show alarm about their alien residents. California, in particular, suffered several years of severe economic depression, which bred resentment on the part of caucasians about the Chinese in the state who worked for low wages. A working class movement led by Dennis Kearney demanded that "The Chinese Must Go!" and, surprisingly, people from all over the country enthusiastically endorsed this sentiment. Congress responded with the Chinese Exclusion Act of 1882, which proved to be the first of many laws during the next forty-two years that restricted the opportunities of foreigners who wished to settle in this country.

The United States Supreme Court, an institution not oblivious to the political ramifications of its decisions, responded to the first of the immigration restriction laws in a way agreeable both to the public and the Congress. It upheld Congress' right to decide which aliens might be admitted to the United States and under what conditions they might remain. In a series of cases over the next two decades, Court decisions so strengthened Congress' unlimited powers in admission or exclusion of foreigners that subsequent blocs of justices merely enhanced and reinforced those early judgments. Thus the judicial interpretation of the Exclusion Act has dictated the substance of immigration regulation to the present day.

The justices did not rule on the validity of the Chinese Exclusion Act until 1889. Chae Chan Ping, a Chinese laborer, had lived in San Francisco from 1875 until June, 1887, when he returned to China to visit relatives. Before leaving the United States, he had obtained a certificate which guaranteed that he would be readmitted to the country. Yet, when Chae returned on October 8, 1888, the customs officer refused him entry because Congress had passed an amendment to the Chinese Exclu-



Chinese Immigrants to United States, wood engraving in Frank Leslie's Sunday Magazine, March 1881. Library of Congress.

sion Act of 1882 (which originally suspended immigration of Chinese laborers to the United States for a ten-year period) annulling reentry certificates after October 1, 1888. Therefore Chae's right to be readmitted had been cancelled seven days before his return. He appealed to the courts and his attorney argued that although Congress could restrict immigration, Chae had a "vested right" to be readmitted. In addition, the lawyer claimed that the amendment barring reentry of laborers who had left the country temporarily constituted an *ex post facto* bill which was *ipso facto* unconstitutional.

Still, after the Court heard the arguments, it deferred to the will of Congress. Justice Stephen Field stated that the act in question was passed because customs officials had discovered that certificates of reentry had been exchanged and that newly arrived immigrants carried fraudulent documents. He also affirmed Congress' right to revoke permission for foreigners to remain in this country whenever it wished to do so. Speaking for the Court, Field said:

> *That the government of the United States . . . can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.*
>
> **Chinese Exclusion Cases,**
> **130 U.S. 581, 603-604 (1889)**

A second case, *Fong Yue Ting* v. *United States* (1893), confirmed the right of the Congress to treat aliens as it wished. It became the constitutional bedrock for all subsequent questions as to Congress' rights in regard to immigrants and aliens. Fong and two other Chinese men were arrested for violating provisions of the 1892 amendments to the Chinese Exclusion Act. The extension not only continued to bar Chinese laborers from American shores but required those already in the United States to obtain a certificate of residence from an internal revenue officer stating that they were legally entitled to be here. A person of Chinese ancestry caught without such certification was to be deported by a federal judge unless he could prove with the aid of "at least one credible white witness" that he was a resident of the United States at the time of the passage of the law and that he had, for a valid reason, been unable to obtain the required document. Fong Yue Ting, though a permanent resident of New York City since 1879, had never bothered to register and was arrested. Justice Horace Gray, summarizing for the Court, noted that another defendant who tried to get the necessary certificate could not do so because "the witnesses whom he produced to prove that he was entitled to the certificate were persons of the Chinese race and not credible witnesses."

Justice Gray continued:

> *Congress, having the right, as it may see fit, to expel aliens of a particular class, or to permit them to remain, has undoubtedly the right to provide a system of registration and identification of the members of that class within the country, and to take all proper means to carry out the system which it provides.*
>
> **Fong Yue Ting v. United States,**
> **149 U.S. 698, 714 (1893)**

A 6–3 majority had rejected the petitioners' case. In substance, the majority declared that aliens remained "subject to the power of Congress to expel them, or to order them to be removed and deported from the country whenever in its judgment their removal is necessary or expedient for the public interest."

The decision led to blistering dissents from Justices David J. Brewer and Stephen Field that still make a compelling argument. Brewer denied that there existed any unrestrained constitutional power to banish resident aliens since in the Constitution "the power to remove resident aliens is confessedly not expressed." In addition, the statute of 1892 specifically stipulated the conditions under which the Chinese might be "arrested and, without a trial, punished by banishment." This, Brewer declared, constituted a deprivation of liberty without due process of law. He also observed:

> *It is true this statute is directed against the obnoxious Chinese; but if the power exists, who shall say it will not be exercised tomorrow against other classes and other people?*
>
> **Fong Yue ting v. United States,**
> **149 U.S. 698, 743 (1893)**

Vaccinating Japanese immigrants on a Pacific steamship, 1904. Library of Congress.

Justice Field developed the constitutional points even further:

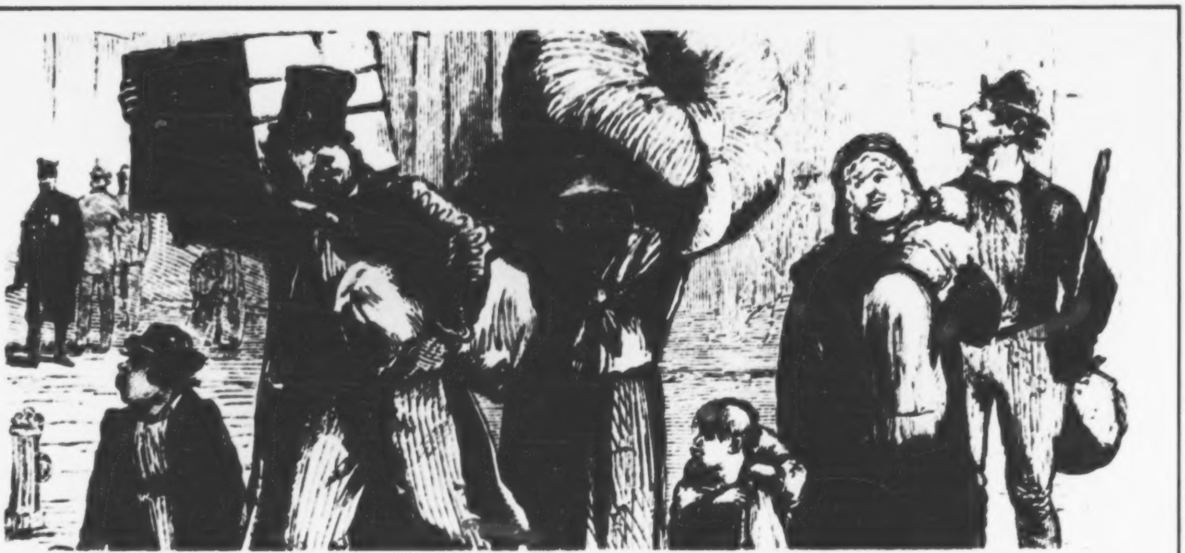
> *If aliens had no rights under the Constitution, they might not only be banished, but even capitally punished without a jury or the other incidents to a fair trial. But, so far has a contrary principle been carried, in every part of the United States, that, except on charges of treason, an alien has, besides all the common privileges, the special one of being tried by a jury of which one-half may also be aliens.*
>
> ***Fong Yue Ting* v. *United States*,**
> **149 U.S. 698, 746 (1893)**

Later Courts have consistently reaffirmed the majority viewpoint in *Fong* that Congress has absolute discretion in deciding whom to admit, and whom to ban from, this country. And as if to underscore the confidence that the majority had in its position, three years later Justice George Shiras, Jr., reiterated:

> *No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein.*
>
> ***Wong Wing* v. *United States*,**
> **163 U.S. 228, 237 (1896)**

Although some rulings of the Supreme Court seem inhumane, a majority of the justices repeatedly allowed Congress and the executive branch, acting on powers delegated to it by the federal legislature, considerable independent authority. Such complete judicial acceptance is unusual but in this field of litigation the Court has been consistent. No more arbitrary example may be given than *The Japanese Immigrant Case* in which Kaoru Yamataya, who could speak no English, was detained at port because the customs officer thought she might be a pauper with no means of visible support. In what seems like shocking and unethical behavior, the customs officer deceived the helpless woman. Her attorney described her experience in this way:

> *Here is a person found dwelling within the United States; she is arrested and imprisoned by a ministerial officer; she is not permitted to see her friends or to consult with her attorneys; she is unable to speak or understand our language, and is ignorant of the cause of her imprisonment, and ignorant of the fact that any investigation is being made concerning her right to liberty. The officer does not give her any notice of the proceedings nor any opportunity to be heard, but goes about secretly collecting evidence against her, considering only such evidence as when unexplained will suit his purpose. He takes advantage of her ignorance of our language and makes her give unintentional answers to questions which she does not understand. He states that he is holding her to appear as a witness in a criminal case against another party, thus deceiving her attorneys as to his intention. As the result of the investigation made by this ministerial officer in his combined capacity of prosecutor, judge and jury, he makes a finding against the appellant.*
>
> ***The Japanese Immigrant Case*,**
> **189 U.S. 186, 90-91 (1903)**



Nineteenth-century engraving of Irish immigrants just arrived in New York. Library of Congress.

Acknowledging the veracity of the attorney's brief, Justice John Marshall Harlan nevertheless declared that "these considerations cannot justify the intervention of the courts."

Harlan's decision not only upheld congressional authority but reflected, as well, the growing American concern with the numbers of aliens arriving in this country. To be sure, in the early twentieth century most of the foreigners came from Southern and Eastern Europe and much of the opposition to immigration centered upon them. Nevertheless, Asians loomed as a major problem in the minds of West Coast and other racists, who were numerous and influential. Thus Congress once again revised its naturalization statutes in 1917 granting the opportunity of applying for citizenship only to free white persons and those of African ancestry. (Most Asians had already been barred by earlier legislation.) Then in two cases, *Ozawa* v. *U.S.* (1922) and *U.S.* v. *Bhagat Singh Thind* (1923), the Court ruled that neither Japanese nor Hindus of full Indian blood were caucasians and hence those people were ineligible for citizenship.

The decade beginning with American entry into World War I proved particularly harsh for all non-white, non-Anglo-Saxon, and non-Protestants in the United States. "Americanism" came to mean the elimination of foreigners, foreign ideologies, and foreign characteristics and gave rise to, among other things, the passage of the Espionage and Sedition Acts in 1917 and 1918, respectively, which made almost any criticism of the war or war effort a crime. The bills were repealed in 1920 but the new statute still allowed for the banishment of undesirable aliens. The Secretary of Labor then ordered the deportation of foreigners convicted of violating the Espionage and Sedition Acts even though the two laws had been discarded. For the Court, Chief Justice William Howard Taft upheld the Secretary of Labor's interpretation of his responsibilities:

> *Congress . . . was not increasing the punishment for the crimes of which petitioners had been convicted, by requiring their deportation if found undesirable residents. It was, in the exercise of its unquestioned right, only seeking to rid the country of persons who had shown by their career that their continued presence here would not make for the safety or welfare of society.*
>
> ***Mahler*** **v. *Eby*,**
> **264 U.S. 32, 39 (1924)**

Anxiety about the number and quality of aliens arriving in the United States had been continually voiced since the end of the nineteenth century. Congress responded to these concerns by passing a series of restrictive immigration acts depriving entry to anarchists, criminals, people with certain diseases, some Asians, and illiterates. But in 1921 a more stringent bill limited newcomers to 3 percent of their national total in the United States in 1910; subsequent legislation in 1924 narrowed opportunities further by stipulating 2 percent, moving the base year back to 1890 which was before most of the Southern and Eastern Europeans had arrived, and barring the entry of Asians altogether. This legislation gave an unambiguous preference to immigrants of Northern European descent and discriminated particularly against Jews, Slavs, and Italians. With Congress so clear about its intentions, there was no further need for the Court to get involved again with federal policies towards immigrants until the emergence of the "Red Scare" after World War II.

State Laws and the Rights of Aliens

The Supreme Court, which always went along with Congress' authority to set conditions for entry into the United States or banishment from it, originally prohibited states from putting non-citizens at a legal disadvantage. States often wanted to give greater protection to citizens than to aliens and, at first, the Court was quite definite in proclaiming that they could not do so. Later, it retreated from this position.

In 1880 San Francisco's Board of Supervisors passed a regulation requiring special permission for individuals to operate laundries in the city. At the time 240 of the 320 laundries were owned and operated by people of Chinese ancestry. As additional individuals began applying for these licenses, the Board of Supervisors turned down the petitions of more than two hundred Chinese persons but quickly granted the requisite permission to eighty non-Chinese applicants. Yick Wo, an alien resident in California for 22 years, took legal action to receive one of the licenses, and his case eventually reached the Supreme Court. Justice Stanley Matthews, in what has become the bedrock opinion granting equal protection of the laws to non-citizens, supported Yick Wo and denounced the administration of the San Francisco ordinance. The Supreme Court thereby established the principle that the Fourteenth Amendment to the Constitution requires states to grant equal protection of the laws to all persons "without regard to any differences of race, of color, or of nationality." Matthews asserted:

> *Though the law itself be fair on its face and impractical in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances then this constitutes denial of equal justice.*
>
> ***Yick Wo* v. *Hopkins*,**
> **118 U.S. 356, 373-374 (1885)**

Almost thirty years later, an Arizona statute blatantly discriminated against foreigners in their choice of employment and once again the Supreme Court stood firm. The law called for 80 percent of all workers in any company, corporation, or business to be either qualified electors or native born citizens. As a result of this act, Mike Raich, a citizen of Austria employed as a cook in a Bisbee restuarant, lost his job because 70 percent of the employees there were foreigners. He sued his employer, William Truax, for reinstatement and the case went up to the Supreme Court. Justice Charles Evans Hughes, for the majority, declared that no state might "deny its lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood." He then pointed out:

> *The authority to control immigration—to admit or exclude aliens—is vested solely in the federal government. . . . The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the states as chose to offer hospitality.*
>
> ***Truax* v. *Reich*,**
> **239 U.S. 33, 42 (1915)**

But the reasoning that guided the Court in *Yick Wo* and *Truax* flickered on an otherwise bleak landscape. In the early twentieth century the Court recognized that some special public interest might exist to modify this broad policy of employment. Thus in *Atkins* v. *Kansas* (1903), decided a decade before *Truax*, and *Heim* v. *McCall* (1915), decided a year after the Arizona case, the Justices allowed that states might give preference to citizens for employment in public works.

Then, in the rabidly anti-alien decade of the 1920s, the justices sanctioned a Cincinnati ordinance barring non-citizens from operating pool rooms and billiard parlors. In presenting the city's case, the Cincinnati attorney's description of these places of recreation was so vile that one wonders why the city government did not outlaw them altogether. The majority opinion summarized his argument:

> *Billiard and pool rooms in the City of Cincinnati are meeting places of idle and vicious persons; . . . they are frequented by lawbreakers and other undesirable persons, and contribute to juvenile delin-*

> *quency; . . . numerous crimes and offenses have been committed in them and consequently they require strict police surveillance; . . . non-citizens as a class are less familiar with the laws and customs of this country than native born and naturalized citizens; . . . the maintenance of billiard and pool rooms by them is a menance to society and to the public welfare, and that the ordinance is a police regulation passed in the interest of and for the benefit of the public.*
>
> **Clarke v. Deckenbach,**
> **274 U.S. 392, 394 (1927)**

The Court majority, while acknowledging the Fourteenth Amendment's prohibition against "irrational discrimination against aliens," nonetheless continued:

> *It does not follow that alien race and allegiance may not bear in some instances such a relation to a legitimate object of legislation as to be made the basis of a permanent classification.*
>
> **Clarke v. Deckenbach,**
> **274 U.S. 392, 396 (1927)**

Since the justices were willing to approve different treatment for citizens and aliens based on classifications affected with a public interest, and since they acknowledged that local authorities knew more about conditions in their own communities than did the justices in Washington, the Supreme Court upheld the Cincinnati pool room ordinance. Reasoning of this kind also allowed states to deny aliens hunting and fishing licenses as well as practicing in professions such as law and medicine.

But twenty-one years after *Clarke*, in the more liberal post-World War II atmosphere toward immigrants and minorities, the Court ostensibly put an end to several blatantly prejudicial state statutes. One case concerned the issuance of fishing licenses to "aliens ineligible for citizenship." Prior to 1943, California granted fishing licenses to any qualified person; after the Japanese Americans had been relocated inland during World War II, the California Fish and Game Commission adopted a proviso prohibiting the issuance of licenses to "alien Japanese." Two years later, in 1945, the stipulation was changed to "persons ineligible for citizenship" although people of Japanese ancestry were obviously the target. When the case reached the Supreme Court, the state argued that the prohibition was basically a fish conservation measure; Justices Frank Murphy and Wiley Rutledge demolished that argument with the observation that the amendment in question came out of a legislative committee concerned with Japanese resettlement problems, not one interested in fish. But Justice Black, for the Court, succinctly argued:

> *It does not follow, as California seems to argue, that because the United States regulates immigration and naturalization in part on the basis of race and color classifications, a state can adopt one or more of the same classifications to prevent lawfully admitted aliens within its borders from earning a living in the same way that other state inhabitants earn their living.*
>
> **Takahashi v. Fish and Game Commission,**
> **334 U.S. 410, 418-419 (1948)**

That decision defeated the last attempt of any state to bar Asians from lawfully engaging in vocations for which they possessed the necessary skills and qualifications.

The only area in which the Supreme Court had consistently upheld state discrimination against immigrants regarded restrictions against foreigners owning land. As early as 1879, the Supreme Court acknowledged that "by common law, an alien cannot acquire real property" (*Phillips* v. *Moore*), and this dictum was repeated several times thereafter. In 1913 California, in one of its periodic crests of anti-Asian feelings, passed a law forbidding "aliens ineligible for citizenship" (i.e. Asians) from acquiring agricultural lands. Many Japanese immigrants evaded this law by buying property for their American-born children and either acting as custodians themselves or hiring non-Asian Americans to manage their children's holdings.

Fred Oyama was born in California in 1928. His father started buying land for him in the 1930s and during the child's minority the elder Oyama served as guardian. In 1942 the federal government evacuated all Japanese persons and Americans of Japanese descent on the West Coast and shipped them to inland relocation centers. While the Oyamas were in one of these centers, the state of California filed a petition with the courts claiming that the elder Oyama had deliberately tried to evade the state's Alien Land Laws by purchasing agricultural grounds in his son's name. The California courts agreed and allowed the state to confiscate Fred Oyama's property. After the Japanese internment ended, Oyama sued to regain his son's property and the case reached the Supreme Court. Chief Justice Fred Vinson delivered the Court's verdict:

> *In our view of the case, the State has discriminated against Fred Oyama; the discrimination is based solely on his parents' country of origin; and there is absent the compelling justification which would be needed to sustain discrimination of that nature.*

He then went on:

> *Fred Oyama. . . faced at the outset the necessity of overcoming a statutory presumption that conveyances financed by his father and recorded in Fred's name were not gifts at all . . . Fred was assumed to hold title for the benefit of his parent.*
>
> ***Oyama* v. *California*.**
> **332 U.S. 633, 640, 641 (1948)**

Although the majority of the court was not quite willing to overturn the legality of California's Land Law (which Congress made unnecessary in 1952 when it granted people of Japanese ancestry the right to become citizens), Justices Murphy and Rutledge called the statute "nothing more than an outright racial discrimination."

Congress and the Rights of Aliens in the Post-War Era

The Oyama case showed how far both the justices and society had come since the 1920s when both the Court and Americans in general were eager to justify circumscribing the rights of aliens. To a certain extent, the changed atmosphere reflected the liberal views of Justices Hugo Black, William O. Douglas, Frank Murphy, and Wiley Rutledge, whom President Franklin D. Roosevelt had appointed to the bench. But Roosevelt's successor, Harry S. Truman, also cared about the welfare of immigrants and aliens—even if his own Court appointees did not always seem equally concerned—and the temper of the United States was undergoing change. The wartime experiences of many young adults contributed to the new climate of opinion. The managing editor of *Yank*, a World War II army publication, wrote in 1945 that many of the soldiers that he had known, especially those who had served overseas, were conscious of the fact that changes had to take place in this country, especially "the need for wiping out racial and religious discrimination." Against the rigidity of the restrictive immigration legislation of the 1920s, one can contrast the War Brides Act of 1946 and the broader Displaced Persons Acts of 1948 and 1950 which brought more than 400,000 foreigners to this country before Truman's tenure in the White House ended in 1953. The Truman era also saw the Court void restrictive housing covenants (*Shelly* v. *Kraemer* (1948)), and whittle away at separate-but-equal educational facilities (*McLaurin* v. *Oklahoma State Regents* (1950), and *Sweat* v. *Painter* (1950)).

Yet, despite the greater concern for minorities and immigrants, a wave of paranoia enveloped the country as the "Red Scare"—fear of Communist subversion and encroachment—dominated the political atmosphere. And in this context, the Court was once again called upon to adjudicate Congress' right to banish aliens from our midst with what possibly might have been insufficient justification. Between 1950 and 1952, three cases came before the Supreme Court in which aliens who married United States citizens or lived and sired families in the United States were prohibited entry or re-entry into this country on the basis of secretly-obtained evidence that their presence might be detrimental to the nation's welfare. From the information that became public, it appears that the fear of communism and its potential influence in this country proved decisive. A majority of the justices, although only a bare majority, maintained that "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." (*Knauff* v. *Shaughnessy* (1950)). All three aliens lost their cases.

Public fear of communism subsided during the next decade but not before Congress passed the McCarran-Walter Immigration Act in 1952. Although the bill continued most of the major restrictions of its 1924 predecessor, it did break new ground by giving all nations of the world minimum immigration quotas of 100 persons per year, by ending the ban against Asians becoming immigrants and citizens, and by permitting aliens already in the country, particularly the Japanese, the opportunity of applying for citizenship according to established procedures.

During the next decade, under the presidency of Lyndon B. Johnson, Americans witnessed the passage in 1965 of the most liberal immigration bill of the twentieth century. All national quotas were replaced with provisions emphasizing family unification and job needs in the United States; limits of 20,000 emigrants per year from any one country were instituted. The altered stipulations paved the way for more Asians and Southern and Eastern Europeans to enter the United States.

This new spirit of tolerance and welcome pervaded the American scene and once again the Supreme Court seemed to respond to the political atmosphere. Thus when Arizona and Pennsylvania tried to discriminate against aliens in the distribution of welfare benefits, the Court struck those laws from the books. Justice Harry Blackmun, for the majority, reemphasized that all persons were entitled to equal protection of the laws under the Fourteenth Amendment. He noted:

> *Classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a "discrete and insular" minority . . . for whom much heightened judicial solitude is appropriate.*
>
> ***Graham* v. *Richardson*,**
> **403 U.S. 365, 371 (1971)**

Two years later, continuing the emphasis of *Graham*, the Court refused to approve a New York state law which required all civil service positions to be filled by citizens (*Sugarman* v. *Dougall* (1973)) and threw out a Connecticut statute which barred aliens from practicing law (*In Re Griffiths* (1973)).

In the 1970s, however, the liberality of the 1960s began to be overtaken by more conservative sentiments as demonstrated by Richard Nixon's election to the Presidency in 1968 and his four subsequent appointments to the Court (Warren Burger, C. J., Harry Blackmun, Lewis Powell, and William Rehnquist). Thus, looking at the Supreme Court's decisions of the 1970s is like watching a tennis game. Sometimes the justices were at one end of the spectrum, displaying the liberal spirit of the 1960s (as in cases like *Graham* v. *Richardson* and *Sugarman* v. *Dugall* above), while at other times the Supreme Court seemed almost like a throwback to the conservative Taft Court of the 1920s.

Both liberal and conservative justices, of course, still allowed Congress and the exective absolute authority to determine who might legally enter the United States and what benefits they were entitled to. Thus a more conservative majority upheld the State Department's right to ban foreign visitors for ideological reasons, sustained Congress' decision to deny federal civil service jobs and coverage under federal Medicare programs to aliens, and refused to disallow a congressional policy which permitted illegitimate children of female, but not male, citizens entry into this country. In supporting this type of sexist discrimination, in *Fiallo* v. *Bell* (1977), Justice Powell relied on previous Supreme Court decisions which "repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens."

On the state level, moreover, the Court decisions also began to reflect the temper of Nixon's appointees. States were told how separate laws regarding citizens and aliens might be sanctioned: "The State need only justify its classifications by a showing of some rational relationship between the interest sought to be protected and the limiting classification." Thus a New York law requiring state troopers to be citizens (*Foley* v. *Connellie* (1978)) was approved as well as a California statute requiring the same of "peace officers" (*Cabal* v. *Chavez-Salido* (1982)). Chief Justice Warren Burger explained the rationale for the majority's position in these words:

> *The essence of our holdings to date is that although we extend to aliens the right to education and public welfare, along with the ability to earn a livelihood and engage in licensed professions, the right to govern is reserved to citizens.*
>
> ***Foley* v. *Connelie*,**
> **435 U.S. 291, 297 (1978)**

The nature of the most recent decisions in regard to aliens suggests that the Court will still sanction just about anything Congress and the executive choose to do with them. A double standard has been set, however, about how the states may act. One the one hand, they are supposed to grant equal protection to non-citizens; but, if they can show a legitimate public interest for classifying aliens on a different basis, the Court will entertain these categories on a case-by-case basis. In *Plyler* v. *Doe* (1982), concerning a state's paying to educate children of undocumented aliens, Justice William J. Brennan reiterated for a narrow 5-4 majority the necessity of granting minors equal protection of the laws. But a powerful minority composed of Justices Burger, William Rehnquist, Byron White, and Sandra Day O'Conner dissented. *Plyler* presented several complex issues which limitations of space prevent us from dealing with here, but it is important to note that any future change in the Court's personnel might be sufficient to erode some established positions concerning the rights of aliens, tilting the Court in a different direction.

The Supreme Court has frequently been criticized for subjecting the rights of citizens to the prevailing political temper of the government and the predilections of the sitting justices. This criticism is even more true of Supreme Court decisions regarding the rights of aliens at the hands of the states. The equal protection clauses of the Fifth and Fourteenth Amendments do not apply to aliens except in those specific areas where Congress and/or the Supreme Court have specified that they do. And, as Peter Schuck wrote in a 1984 *Columbia Law Review* article, in the field of immigration law, "government authority is at the zenith, and individual entitlement is at the nadir."

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The two best articles on immigrants and the Supreme Court are Peter H. Schuck, "The Transformation of Immigration Law," 84 *Columbia Law Review* 1 (1984), and "Developments in the Law—Immigration Policy and the Rights of Aliens," 96 *Harvard Law Review* 1286 (1983). Since 1975, the *San Diego Law Journal* has devoted one issue a year to immigration policy. A brief history of American immigration is Leonard Dinnerstein and David M. Reimers, *Ethnic Americans* (2nd edition; New York: Harper and Row, 1982). The most recent analysis of third world immigration to the United States since 1945 is David M. Reimers, *Still The Golden Door* (New York: Columbia University Press, 1985).

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Japanese agricultural workers packing broccoli, March 1937. Farm Security Administration photograph. Library of Congress.

For the Classroom

THE TREATY OF PARIS, 1783

Benjamin Franklin, by David Martin. White House Collection.

The following curriculum materials pertain to the Treaty of Paris, which ended the American War of Independence; the Treaty is printed on the inside covers of **this Constitution***. These materials are excerpted from* The Treaty of Paris: The Work of Peace Teachers' Guide, *published by the Office of Elementary and Secondary Education of the Smithsonian Institution to accompany the Smithsonian film,* The Work of Peace: The Treaty of Paris, 1783. *The Teachers' Guide was prepared by Helen H. Carey and Judith E. Greenberg. Both the Guide and the film were created with the support of the National Committee for the Bicentennial of the Treaty of Paris. The Guide and film are available for classroom use; for further information, contact: Office of Telecommunications, Natural History Building, room C22B, Smithsonian Institution, Washington, D.C. 20560; telephone: (202) 357-2984.*

Teachers' Notes: Background to the Treaty of Paris

When Congress in 1782 named John Adams, Benjamin Franklin, John Jay, Thomas Jefferson (who did not serve abroad), and Henry Laurens to negotiate the peace with Great Britain at the end of America's War for Independence, no one expected the improbable diplomatic victory they were able to achieve. America's first diplomats were arrayed against the formidable might and entangling alliances of three strong nations—Great Britain, France, and Spain. In addition, they had the task of nurturing the Franco-American alliance while simultaneously holding fast to the interests of their own new nation. The situation they were facing was formidable. It would call for their best efforts as they worked their way through the complexities of European alliances and animosities.

To understand the negotiations, we have to examine the background of interrelationships among the European powers and America.

France, jealous of England's power, looked to an alliance with America as an effective way of seeking revenge on Great Britain for the loss of French territory in America at the close of the Seven Years' War (1756–1763). Such an alliance would also develop a market for French goods. Spain was an ally of France by the Family Compact of 1761 (members of the Bourbon family ruled both countries), and France hoped to persuade Spain to enter the war on her side against England.

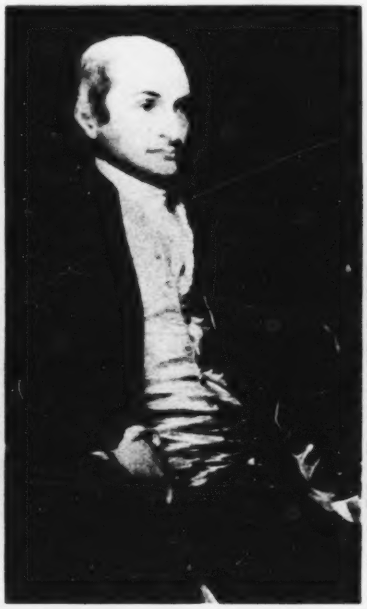
Gibraltar, the strategic fortress at the entrance to the Mediterranean, had belonged to Spain but had been taken by England in 1704 and Spain wanted it back. Spain needed the help of France in regaining Gibraltar but didn't want to send its large fleet across the Atlantic to help the French and Americans. Thus, Spain was left vulnerable to the British navy. Eventually, France got tired of Spain's dallying and went ahead on her own, declaring war on Great Britain and recognizing America. Spain hoped that both France and England would suffer such great losses in the conflict that when peace arrived, a strong Spain would be able to retain control of the Mississippi River and its Florida areas, and would recover Gibraltar. In 1779, anxious to push her ambitions more actively, Spain declared war on Britain.

During this same period of time, England, drained by constant fighting in America and Europe, was anxious to settle with its former colonies. However, England wanted to keep America and Canada part of the Empire, if possible. It also refused to return Gibraltar to Spain. (To this day, Britain still holds Gibraltar.) The English people wanted peace, and in 1782 the British negotiator Richard Oswald sat down with Benjamin Franklin to informal discussions about ending the war.

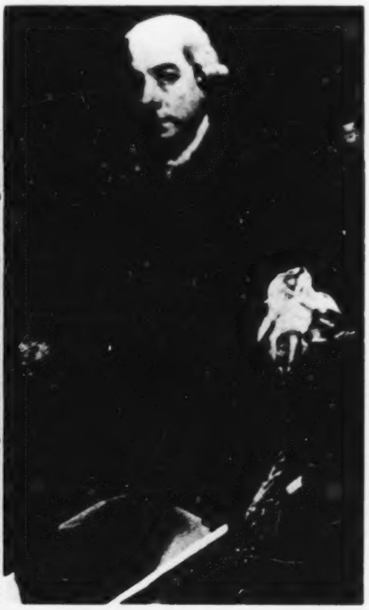
The Continental Congress insisted that our peace negotiators confer with France and, to a lesser extent, Spain. As the work of peace progressed, the Americans realized that France and Spain wanted to keep the thirteen states bottled up along the Atlantic seaboard. Neither country wanted the new America to become a strong nation. To further complicate matters, England's King George III refused to admit that the colonies were a lost cause, even though the English people were pressing for peace. The American diplomats, sensing that England was ready for peace, entered into secret negotiations with England without the knowledge of the Continental Congress or France. They were willing to risk repercussions from both because the opportunity was at hand. The result was a preliminary peace treaty with England that recognized America's independence, doubled the size of the new American nation, and secured America's fishing rights off the coast of Newfoundland. The provisions of this preliminary treaty remained largely intact in the final Definitive Treaty, signed September 3, 1783, in Paris, and ratified by the United States in Annapolis, Maryland, on January 14, 1784.

America's first peacemakers, inexperienced as they were, demonstrated to the world that they were capable of dealing successfully with other nations in the realm of diplomacy.

John Adams, by John Singleton Copley. Fogg Museum, Harvard University Portrait Collection.



John Jay, by Gilbert Stewart and John Trumbull. National Portrait Gallery, Smithsonian Institution, Washington, D.C.



Henry Laurens, by John Singleton Copley. National Portrait Gallery, Smithsonian Institution, Washington, D.C.

Ratification of the Treaty of Paris, 1783

On November 22, 1783, the treaty arrived in Philadelphia and was given to Thomas Mifflin, the president of the Continental Congress. As the treaty needed to be approved within six months, he immediately called the delegates of the thirteen states to a meeting in Annapolis. Under the Articles of Confederation, Congress ratified treaties. Each state sent delegates to the Congress, and these men had their own questions and doubts about the peace and what it might mean to America's formal alliance with France. The peace commissioners had overstepped their orders, and some Americans, particularly John Mercer, actually spoke of censuring the peacemakers. Others, including congressmen in Philadelphia, had little faith in France as an ally. By mid-December, only seven of the necessary nine states' representatives were present. The delegates were concerned enough to consider bringing a delegate from his sickbed to the floor to vote. Fortunately, both he and the Connecticut delegates arrived and the treaty was unanimously approved on January 14, 1784.

Three separate copies of the treaty were prepared to make sure that at least one reached Europe safely. Actually, only two arrived and they were several weeks late. England decided not to object to the late arrival, and on May 12, 1784, ratifications were exchanged in Paris by Franklin and Jay for the United States and by David Hartley for England.

Provisions of the Treaty of Paris, 1783

1. England recognized the United States as a free and independent nation.
2. The U.S. boundaries became: north to roughly the present boundary line between Canada and the United States; west to the Mississippi River; south to the border between Spanish East and West Florida.
3. The United States was granted certain rights to fish off the coasts of English-controlled Newfoundland and unsettled portions of Nova Scotia, the Magdalen Islands, and Labrador.
4. The British and Americans were to place no legal impediments in the way of the collection of prerevolutionary debts.
5. The U.S. Congress was to recommend that Loyalist properties be returned.
6. All fighting should cease and English troops leave the United States without taking slaves with them.

What is Diplomacy?

A year and a half after Congress ratified the Treaty of Paris, Benjamin Franklin wrote to David Hartley, saying, "We have long been fellow labourers in the best of all works, the work of peace." Nothing has changed fundamentally since the days of Franklin's and Hartley's labors. Maintaining peaceful relations with other nations remains a goal of diplomacy. It is also through the skill and labor of the diplomat that nations are able to do steady business with each other. A diplomat is a representative of a nation in these transactions.

America's first experience with the process of diplomacy relied mainly on the skills of three representatives. Today, America maintains relations with more than 140 nations and requires the labor of more than 9,000 men and women in implementing its foreign policy.

Central to the whole diplomatic process in the United States is the idea that diplomats *represent* the country and protect its national interests in dealings with foreign countries. This is accomplished largely through *negotiation* with the representatives of other nations in an effort to obtain information, digest it, analyze it, and finally report it back to the United States. *Receiving instructions and reporting information* constitute the third step in this process. The final step is the *development of a document*, which all sides can sign. (The document may be a treaty, but today it is more often an executive agreement, accord, or protocol.) Accomplishing these steps can be a slow and tedious process that often takes years to complete.

Student Negotiating Exercise

A treaty is a formal agreement between two or more countries. Most treaties do not end wars; many settle boundary disputes, set up international organizations, settle commercial disputes, or deal with extradition and civil justice. These issues may also become clauses in a general political treaty. Most treaties are political in that they deal with alliances and settle disputes among nations. The enforcement of a treaty depends partly on international public opinion and goodwill. A treaty may be terminated upon the agreement of all parties or may become void if the physical conditions become impossible to fulfill.

Goal

Your students may find it difficult to understand the complex nature of treaty development as the finished product is usually the only part that is studied in a classroom. To help them participate in the difficult process of choosing words that spell out the exact meaning of the terms of a treaty, you might use the following activity.

Procedure

Divide the class into groups of two, with one person representing a parent and one a teenager. Each pair must draw up an agreement or treaty that deals, for example, with the teenager's use of the family car. If students need help getting started, suggest that each side make a list of demands before attempting to negotiate the exact wording of the terms. After the issues have been identified, let each team of two try to word the terms of an agreement that will make clear what is acceptable to both parties.

Other issues that could be used in this writing activity are: drinking and driving agreements, curfews, money management, family chores, or television use. As you work out the exercise, keep in mind that the purpose of the activity is to give your students practice in writing with clarity and precision. Many skills are necessary for successful diplomacy, and clear writing is certainly one of them; it can be practiced now while they are in school.

For Follow-Up

Ask students which factors hindered negotiations and which facilitated them. Such a discussion will help students see that it is not simply the position of each side that matters. The personalities of the negotiators and the willingness (or lack of it) to compromise are also critical.

Activities Using Selected Treaties in American History

The following chart contains a sample of treaties in which the United States has participated. Some have taken as long as eight years to negotiate and write. The teacher can use this information to flesh out a unit on diplomacy or choose one treaty from the list to introduce the topic of diplomacy within the framework of the historical era currently under study in class. Here are some other suggestions for further use of the treaty chart:

1. Ask students to prepare maps that show U.S. growth in terms of land acquired by treaties.
2. Ask individual students or groups to investigate the provisions of any current treaties not included on the chart.
3. Ask students to prepare a report on one member of a peace delegation in history. Summarize this diplomat's essential impact on the results.
4. Ask students to provide the information for an additional column on the chart. Among the subjects that may be investigated are the causes for each treaty, or the conflict that each treaty resolved.
5. Have students refer to microfilms of newspapers printed at the time a treaty was signed or ratified. These primary source documents can provide depth to the content or illustrate the public opinion at the time.
6. Review constitutional powers granted to the executive branch using the Constitution as the primary source. Ask students: What is the president's role in treaty making?
7. Have students investigate the purpose and evolution of the Department of State.
8. Ask students to compare one of the treaties to the Treaty of Paris. The following procedure may be used to help their research:
    - Ask what goals the negotiators were trying to achieve in the making of this treaty.
    - Have one student prepare a report on one of the Paris negotiators, and another on a member of another peace delegation. Then have students discuss which negotiator was more effective, and why.
    - Have students compare public acceptance of the Treaty of Paris with public acceptance of another treaty, for example, the Jay Treaty, which got very negative reviews and to which citizens responded by hanging Jay in effigy.

Chart of Selected American Treaties

Treaty and Date	**Participants**	**Provisions**
Jay Treaty 1794–95	Britain and United States	1. Britain withdrew troops from northwest United States. 2. Arbitration commission settled debts between the two countries.
Pinckney Treaty 1795	Spain and United States	1. Established Mississippi River as west boundary and 31st parallel as south boundary. 2. Guaranteed the United States free navigation of the Mississippi River and right of deposit at New Orleans.
Treaty of Ghent 1814	Britain and United States	1. Reestablished prewar boundaries of the United States. 2. Did not mention British impressment of U.S. sailors.
Adams-Onis Treaty 1819	Spain and United States	1. Florida ceded to the United States. 2. The United States gave up claims to Texas. 3. Spain accepted 42d parallel as boundary between Mexico and Oregon country.
Treaty of Guadalupe Hidalgo 1848	Mexico and United States	1. Rio Grande River made southern border of Texas. 2. Mexico gave up California and New Mexico (Mexican cession). 3. The United States paid Mexico and assumed claims of U.S. citizens against Mexico.
Treaty of Paris 1898	Spain and United States	1. Cuba freed of Spanish rule. 2. Puerto Rico and Guam ceded to the United States. 3. Philippine Islands sold to United States for $20 million.
Hay-Bunau-Varilla Treaty 1903	Panama and United States	1. American control "in perpetuity" of canal. 2. American intervention in canal if necessary. 3. America pays $10 million and rent yearly.
Treaty of Versailles 1919	France, Britain, Germany, and United States	1. Established League of Nations. 2. Germany surrendered: Alsace-Lorraine to France, Saar Valley to League of Nations and coal from Saar to France. Minor border regions to Denmark and Belgium. Land to the new nation of Poland. Danzig to League of Nations for Polish use. 3. Navy and army limited. 4. Reparations.
Treaty of Peace with Japan 1952	Allies (not Russia)	1. Japan lost its conquests. 2. Contribute goods and services to countries damaged by Japan in the war. 3. Japan recognized as independent.
North Atlantic Treaty Organization 1949	Britain, France, Belgium, Netherlands, Luxembourg, Denmark, Iceland, Italy, Norway, United States, Portugal, Canada (later Greece, Turkey, Federal Republic of Germany)	1. An attack on one is an attack on all. 2. Defend each other with force if needed.
Southeast Asia Treaty Organization 1954	United States, Britain, France, Australia, New Zealand, Thailand, Pakistan, Philippines	1. Pledged to meet common danger with appropriate constitutional process. 2. Recognized that civil wars might involve foreign aggression. 3. Aid on request to Cambodia, Laos, and South Vietnam.
Austrian State Treaty 1955	United States, Britain, France, Russia, Austria	1. Austria agreed to become a neutral nation and thus obtain its freedom.
Panama Canal Treaties (Carter-Torrijos Treaties) 1977	Panama and the United States	1. Established new arrangements for operating and defending the Panama Canal. 2. Ensured continuing neutrality and accessibility to all shipping. 3. The United States continues to operate the canal until December 31, 1999. 4. Control of canal operations assumed by Panama with the United States sharing permanent responsibility for maintaining the canal's neutrality.

The Pursuit of Happiness: the Private Realm, Commerce, and the Constitution

Some Remarks Prepared for a Project '87 Conference at Mount Vernon, April 2, 1985

by JACK P. GREENE

From the earliest days of settlement of the English-American colonies, the pursuit of happiness has almost certainly been the primary shaping social value. No imperative has been so important in determining the character of American society or in forming American culture. For the overwhelming majority of Americans, moreover, the pursuit of happiness has always resided in the *private* rather than the *public* realm. Notwithstanding this basic fact of American life, historians, as we are doing here today, have until quite recently concentrated most of their attention upon events and developments in the public realm. A sweeping revolution in historical studies over the past twenty years has, however, taken historians out of the halls of government and into the busy and variegated scenes of private activity that have traditionally composed the essence of American life.

Private Concerns

One of the most important things this scholarly revolution is uncovering, is the basically private orientation of American society, a powerful underlying predisposition among the free populations of seventeenth- and eighteenth-century America to preoccupy themselves with the pursuit of personal and family independence and the social improvements that would guarantee and enhance their individual economic achievements, enrich their lives, and give them a sense of personal self-worth. For all but a few Americans, the pursuit of happiness did not involve the pursuit of public office or even the active occupation of a public space. There was simply too much private space for most people to be much interested in having a public space. Although the intensity of civic responsibility differed from place to place and time to time during the colonial era, the primary concerns of most independent Americans were private rather than public. Their allegiances were to themselves and their families rather than to the larger social entities to which they belonged. To quote one observer, they were mostly "too engaged in their respective occupations for the enticements" of public life.

They, or their ancestors in any case, had left Britain or Europe not only to escape want and to gain independence but also, as contemporaries were fond of pointing out, to get away from excessive public intrusions into their private lives, intrusions in the form of high taxes, rapacious civil and religious establishments, obligations to military or naval service, and war. The most popular cultural image invoked by early Americans was the biblical image of the industrious husbandman who sat contentedly, safely, and without want under the shade of his own vine and fig tree presiding over—and luxuriating in—the development of his family and estate.

The new emphasis upon the private orientation of early American society has at least implicitly raised the question of how it affected public life and public institutions. Or, more to the point for the subject that has brought us together here today, how it was reflected in the new federal framework created in 1787 and 1788. For the founding fathers almost all recognized the wisdom of that classic early modern political truism, that all government was founded on "opinion," by which they meant that no government could long survive that did not have the support of the people it served.

Throughout the colonial period, the private orientation of American society had meant that in most places and at most times the public realm had been small. With only a tiny bureaucracy and no police, a localized judicial system that rarely met more than fifteen to thirty days in any given year, and legislatures that in peacetime were not often in session for more than a month in any given year, government was small, intermittent, and inexpensive. Except during wartime, taxes were low, and the only public activities that engaged most men were infrequent militia or jury service and somewhat more frequent participation in vital public works such as building and repairing bridges and roads. With little coercive power—and very little presence—government in America was consensual and depended for its energy upon the force of community opinion, which was the sum of individual opinions.

Government in early America was thus largely a device, in the traditional sense, for maintaining orderly relations among people and protecting them from their own and others' human frailties. Even more important, it was an agency for the protection of one's individual property in land, goods, and person, one's property in person including the right of striving, of pursuing (as well as protecting) one's interests, of seeking to alter one's place on the scale of economic well-being and social status. While Americans wanted enough government to secure peace and to maintain a just and open civil order, they were usually, to quote one contemporary, in favor of just "so much government as will do justice, protect property, and defend the country."

The critical point about the implicit conception of political society that underlay this pattern of governance is that it assigned to political society no more authority over the individual and to the individual no more obligation to political society than was absolutely necessary to make sure that all free individuals had approximately the same scope for private activity. Political society was thus *regulative* as it was in the traditional societies of

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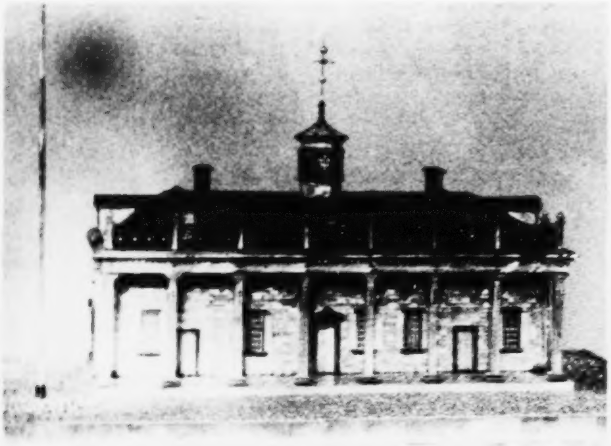

Mount Vernon in pearls, presented to the United States by Kokichi Mikimoto. Exhibited at the Chicago World's Fair, 1933. Division of Political History, Smithsonian Institution, Washington, D.C.

Europe. But it was also *facilitative* in at least two senses. First, it acted to "enlarge" the private realm by overseeing and stimulating those public improvements that would provide people with an ever larger field for the pursuit of happiness, for the realization of their individual potentials. Second, it encouraged individuals to pursue their own goals without forcing them to be much concerned with the social well-being of the community as a whole.

But the American Revolution represented a radical challenge to these enduring and already quite ancient arrangements and to the traditional division of emphasis between the private and the public sphere. The demands of war both raised taxes and significantly increased the range of public demands upon individuals, while the imperatives of the new republicanism and the absence of a strong controlling central power encouraged the state governments to involve themselves in a variety of new activities. The result was a dramatic growth of government, especially at the state level, an enlargement of the public realm that represented a massive—and thitherto unprecedented—intrusion of the public into the private realm. Never before in the history of British America had the public realm made such heavy demands upon the citizenry.

'The Benefits of a Liberal and Free Commerce'

At the conclusion of the War for Independence, people expected a return to the old order, a restoration of the old system whereby, in the vast majority of areas, the private realm took precedence over the public. Like George Washington, they had for nine long years looked forward to their return to those domestic and private pursuits that had traditionally engaged most of their attention, and the energy with which they threw themselves into those pursuits in the immediate post-war years was evident in the rapid recovery of the United States from many of the effects of the war. "It is wonderful," Washington wrote to a French correspondent less than three years after the war, "to see how soon the ravages of war are repaired. Houses are rebuilt, fields enclosed, stocks of cattle which were destroyed are replaced, and many a desolated territory assumes again the cheerful appearance of cultivation. In many places the vestiges of conflagration and ruin are hardly to be traced. The arts of peace, such as clearing rivers, building bridges, and establishing conveniences for travelling &c. are assiduously promoted."

As Washington's emphasis upon clearing rivers and building bridges suggests, nothing seemed more vital to the recovery and more important to the future development of Americans than commerce. Trade, they clearly understood, had been the basis for the extraordinary economic and demographic growth and social and cultural development that had characterized colonial British America for the century prior to Independence. Although a few devout republicans condemned commerce in traditional terms as the seed of "luxury, effeminacy, and corruption," most Americans agreed with Washington both that such evils were "counterbalanced by the convenience and wealth" generated by commerce and that "the spirit of Trade which pervades these States" was already too deeply engraved upon American life ever to "be restrained."

They looked to *internal* commerce to bind the new union together and to connect the old states with the new and already burgeoning sections of the west. They looked to *foreign* commerce as the key to prosperity and growth. The United States might be the world's best "poor man's Country, but," as one contemporary observed, "without . . . an Opportunity of exporting our produce it cannot flourish." Commerce, indeed, many leading Americans believed, including even a pragmatic realist like Washington, could be expected not only to bring wealth and unity to their new country but, in time, to transform the world and perhaps even human nature itself. "I cannot avoid reflecting with pleasure on the probable influence that commerce may hereafter have on human manners and society in general," Washington wrote Lafayette in August 1785. On the occasion of such reflections, he continued, "I consider how mankind may be connected like one great family in fraternal ties. I indulge a fond, perhaps an enthusiastic idea, that as the world is evidently much less barbarous than it has been, its melioration must still be progressive; that nations are becoming more humanized in their policy, that the subjects of ambition and causes for hostility are daily diminishing, and, in fine, that the period is not very remote, when the benefits of a liberal and free commerce will, pretty generally, succeed to the devestations and horrors of war."

A Need to Restrain the States

To produce such beneficial effects, however, commerce had to be free from unnatural restraints and to operate within an environment in which the public faith

During the 1780s, the advocates of a more energetic union increasingly came to believe that the unrestrained power of the states over trade was productive of discord among the states, inimical both to the union and to the private welfare of the people in general, and oppressive to many key minority groups, especially creditors, within the states.

was inviolable and money and property were secure, and in this connection Americans of the 1780s faced three problems. First were the restrictions imposed on their trade by other countries, especially Britain. Second were the restrictions and contradictory measures imposed on trade by the several states. Third was the impotence of the national government to do anything about either of the first two problems. Historians have traditionally focused upon the first problem. But the second was in many respects every bit as worrisome to people who advocated strengthening the national government. With the end of the war, the state legislatures showed few signs of wanting to relinquish the enormous powers they had acquired during the war or to diminish the scope of their activities; during the 1780s, the advocates of a more energetic union increasingly came to believe that the unrestrained power of the states over trade was productive of discord among the states, inimical both to the union and to the private welfare of the people in general, and oppressive to many key minority groups, especially creditors, within the states. At the same time, the states' extensive control over trade and other aspects of economic life, including money and credit, had left American society vulnerable to the uncertain influences of "local politics and self-interested views," which invariably, as Washington once complained to David Humphreys, 'obtrude[d] themselves into every measure of public utility."

The result, as Washington put it, was "that property was [not] well secured, faith and justice [were not] well preserved," government was unstable, and public confidence was low and falling, all developments that, in his view, were detrimental to commerce and to the individual interests and welfare—the private potentialities—of the citizenry at large. "In a Country like this where equal liberty is enjoyed, where every man may reap his own harvest, where proper attention will afford him much more than is necessary for his own consumption, and where there is so ample a field for every mercantile and mechanical exertion," Washington wrote a correspondent in the spring of 1788 while the new constitution was still in process of ratification, the absence of "money . . . to answer the . . . necessary commercial circulation" could only be interpreted as a certain indication that there was "something amiss in the ruling political power" that, in the interest of restoring public confidence, required "a steady, regulating and energetic hand to correct and control."

James Madison agreed. "Much indeed is it to be wished," he wrote to James Monroe in August 1785, "that no regulations of trade, that is to say, no restrictions or imposts whatever, were necessary. A perfect freedom," he declared, "is the System which would be my choice." But, he continued, "if it be necessary to regulate trade at all, it surely is necessary to lodge the power, where trade can be regulated with effect" and, he implied, where such regulations would not be fettered by the cramped and local views of state politicians. Experience, Madison added, "has confirmed what reason foresaw, that it can never be so regulated by the States acting in their separate capacities. They can no more exercise this power separately [or responsibly], than they could separately carry on war, or separately form treaties of alliance or Commerce."

The American people, proponents of a stronger central government thus came to believe, had to be freed from the intrusive and obstructive interventions of the majorities in the state legislatures before commerce could achieve its full potential as a bountiful arena for the free exertion of individual talents and resources, before the private realm in general and economic life in particular could once again become, as they had been for many decades prior to the Revolution, the central domain for the realization of individual human potential, the pursuit of happiness, in American society.

Historians have traditionally interpreted the Constitution as a movement for stronger government, and, to an important degree, it was. But it is also necessary to call attention to the very significant extent to which, in seeking a stronger *national* government, the men who wrote and supported the Constitution were also endeavoring to reduce the power of the states and thereby, in Joyce Appleby's words, "to constrict [an important section of] the public sphere they could not control and expand the private realm they occupied as undifferentiated individuals." In so doing, they constructed a political system that was far more compatible with the basic predispositions of the American people than had been the Revolutionary state governments, a system that helped, at least in the short run, to set men free from the intrusions of the public realm and to enable them "to pursue happiness by choosing their own goals" in the private sphere. In so doing, they also helped to reinforce the hope that through commerce, facilitated by government and pursued for the private happiness of individuals, "population and wealth," in Washington's words, "would flow to us, from every part of the Globe, and, with a due sense of the blessings, make us the happiest people upon earth."

Jack P. Greene is Andrew W. Mellon Professor in the Humanities at The Johns Hopkins University. He is now finishing a book tentatively entitled *Center and Periphery: An Interpretation of British-American Constitutional Development, 1607 and 1788.*

Bicentennial Gazette

The Bicentennial of the Mount Vernon Conference

This article was written by Nancy McManus.

In 1785, the Union was plagued by commercial disputes among the states. In March of that year, George Washington hosted a meeting of commissioners from Maryland and Virginia to discuss their competing claims for navigation rights on the Potomac River and the Chesapeake Bay. That meeting, known as the Mount Vernon Conference, produced a resolution to hold annual meetings at which representatives of the several states would work out their differences in the areas of commerce and trade; the first such meeting was to take place the following year at Annapolis. The Mount Vernon Conference thus marked the beginning of the crucial two-year period during which the Union evolved from a confederation of largely independent states into a republic in which the states vested the central government with adequate power to conduct the nation's business, under the authority of the Constitution.

To commemorate the two-hundredth anniversary of that beginning and to underscore the central role played by commerce in the design of the U.S. Constitution, Project '87 and the Mount Vernon Ladies' Association of the Union* held a second conference at George Washington's estate on the Potomac on April 2, 1985. This second Mount Vernon Conference included a group of about 120 scholars of American history and law, government officials, members of the business community, and foundation executives, along with members of Project '87's Advisory Board and the Mount Vernon Ladies' Association. Speakers pointed to the early and continuing importance of commercial interests to the vitality of our constitutional system and highlighted the potential role of the business community in supporting the celebration of the Constitution's Bicentennial.

The day-long conference was launched on the preceding evening with a dinner at the United States Supreme Court, hosted by Chief Justice Warren E. Burger, the honorary chair of Project '87's Advisory Board. The co-chairs of Project '87, James MacGregor Burns and Richard B. Morris, spoke. Morris recounted the events of the first Mount Vernon Conference (see ***this Constitution***, Spring, 1985). Burns, in reflecting upon the best way to celebrate the Constitution's Bicentennial, observed: "If we are truly to honor the framers, we might—even though our intellectual equipment is puny by comparison—we might try to emulate the founding fathers in at least one way—by standing back from our existing constitutional arrangements, to distance ourselves from them intellectually, and to ask the question the framers asked and answered so magnificently: However successful those institutions may have been in the past, will they be adequate to the enormous pressures on American government and society that we can expect to boil up in the next century and in the century after that?"

The next day, Walter Berns, Resident Scholar at the American Enterprise Institute, presided over the morning session whose theme was "The Constitution: Commerce and 'the Pursuit of Happiness'." In his introduction, Berns pointed out that "the Constitution of the United States is not only the oldest national constitution; it is also unique insofar as it served to constitute a people and a way of life. . . . The United States is what it is because of its two founding documents: the Declaration of Independence of 1776 and the Constitution of 1787."

Secretary of Commerce Malcolm Baldrige, in his keynote address for the conference, observed: "Commerce and trade were key when the Constitution was written. Some experts today express surprise, salted with suspicion, that so many of the delegates to the Constitutional Convention in Philadelphia in 1787 were involved in commerce. . . . My guess is those delegates in 1787 would have been even more surprised at the suggestion that this domination of the convention by individuals engaged in commerce was either unusual or to be censured. Or that it could have been otherwise. Why? Because practically every voter in every one of the 13 states was actively engaged in trade activities. . . . So, to the extent that the delegates in 1787 were 'businessmen,' they were truly representative of the voters to whom they were ultimately responsible."

View of Mount Vernon, by Jennie Bellows Millard. Gift of Miss May Hastings Dickinson in the collection of The Corcoran Gallery of Art, Washington, D.C.

Jack P. Greene, Professor of the Humanities at Johns Hopkins University, whose speech is reprinted in this magazine, spoke about the condition of commerce during the 1780s. He observed that citizens saw the need both to strengthen national commercial regulation as well as to control state intervention in commerce.

Bernard Siegan, Professor of Law at the University of San Diego, offered his interpretation of the role of the Supreme Court in the protection of commercial rights. Siegan asserted that the founding fathers, as well as the framers of various amendments to the Constitution, intended to protect economic and property rights, a perspective that was particularly influential between 1897 and 1937 when the Supreme Court struck down much economic regulation. Since that time, the Court has ruled that economic regulation in the public interest should take precedence over private entrepreneurial rights. As a result, the Court no longer safeguards these prerogatives. They are preserved only when included within liberties that the Court does protect, such as speech, press, religion, and sexual privacy. In Siegan's opinion, this failure to protect economic activity directly is contrary to constitutional intention and meaning.

At luncheon, Mrs. William Loring Vaughan, Vice Regent for Maine of the Mount Vernon Ladies' Association of the Union, welcomed the assembled guests and introduced Governor

Charles S. Robb of Virginia who gave the luncheon address. Governor Robb traced the history of Virginians' involvement in the design of the Constitution and in court cases resulting in its interpretation, and he recommended that Virginians' lively interest in constitutional issues serve as an example to all citizens. [See box.] Governor Harry Hughes of Maryland, who followed Governor Robb at the luncheon podium, reminded the audience that the first Mount Vernon Conference "taught a lesson that quickly proved to have greater meaning than perhaps even the participants envisioned at the time. If two states could set up a mutually agreeable framework to handle matters affecting both, a framework that provided that neither legislature could act independently to nullify the provisions of the compact or alter agreements reached under it, then why could not all the states agree to submit to a national framework that accomplished similar goals on issues that were of concern to all?" That lesson, of course, bore fruit in the convention of 1787 which produced the Constitution.

The afternoon session, presided over by Samuel R. Gammon, Executive Director of the American Historical Association, focused on plans for the celebration of the nation's constitutional Bicentennial in 1987. The first speaker was Rodney W. Rood, Vice President of the Atlantic Richfield Company who was a member of the 1984 Los Angeles Olympic Organizing Committee. Rood elaborated his strong belief that "most of the great achievements and advancements in our society, including the Constitution itself, have come about because we have had the wit in this country to fully utilize our most creative and productive resource—private initiative." He cited the enormously successful Los Angeles Olympic Organizing Committee to illustrate how private enterprise can participate productively in activities for the public good and concluded that "much of that same experience can be put to use to help America celebrate something more important than the Olympics—the Bicentennial of the Constitution of the United States."

John Agresto, Deputy Chairman of the National Endowment for the Humanities, described to the assembly some of the projects for the Bicentennial supported by the Endowment. Agresto affirmed the Endowment's commitment to assist scholarly efforts to illuminate the history and theory of the Constitution.

Joan R. Challinor, who chaired the National Committee for the Bicentennial of the Treaty of Paris and who is now chair of Project '87's Exhibit Task Force, took up Rood's theme of private involvement in Bicentennial events. Since, she reasoned, "much of the impetus for the writing of the Constitution came from worries about commerce," the commercial sector has a special reason for participating in its celebration. She ended with a call for cooperation among scholars, private enterprise, and the general public to make the Bicentennial of the Constitution both memorable and meaningful.

Harry Hughes, Governor of Maryland.

RESOLUTION ENACTED BY THE GENERAL ASSEMBLY OF VIRGINIA

in honor of the Mount Vernon Conference

WHEREAS, the United States is approaching the Bicentennial in 1989 of the founding of our Republic, and

WHEREAS, we are in a period that is the prelude to the Bicentennial of the adoption of the Constitution, and

WHEREAS, in March of 1785, a Conference at Mount Vernon prepared the way for the Annapolis Convention in 1786, which resulted in the Constitutional Convention the following year at Philadelphia, and,

WHEREAS, the historic Mount Vernon Conference, was convened to discuss matters of mutual concern, to the joint actions of the Legislatures of both Maryland and Virginia, each naming Commissioners to the Conference between the two states, and

WHEREAS, the agreement reached by the Conference had an "impact upon the whole structure of the fledgling confederation," and

WHEREAS, March 28th, 1985 marks the 200th Anniversary of the Mount Vernon Conference,

NOW, THEREFORE, be it resolved that:

1. March 28th, 1985 shall be observed in the Commonwealth as a day of historic significance marking the part played by the Mount Vernon Conference as a first step leading ultimately to the Constitutional Convention;
2. That this Resolution be sent to the Legislature of Maryland to apprise them of this action by the General Assembly of Virginia for such joint recognition, or other ceremonies, as they might deem appropriate;
3. And, further, it is encouraged that ceremonies be undertaken in the Commonwealth, by the Federal Government, and in other states, to recognize the importance of the Mount Vernon Conference in establishing the American Republic; and finally,
4. That copies of this Resolution also be sent to the President, to the United States Congress, and each Member of the Virginia Delegation to the Congress.

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*The Mount Vernon Ladies' Association of the Union, America's first preservation group and oldest national women's organization, owns and maintains the estate of George Washington. Founded in 1853 as a non-profit institution, the Association includes representatives from more than thirty states in the Union. The Association's primary goal is to preserve and restore the home of George Washington for the benefit of the public and to assemble a fine collection of Washington books, manuscripts, furnishings and memorabilia.

Charles S. Robb, Governor of Virginia.

Excerpt from remarks by ***Governor Charles S. Robb*** *at the Second Mount Vernon Conference, April 2, 1985.*

The lesson of Virginia's constitutional history is a simple, but important one. It is that the vigor of constitutional government is maintained only through constant effort, through a willingness to reexamine old precepts, through an unending dialogue in which the people search for ways to make self-government work.

In this context, today's meeting at Mount Vernon takes on added significance. The historic meeting at this place two hundred years ago took the form of an effort to stimulate discussion between sister states on matters of common concern, especially commerce. This effort led in turn to the convention at Annapolis in 1786, and that in turn to the great conclave at Philadelphia in 1787. As those who attended those meetings searched for answers to tough questions, so must we bend our best efforts to raising and dealing with the challenging questions of our own time. The Constitution's Bicentennial will mean little if it takes the form of self-congratulation or empty ceremony. We are not without the talent to respond as effectively to our generation's needs as did the framers to theirs. It is in this spirit that I hope we leave this latest meeting at Mount Vernon.

ORGANIZATIONS and INSTITUTIONS

THE AMERICAN CONSTITUTION AND REPRESENTATIVE GOVERNMENT

With a grant from the National Endowment for the Humanities, the Carl Albert Congressional Research and Studies Center, the University of Oklahoma Department of Political Science and the Oklahoma Center for Continuing Education held a conference on June 12, 13, and 14, 1985 for fifty public school and undergraduate college teachers. The conference examined the idea of representative government found in the Constitution and in the early years of the Republic. Constitutional scholars Ross M. Lence, University of Houston, Harvey C. Mansfield, Jr., Harvard University, Wilson Carey McWilliams, Rutgers University, and Gordon S. Wood, Brown University, conducted lectures, workshops and informal meetings with participating teachers. Participants received conference books and educational materials and were eligible for in-service training credit. For further information, contact Ronald M. Peters, Jr., at the Albert Center, 630 Parrington Oval, Room 106, University of Oklahoma, Norman, OK 73019.

THE FRAMING OF THE UNITED STATES CONSTITUTION

The History Department and the Office of Continuing Education and Community Services at Central Michigan University sponsored a conference for teachers of social studies on the theme, "The Framing of the Constitution." This conference was designed to aid secondary school teachers in preparing for the celebration of the Bicentennial of the U.S. Constitution in 1987.

The conference was held on Friday, April 26, 1985, in the Bovee University Center on Central Michigan University's campus in Mt. Pleasant. Professor Stanley Kutler, Professor of History, University of Wisconsin—Madison, Wisconsin, spoke on "The Framing of the Constitution." Ms. Katie Villaire, Granville-Jenison Alternative High School, Standale, Michigan, addressed "Teaching the Constitution in the Secondary Classroom."

All teachers, administrators, and advanced high school students were invited to attend these sessions. All of the sessions were open to the general public as well.

For further information, contact William T. Bulger, conference chairman. Telephone: (517) 774-3374.

THE LEGACY OF GEORGE MASON

A Continuing Lecture Series sponsored by the George Mason Project for the Study of Human Rights

The fourth annual lecture series in honor of George Mason was held in March and April 1985 at George Mason University in Northern Virginia. Linda Grant DePauw (George Washington University) spoke on the roots of American federalism, Daniel J. Elazar (Center for the Study of Federalism, Temple University) talked on the theory of federalism, Robert B. Hawkins (Advisory Commission on Intergovernmental Relations) addressed intergovernmental relations in the federal system; and Edwin R. Black (Queen's University, Canada) offered a comparative study of federalism. For further information, contact the George Mason Project for the Study of Human Rights, Center for Historical Studies, Room 2524, Fenwick Library, George Mason University, Fairfax, VA 22030. Telephone: (703) 323-2571.

The History Teaching Alliance

The History Teaching Alliance is a joint enterprise of the American Historical Association, the National Council for the Social Studies, and the Organization of American Historians. Its goals are two-fold. First, the Alliance seeks to encourage better history instruction in secondary schools by bringing faculty and teachers into a sustained dialogue. Second, the seminars are intended to cement ties of mutual respect and understanding between history faculties and high school history teachers. To this end, the Alliance sponsors yearlong seminars devoted to engaging faculty and teachers in a sustained Socratic dialogue about history. During the first two years, the Alliance seminars will concentrate on the history of the American Constitution.

The Alliance seminars operate in the following way. They begin with a two-week summer session that establishes the year's intellectual agenda, builds group cohesion, and introduces broad substantive constitutional concerns. Thereafter, the seminars meet approximately every three weeks for the remainder of the academic year. These sessions provide a sense of continuity and common purpose; they enable teachers and faculty to pursue a common intellectual agenda while building binding ties of mutual interest. The core of the seminar materials are *Lessons on the Constitution*, designed by John J. Patrick and Richard C. Remy and sponsored by Project '87, and the AHA Constitutional Bicentennial Pamphlet Series. Local seminar leaders are free to supplement these materials.

The Alliance, under the auspices of the OAH Committee on the Bicentennial, conducted two pilot projects during the 1984–85 school year. The lessons learned through those pilot projects, which were funded through a grant from the William and Flora Hewlett Foundation, contributed materially to the creation of the Alliance. At the same time, both the AHA and NCSS had undertaken similar programs. The directors of the three professional associations quickly decided to combine their objectives into a common project—the Alliance. Subsequently, the Alliance received funding support from the Exxon Education Foundation, the William and Flora Hewlett Foundation, and the Rockefeller Foundation.

Through this support, the Alliance will conduct five seminars beginning in the summer of 1985. These seminars will bring together the following history faculty and school systems: Professor Mary K. B. Tachau, Department of History, University of Louisville and the Jefferson County, Kentucky, Schools; Professor John Johnson, Department of History, Clemson University and the Pickens County, South Carolina, Schools; Professor Gordon B. McKinney, Department of History, Western Carolina University and The Buncombe County, North Carolina, Schools; Professor Ann W. Ellis, Department of History, Kennesaw College and Cobb County, Georgia, Schools; and Professor Augustus M. Burns, Department of History, University of Florida and the Alachua County, Florida, Schools. In addition, the Alliance has already approved a seminar to begin in the summer of 1986 conducted by Professor Steven R. Boyd, Department of History, University of Texas, San Antonio, and Northside, San Antonio, Texas, Schools.

The Alliance plans to expand its operation significantly during 1986 and 1987. It welcomes, therefore, applications for the establishment of collaboratives from school districts and universities and college history departments. Further information, guidelines, and application materials are available by writing to: Deborah Welch, Project Director, The History Teaching Alliance, American Historical Association, 400 A Street S.E., Washington, D.C. 20003.

Scottish Enlightenment Thought and the Constitution

With the British Institute of the United States, in September 1985 the Mentor Group sponsored three symposia—in Washington, D.C., Baltimore and New York—to initiate studies in constitutional thought which trace the influence of the Scottish Enlightenment on the founding generation of American leaders. The symposia were chaired by Chief Justice Warren E. Burger; other participants included the Honorable Lord Cameron, Senator of the College of Justice in Scotland; Judge Robert H. Bork of the U.S. Court of Appeals, Professor Neil MacCormick of the University of Edinburgh, and Dr. Edwin J. Feulner, Jr., president of the Heritage Foundation.

The Mentor Group plans other Bicentennial programs, including a volume of essays on the impact of the Scottish Enlightenment on constitutional thought, a research program for American scholars at Scottish universities, a symposium in Scotland in 1986, a series of conferences at American universities in 1987–88, and a major Constitutional Bicentennial Symposium in September, 1987.

The Mentor Group has initiated a similar project to explore the French historical and intellectual influences upon the founding fathers in celebration of the adoption of the U.S. Constitution and the French Revolution Bicentennials in 1989.

For further information, contact Thomas Kosmo, The Mentor Group, 160 Commonwealth Avenue, Boston, MA 02116. Telephone: (617) 262-4555.

THE NATIONAL ARCHIVES VOLUNTEERS CONSTITUTION STUDY GROUP

As its way of celebrating the Bicentennial, the National Archives Volunteers Association in 1982 formed the National Archives Constitution Study Group, whose purpose it is to present lectures, seminars and other special events designed to focus attention on the Constitution. The Constitution Study Group approach is to reach out to the broadest possible audience and to be meaningful and comprehensive in its programming, thus promoting a better understanding of the document and a better appreciation of U.S. constitutional history. Support has been provided by the three Humanities Councils in the Washington Metropolitan Area, by private foundations, and, most importantly, by the National Archives and Records Administration.

Last March, the Constitution Study Group in collaboration with the Commission on Public Understanding About the Law of the American Bar Association sponsored an all-day symposium on the theme "The Constitution: Past, Present and Future." The symposium was designed to help organizations with their Bicentennial planning. The lectures and panels brought together a number of distinguished historians, lawyers, journalists, and others to discuss the Constitution as a living document and the great variety of ways its significance might be celebrated during the Bicentennial period. Professor James MacGregor Burns, co-chair of Project '87, was the keynote speaker. He was followed by a number of other distinguished speakers and panelists, including Professor A. E. Dick Howard of the University of Virginia, Professor Michael Kammen of Cornell University, Dr. James Hutson of the Library of Congress, Dr. Frank Burke of the National Archives, Dr. Gary McDowell of the National Endowment for the Humanities, and Dr. Charlotte Anderson and Betty Southard Murphy of the American Bar Association. Addressing the evening session in the National Archives Rotunda were Professor Howard, Professor Marcus Cunliffe, ABA President John Shepherd, Senator Strom Thurmond, the Honorable Lloyd Cutler, and Chief Justice Warren Burger.

Current plans for the Constitution Study Group include a six-month program of lectures and other events focussing on the First Amendment. The theme emphasizes the importance to the successful functioning of our constitutional system of freedom of individual conscience, free trade in ideas, plus maximum availability of relevant and timely information. Collaborating in the list of events shown below will be the American Newspaper Publishers Association, the ANPA Foundation, and the First Amendment Congress. More detailed information is available from the Chairman, Constitution Study Group, National Archives and Records Administration, Pennsylvania at 8th Street, N.W., Washington, DC 20408.

Program Schedule July–December 1985

July 17: J.G.A. Pocock (Johns Hopkins University), "The Influence of British Political Thought on the American Constitution—Magna Carta in Context;"

August 14: Martin Schram (*The Washington Post*), "The Impact of Television on the Political Process;"

September 18: Floyd Abrams, Esq. (Cahill Gordon & Reindel), "Freedom of the Press Today" (Commemorating John Peter Zenger on the 250th Anniversary of His Trial for Seditious Libel);

October 16: Judith F. Krug (American Library Association), "Information—The Currency of Democracy;"

November 14: Speaker and Panel, "The Right To Know and Press Responsibility" (This will be a half-day seminar and will feature a prominent speaker and distinguished panel. It is presented in collaboration with the American Newspaper Publishers Association and Foundation, and the First Amendment Congress);

December 18: A.E. Dick Howard (University of Virginia), "The Virginia Statute for Religious Freedom on Its 200th Anniversary."

Update from Project '87

Project '87, the joint effort of the American Historical Association and the American Political Science Association for the Bicentennial of the Constitution, continues to develop and implement programs for the Bicentennial and to offer resources for others planning Bicentennial events.

Its illustrated quarterly magazine, ***this Constitution***, serves as a central clearinghouse of information for the planners of Bicentennial programs. [A subscription form appears on p. 52.]

A major resource for high school teachers and students, *Lessons on the Constitution: Supplements to High School Courses in American History, Government and Civics* has just been published. Publication follows an extensive process of development and evaluation supported by a grant from the National Endowment for the Humanities. This collection of sixty lessons, written for Project '87 by curriculum specialists John J. Patrick and Richard C. Remy, can be ordered from the Social Science Education Consortium, 855 Broadway, Boulder, CO 80302. [See order form on p. 51.]

With the support of the Lilly Endowment, Project '87 conducted a third series of college faculty seminars on constitutional topics. The seminar leaders and topics for 1985 were: Richard B. Morris (Columbia University) on the Founding Period; Walter Dellinger (Duke University) on Constitutional Amendment; Walter Murphy (Princeton) on Constitutional Interpretation; and Rudolph Vecoli (University of Minnesota) on the Constitution and Immigration.

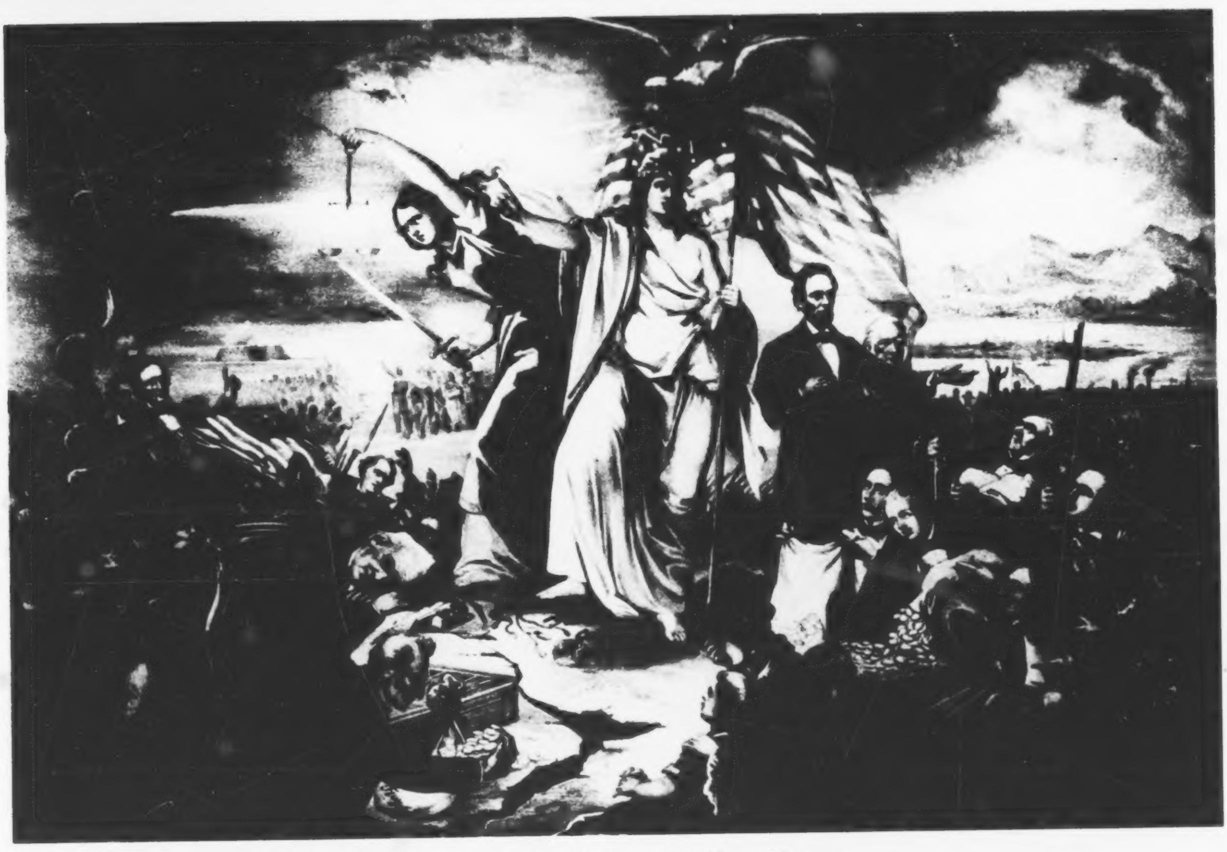
An additional resource for scholars, a volume to supplement Max Farrand's *Records of the Federal Convention*, will be published in 1987 by Yale University Press. Project '87 has provided support for the research for the volume, which was done by Leonard Rapport and James Hutson. The volume will be edited by Dr. Hutson.

A poster series for the public will be available in 1986, distributed by the Smithsonian Institution Traveling Exhibition Service. The posters, suitable for display in libraries and schools, will highlight the Constitutional Convention and the history of the ratification of the document. They will be accompanied by a users' guide that will include materials for teachers. Project '87 plans to work with state humanities councils to distribute the posters in conjunction with lecture series and reading groups.

Two television-assisted instructional series are being developed in collaboration with organizations experienced in this field. With Project '87, the Agency for Instructional Technology is creating in-school television programming on the Constitution for seventh, eighth and ninth graders, in order to fill a gap in materials on the Constitution for this age group. Project '87 is also collaborating with the International University Consortium and the Maryland Center for Public Broadcasting to produce a television-assisted college course for distant learners.

Events will also take place to mark a variety of anniversaries connected with the creation of the Constitution. The first of these, a conference to commemorate the Bicentennial of the Mount Vernon conference of 1785, has already been held. Project '87 and the Mount Vernon Ladies Association invited business executives, foundation officers and representatives of government agencies working on Bicentennial programs to George Washington's home on April 2, 1985. The agenda focused on the role of commerce in the creation of the Constitution and the ways in which the business community might participate in commemorating the Constitution's Bicentennial.

A series of Constitutional Forums, conducted with other organizations, will highlight significant dates in the Bicentennial era. The initial conference will mark the anniversary of the Annapolis Convention of 1785. With the cooperation of Independence National Historical Park, Project '87 will host a program in Philadelphia in May, 1987, to celebrate the Bicentennial of the opening of the Constitutional Convention.



The outbreak of the rebellion in the United States in 1861, *lithograph by Kimmel & Forster, 1865. Library of Congress.*

Though Lincoln refused to obey the chief justice, Taney's *Merryman* opinion received such warm reception in Union states, especially among Democratic lawyers, that Lincoln sometimes despaired about the failure of constitutional history to offer remedies for present ills.

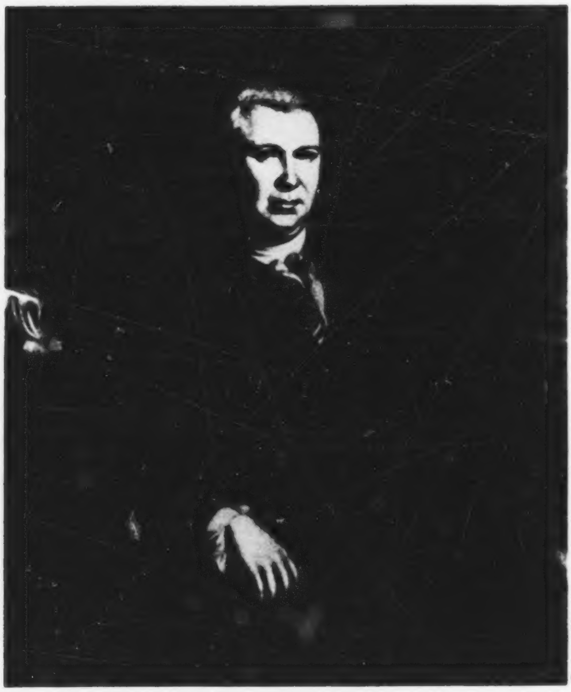
Had Lincoln obeyed Taney in May 1861, the Confederacy conceivably could have won its bid for independence. Lincoln's surprising readiness to act in the existing crisis awoke leaders of the legal community and the general public from the despair into which many had descended during the secession winter. Excited by Lincoln's vigor and forthrightness, constitutional specialists responded quickly and accurately that civil wars were never declared, that grey areas existed between declared and undeclared wars, and that Lincoln's policies sustained rather than threatened Congress and the courts. Republican legalists insisted that though jurists might create constitutional abstractions, more accountable officials had to deal with the real world. Republicans said the Taney formula offered the nation no relevant means of self-defense against secession activists, and that the Constitution had to allow alternatives between acquiescence in national dismemberment and dictatorship.

Clearly individuals suffered from the arrests and other war power policies. But it appears that their imprisonments were brief, uncruel, and open rather than secret. Political criticism flourished everywhere in Union states during the War and Reconstruction years, and competitive two-party politics travelled to occupied southern states in the Union armies' knapsacks. The dynamic war aims of Lincoln's party came to center on enlarging, not diminishing the electorates of both the Union states and the crumpling Confederate states. Unrigged, calendared elections and unfettered courts, including Taney's, operated almost as if no war existed. Neither Congress nor the majority of Union voters, in overwhelmingly fair elections, repudiated Lincoln, his policies, or his party, even after he used the war power to free slaves, recruit blacks into Union ranks, and reconstruct whole states and their local subdivisions. Himself as keen a defender of constitutional rights and legal processes as nineteenth-century America was capable of producing, Lincoln never apologized for the abrasive and politically risky arbitrary arrests.

Indeed, so far from apologizing for the arrests, Lincoln defended their necessity and constitutionality and argued that he had kept them to a risky minimum. The Constitution's war-emergency clauses existed to give the nation a reasonable capacity for self-defense, and implicitly sanctioned the arrests. Lincoln and those who agreed with him argued that necessity justified the president and commander-in-chief in invoking the Constitution against disloyalists because the secessionists of 1861 had left behind them in Union states, often in official positions, spies, informers, suppliers, and aiders and abettors of rebellion. These miscreants cloaked themselves in the Bill of Rights and *habeas corpus*, Lincoln claimed, and he had to lift that cloak.

And so the *Merryman* confrontation, although shocking even to

PUBLICATIONS / MEDIA PROGRAMS



Robert Morris. Independence National Historical Park Collection.

THE PAPERS OF ROBERT MORRIS

Sponsored by Queens College, the papers of Robert Morris, "the Financier of the American Revolution" and a signer of the Declaration of Independence, the Articles of Confederation and the Constitution, are being published by the University of Pittsburgh Press. Six of the nine volumes, which contain his official diaries and letterbooks written between 1781–84, have appeared. Major funding for the project is provided by the National Endowment for the Humanities, the National Historical Publications and Records Commission and Queens College. For further information, contact John Catanzariti, editor, Queens College, CUNY, Flushing, NY 11367-0904; telephone: (718) 670-4208.

REVOLUTIONARY AMERICA, 1763–1789

The Library of Congress has published a two-volume guide to the more important primary and secondary works in its collections on the American Revolutionary era. Compiled over a ten-year period, this bibliography represents a comprehensive review of monographs, doctoral dissertations, collected works, festschriften, pamphlets, and serial publications. An extensive index to persons and places contains nearly 100,000 references and cross-references to the 14,810 numbered entries in the text. There is also an essay by the compiler, Ronald M. Gephart, on the preservation and publication of documentary sources on the American Revolution. Volume II contains a section devoted to the drafting and ratification of the Constitution. It can be ordered from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402; the two-volume set is $38.00. (Include stock number: 030-000-00125-7.)

THE SAR MAGAZINE

The SAR Magazine inaugurated its commemoration of the Bicentennial of the Constitution with its spring 1985 issue, which contains special features including an article on the events leading up to the Constitutional Convention of 1787 by the Secretary General of the Sons of the American Revolution, a look at the influence of John Dickinson on eighteenth-century political events, and a discussion of the motives of the framers of the Constitution by former senator Sam J. Ervin, Jr. For further information, contact Winston C. Williams, Editor, P.O. Box 26595, Milwaukee, WI 53226; telephone: (414) 259-9915.

THE ESSENTIAL ANTIFEDERALIST

Edited by William Allen of Harvey Mudd College and Gordon Lloyed of the University of Redlands, *The Essential Antifederalist* has just been published by the Center for the Study of the Constitution, Carlisle, PA., and the University Press of America. It has been designed specifically for classroom use and provides a broad selection of some of the principal themes of the Antifederalists. For more information, write to the University Press of America, 4720 Boston Way, Lanham, MD 20706.

WILLIAM and MARY QUARTERLY
SPECIAL BICENTENNIAL ISSUE

The *William and Mary Quarterly* solicits contributions to its Constitution Bicentennial issue, scheduled for 1987. Manuscripts should be submitted, in triplicate, by December 31, 1985. The contents of the issue will be selected by recommendation of a jury of distinguished historians after initial sifting by the editors. Manuscripts not chosen will be returned promptly. The best article, as determined by the jury, will receive a prize of $500.00. Manuscripts should be addressed to The Editor, *William and Mary Quarterly*, Box 220, Williamsburg, VA 23187.

ESSAYS ON THE CONSTITUTION

WNET and Alvin Perlmutter Productions have received a grant to support research and development from the Corporation for Public Broadcasting for a six-part series of one-hour documentaries examining the meaning and effectiveness of the Constitution. Entitled *Essays on the Constitution*, the programs are expected to be broadcast in 1987 over the Public Broadcasting System. The series writer/historian is Bernard Weisberger. For more information, contact Alvin H. Perlmutter, Inc. 45 West 45th Street, N.Y., N.Y. 10036; telephone: (212) 221-6310.

State Programs

After the Revolution: New Hampshire and the New Nation, 1783–1820

sponsored by the New Hampshire Bicentennial Commission on the U.S. Constitution

New Hampshire was the ninth and therefore decisive state to ratify the Constitution; in 1981, New Hampshire became the first state to establish a Bicentennial Commission on the Constitution. Composed of legislators and executive appointees, the Commission began discussions of a number of commemorative activities in 1984. The first of these is "After the Revolution: New Hampshire and the New Nation, 1780–1800." The project involves both research and public programs and is supported in part by a grant from the New Hampshire Council for the Humanities.

With an interest in furthering understanding of the ratification process and of the society which gave rise to the Constitution, the Commission developed "After the Revolution" as a project that will examine in depth eight towns. It involves an eight-month research phase in which historians and local researchers are collaborating on community studies of the eight towns; it will result in a traveling exhibit on patterns of town development in the years following the Revolution, a chamber theater production on the ratification, a speakers' bureau, and a collection of essays.

The project began on January 26, 1985, with a conference held at the State House in Concord. More than 230 people—including substantial numbers of teachers, librarians, legislators, and local historians—attended the day of workshops. The keynote was struck in the morning session by Commission member Jere Daniell, Professor of History at Dartmouth College and author of *Experiment in Republicanism: New Hampshire Politics and the American Revolution, 1741–1794*. Daniell focussed his discussion on the consummate political skills by which the proponents of the Constitution achieved their narrow but critical victory in New Hampshire.

Several specialists in the history of the federal period in New Hampshire and New England then addressed a range of topics pertinent to the proposed community studies: agriculture, commerce and self-sufficiency; patterns of town development; religious diversity; intellectual backgrounds; developments in architecture and technology; the role of women in the family and society. Each presented a topic from his or her own work, with particular attention to sources and methods of research.

The research phase is well under way in eight towns around the state. The study communities have been chosen to reflect the diversity of the state in the period: the long-settled mercantile and commercial towns of the coast; the farming communities of the Merrimack and Connecticut Rivers with their respective ties to Massachusetts and Connecticut; the newly settled communities of the northern frontier. Four of the eight were federalist, three antifederalist, and one did not vote. Site historians include the Director of the State Historical Society, the State Archivist, and historians from three state colleges, and Phillips Exeter Academy. Stephen Marini, Associate Professor of Religion at Wellesley College, is project historian.

To assist in these local studies and others undertaken by researchers working independently throughout the state, the project has prepared "After the Revolution: A Guide to Research in the History of New Hampshire Towns, 1780–1800." The guide includes notes on research and interpretation, brief descriptions of the many different kinds of primary sources available and advice about where to find them, a basic bibliography of secondary sources, and notes on the care and preservation of old papers.

For more information, contact Karen Bowden, Project Director, 44 Ivaloo #2, Somerville, MA 02143; telephone: (617) 625-7013.

UTAH COMMEMORATES CONSTITUTION'S BICENTENNIAL

In November 1984, Utah Governor Scott Matheson issued an executive order naming the Utah Commission on Education for Law and Citizenship as the coordinator of the Bicentennial activities in Utah. The Utah legislature has appropriated $25,000 to be used for Bicentennial projects. The Commission plans to involve Utah's schools, church, civic and community groups in the celebration. For further information, contact Eldon M. Tolman, Director of the Bicentennial for the Utah Commission on Education for Law and Citizenship, 4235 Highland Drive, Salt Lake City, Utah 84124.

NORTHWEST ORDINANCE BICENTENNIAL

Efforts to commemorate the two hundredth anniversary of the Northwest Ordinance, which was enacted in 1787 and put into effect in 1788, are going forward.

The Ohio Historical Society sponsored a public conference, "Toward the Bicentennial of the Northwest Ordinance," with the support of the Ohio Humanities Council in Columbus on October 20, 1984. Designed to increase public awareness and appreciation of the Northwest Ordinance as a seminal influence on American political culture, it featured presentations by Robert S. Hill on the origin of the Ordinance, Phillip R. Shriver on its interpretation by historians, Peter S. Onuf on its impact on the mechanics of statehood and Reginald Horsman on federal Indian policy under the Ordinance. A planning session followed.

The Northwest Ordinance Bicentennial Planning Committee has been organized to encourage, coordinate and carry on celebratory and educational activities. Projected programs include conferences, the preparation of curriculum materials, and the support of scholarship. The Committee is now forming a network of scholars. Persons with an interest in the history of the Northwest Ordinance, including its background and influence, and in the meaning and current relevance of its principles, are invited to write to R. S. Hill, Chair, Northwest Ordinance Bicentennial Planning Committee, Marietta College, Marietta, Ohio, 45750.

Federal Bicentennial Agenda

USIA AWARDS GRANT FOR INTERNATIONAL CONFERENCE ON CONSTITUTIONALISM

Forty participants from 23 countries will attend a five-day international conference on constitutionalism which is being sponsored by the American Enterprise Institute for Public Policy Research (AEI), with partial funding from the U.S. Information Agency (USIA) and the Agency for International Development.

USIA awarded a $58,025 grant to AEI to cover travel and per diem expenses for 20 foreign and 10 U.S. participants, including government officials, political leaders, constitutional lawyers, judges, and scholars.

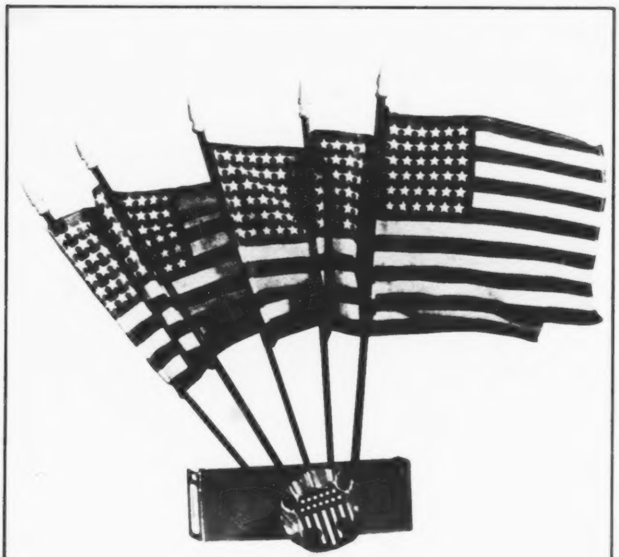
At the invitation of Chief Justice Burger, the conference, which begins on November 18, 1985, will be held in the U.S. Supreme Court building in Washington, D.C. Robert A. Goldwin, AEI's Director of Constitutional Studies, will preside over the conference.

The focus of the conference will be on the different ways, including federalism, that constitutions address problems of national diversity—racial, ethnic, religious, and linguistic. Eight leading constitutionalists will present papers describing their countries' experiences.

Participants from the following nations are scheduled to attend: Argentina, Belgium, Brazil, Cameroon, Canada, Egypt, Federal Republic of Germany, France, India, Indonesia, Israel, Italy, Japan, Malaysia, Peoples Republic of China, Portugal, Singapore, Spain, Sri Lanka, Switzerland, United Kingdom, United States, and Yugoslavia.

This conference is one activity of AEI's bicentennial project, "A Decade of Study of the Constitution."

USIA, an independent agency within the Executive Branch, is responsible for the U.S. Government's informational, educational and cultural exchange programs. For further information, contact Jane Taylor: (202) 485-2355.



LIBERTY
CONSTITUTION & LAWS

Bicentennial Commissioners Named

On June 25, 1985, President Reagan announced the names of all but three appointees to the federal commission to plan the Bicentennial of the Constitution. The legislation passed by Congress specified that the president, in addition to members he would choose himself, would select members recommended by the House and Senate leadership and by the Chief Justice.

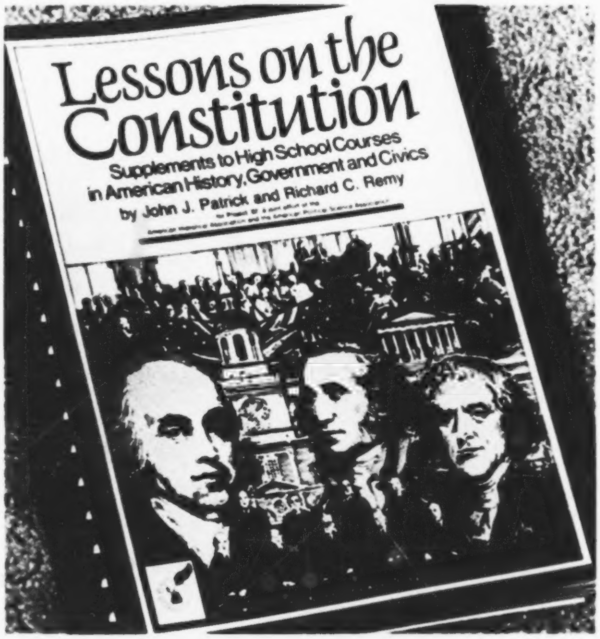
The following members were appointed by the President: *FREDERICK K. BIEBEL*, Executive Vice President and Treasurer of the International Republican Cooperation Fund in Washington, D.C.; *BETTY SOUTHARD MURPHY*, a partner in the law firm of Baker & Hostetler in Washington, D.C.; *PHYLLIS SCHLAFLY*, President of Eagle Forum in Washington, D.C.; *BERNARD H. SIEGAN*, Distinguished Professor of Law at the University of San Diego; *RONALD H. WALKER*, Managing Director and Partner of Korn/Ferry International in Washington, D.C.; *CHARLES ALAN WRIGHT*, Professor of Law at the University of Texas at Austin; and *E. V. HILL*, Pastor, Mount Zion Missionary Baptist Church, has Angeles (appointed to Commission, July 1985).

Members recommended by the House leadership include: *LYNNE ANNE VINCENT CHENEY*, Senior Editor of the *Washingtonian Magazine*; *PHILIP M. CRANE*, U.S. Representative for the 12th District of Illinois; *WILLIAM JOSEPH GREEN*, an attorney with the firm of Wolf, Block, Schorr & Solis-Cohen of Philadelphia; and *THOMAS HENRY O'CONNOR*, a Professor of history at Boston College.

Members chosen on recommendation of the Senate leadership are: *HARRY McKINLEY LIGHTSEY, JR.*, Dean, University of South Carolina School of Law; *EDWARD P. MORGAN*, owner of the law firm of Welch & Morgan of Washington, D.C.; *THEODORE FULTON STEVENS*, U.S. Senator for the State of Alaska; and *EDWARD M. KENNEDY*, U.S. Senator for the State of Massachusetts (appointed to Commission, July 1985).

Commission members recommended by the Chief Justice are: *HERBERT BROWNELL*, Counsel with the law firm of Lord, Day and Lord in New York City; *CORNELIA G. KENNEDY*, U.S. Circuit Judge for the Sixth Circuit (Michigan); *OBERT CLARK TANNER*, Founder and Chairman of the Board of O.C. Tanner & Company; and *CHARLES EDWARD WIGGINS*, U.S. Circuit Judge for the Ninth Circuit (California).

One member is still to be named from the president's list. Chief Justice Warren E. Burger was designated the commission's chair.


Lessons on the Constitution
Supplements to High School Courses in American History, Government and Civics
by John J. Patrick and Richard C. Remy

PROJECT '87
announces the publication of

LESSONS ON THE CONSTITUTION

Supplements to High School Courses in American History, Government and Civics

Lessons on the Constitution **features sixty lessons designed to enhance teaching about the Constitution in secondary schools. The lessons are designed to fit into existing curricula and to complement standard high school textbooks. Lesson plans for teachers accompany each of the sixty lessons, which are organized into chapters on the origins and principles of the Constitution, the principles of constitutional government, specific constitutional issues, and, last, digests of landmark Supreme Court cases, accompanied by student worksheets. These lessons are introduced with a chapter devoted to the text of the Constitution, a list of amendments to the Constitution proposed by Congress but not adopted, and selected essays from *The Federalist*.**

Lessons on the Constitution **was developed for Project '87 by John J. Patrick, Department of Curriculum and Instruction, Indiana University, and Richard C. Remy, Mershon Center, Ohio State University. The lessons have been field-tested by teachers and reviewed by scholars. Paul Finkelman, History Department, State University of New York, Binghamton, served as consulting historical editor.**

Development of the lessons was supported by a grant from the National Endowment for the Humanities. Scott, Foresman Publishing Company provided a contribution toward producing the manuscript. Core support to Project '87 from the William and Flora Hewlett Foundation provided additional administrative expenses.

Lessons on the Constitution is being published by Project '87 and the Social Science Education Consortium. The cost of the *Lessons* is $19.50 per copy with a 20% discount for orders of 10 or more copies. *Note: Individuals who are ordering 10 or more copies must have them shipped to the same address in order to qualify for the 20% discount.* Prepayment must accompany any order under $20.00 and orders of 10 or more copies placed by individuals. (Mastercharge and Visa charges are acceptable.) Information for postage and handling is as follows:

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Allow at least three weeks delivery by fourth-class mail; if you require faster delivery, call the Social Science Education Consortium publications secretary (303/492-8154) to make arrangements for an alternative method of shipping or mailing.

All orders must be sent and made payable to: SSEC Publications
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* Due to U.S. Postal Service requirements, only those customers with a shipping address to a library or school qualify for library rate on postage and handling.

SUBSCRIPTION INFORMATION

The National Endowment for the Humanities is underwriting the publication of ***this Constitution*** as a quarterly magazine so that it may be distributed free to organizations planning programs for the Constitution's Bicentennial. The officer of the organization who is responsible for planning programs is invited to write us and ask to be placed on the free mailing list; requests should include a short statement about the program being planned. Free subscriptions begin with the next issue after receipt of the letter. Institutions wishing to receive more than one copy may do so by subscribing for additional copies at the rates below.

Individuals and organizations who are not planning Bicentennial programs but who wish to receive the magazine may subscribe as follows:

Individuals	$10.00 per year (4 issues)
Institutions	$16.00 per year (4 issues)

(Individuals and institutions outside the United States please add $5.00 per subscription.)

Paid subscriptions received by November 1, 1985, will begin with issue no. 6 (Spring, 1985) and end with no. 9 (Winter, 1985).

Single copies (less than 10) of back issues can be purchased for $4.00 each. Each issue of the magazine will also be available for purchase at bulk rate. (Issue no. 1 is no longer available.)

Bulk rate (10 or more copies)	$1.75 each

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66—85	$6.75
86—100	$7.50

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In order to subscribe, or to order in quantity, please fill out the form on this page and return it, with your check, to: **Project '87, 1527 New Hampshire Avenue, N.W., Washington, D.C. 20036.** We must request that **all orders be pre-paid.** If you have already received the magazine, please include a photocopy of the mailing label with orders or changes of address.

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The Treaty of Paris, *continued from inside front cover*

ARTICLE 3d

It is agreed that the People of the United States shall continue to enjoy unmolested the Right to take Fish of every kind on the Grand Bank and on all the other Banks of New-foundland, also in Gulph of St Lawrence, and at all other Places in the Sea where the Inhabitants of both Countries used at any time heretofore to fish. And also that the Inhabitants of the United States shall have Liberty to take Fish of every Kind on such Part of the Coast of New-foundland as British Fishermen shall use, (but not to dry or cure the same on that Island) And also on the Coasts Bays & Creeks of all other of his Britannic Majesty's Dominions in America, and that the American Fishermen shall have Liberty to dry and cure Fish in any of the unsettled Bays Harbours and Creeks of Nova Scotia, Magdalen Islands, and Labrador, so long as the same shall remain unsettled but so soon as the same or either of them shall be settled, it shall not be lawful for the said Fishermen to dry or cure Fish at such Settlement, without a previous Agreement for that purpose with the Inhabitants, Proprietors or Possessors of the Ground.

ARTICLE 4th

It is agreed that Creditors on either Side shall meet with no lawful Impediment to the Recovery of the full Value in Sterling Money of all bona fide Debts heretofore contracted.

ARTICLE 5th

It is agreed that the Congress shall earnestly recommend it to the Legislatures of the respective States to provide for the Restitution of all Estates, Rights and Properties which have been confiscated belonging to real British Subjects; and also of the Estates Rights and Properties of Persons resident in Districts in the Possession of his Majesty's Arms, and who have not borne Arms against the said United States. And that Persons of any other Description shall have free Liberty to go to any Part or Parts of any of the thirteen United States and therein to remain twelve Months unmolested in their Endeavors to obtain the Restitution of such of their Estates rights & Properties as may have been confiscated. And that Congress shall also earnestly recommend to the several States, a Reconsideration and Revision of all Acts or Laws regarding the Premises, so as to render the said Laws or Acts perfectly consistent, not only with Justice and Equity, but with the Spirit of Conciliation, which, on the Return of the Blessings of Peace should universally prevail. And that Congress shall also earnestly recommend to the several States, that the Estates, Rights and Properties of such last mentioned Persons shall be restored to them, they refunding to any Persons who may be now in Possession, the Bonâ fide Price (where any has been given) which such Persons may have paid on purchasing any of the said Lands, Rights or Properties, since the Confiscation.

And it is agreed that all Persons who have any Interest in confiscated Lands, either by Debts, Marriage Settlements, or otherwise, shall meet with no lawful Impediment in the Prosecution of their just Rights.

ARTICLE 6th

That there shall be no future Confiscations made nor any Prosecutions commenc'd against any Person or Persons for or by Reason of the Part, which he or they may have taken in the present War, and that no Person shall on that Account suffer any future Loss or Damage, either in his Person Liberty or Property; and that those who may be in Confinement on such Charges at the Time of the Ratification of the Treaty in America shall be immediately set at Liberty, and the Prosecutions so commenced be discontinued.

ARTICLE 7th

There shall be a firm and perpetual Peace between his Britannic Majesty and the said States and between the Subjects of the one, and the Citizens of the other, wherefore all Hostilities both by Sea and Land shall from henceforth cease: All Prisoners on both Sides shall be set at Liberty, and his Britannic Majesty shall with all convenient speed, and without causing any Destruction, or carrying away any Negroes or other Property of the American Inhabitants, withdraw all his Armies, Garrisons & Fleets from the said United States, and from every Port, Place and Harbour within the same; leaving in all Fortifications the American Artillery that may be therein: And shall also Order & cause all Archives, Records, Deeds & Papers belonging to any of the said States, or their Citizens, which in the Course of the War may have fallen into the Hands of his Officers, to be forthwith restored and deliver'd to the proper States and Persons to whom they belong.

ARTICLE 8th

The Navigation of the River Mississippi, from its source to the Ocean shall for ever remain free and open to the Subjects of Great Britain and the Citizens of the United States.

ARTICLE 9th

In Case it should so happen that any Place or Territory belonging to great Britain or to the United States should have been conquer'd by the Arms of either from the other before the Arrival of the said Provisional Articles in America it is agreed that the same shall be restored without Difficulty and without requiring any Compensation.

ARTICLE 10th

The solemn Ratifications of the present Treaty expedited in good & due Form shall be exchanged between the contracting Parties in the Space of Six Months or sooner if possible to be computed from the Day of the Signature of the present Treaty. In Witness whereof we the undersigned their Ministers Plenipotentiary have in their Name and in Virtue of our Full Powers signed with our Hands the present Definitive Treaty, and caused the Seals of our Arms to be affix'd thereto.

Done at Paris, this third Day of September, In the Year of our Lord one thousand seven hundred & eighty three.

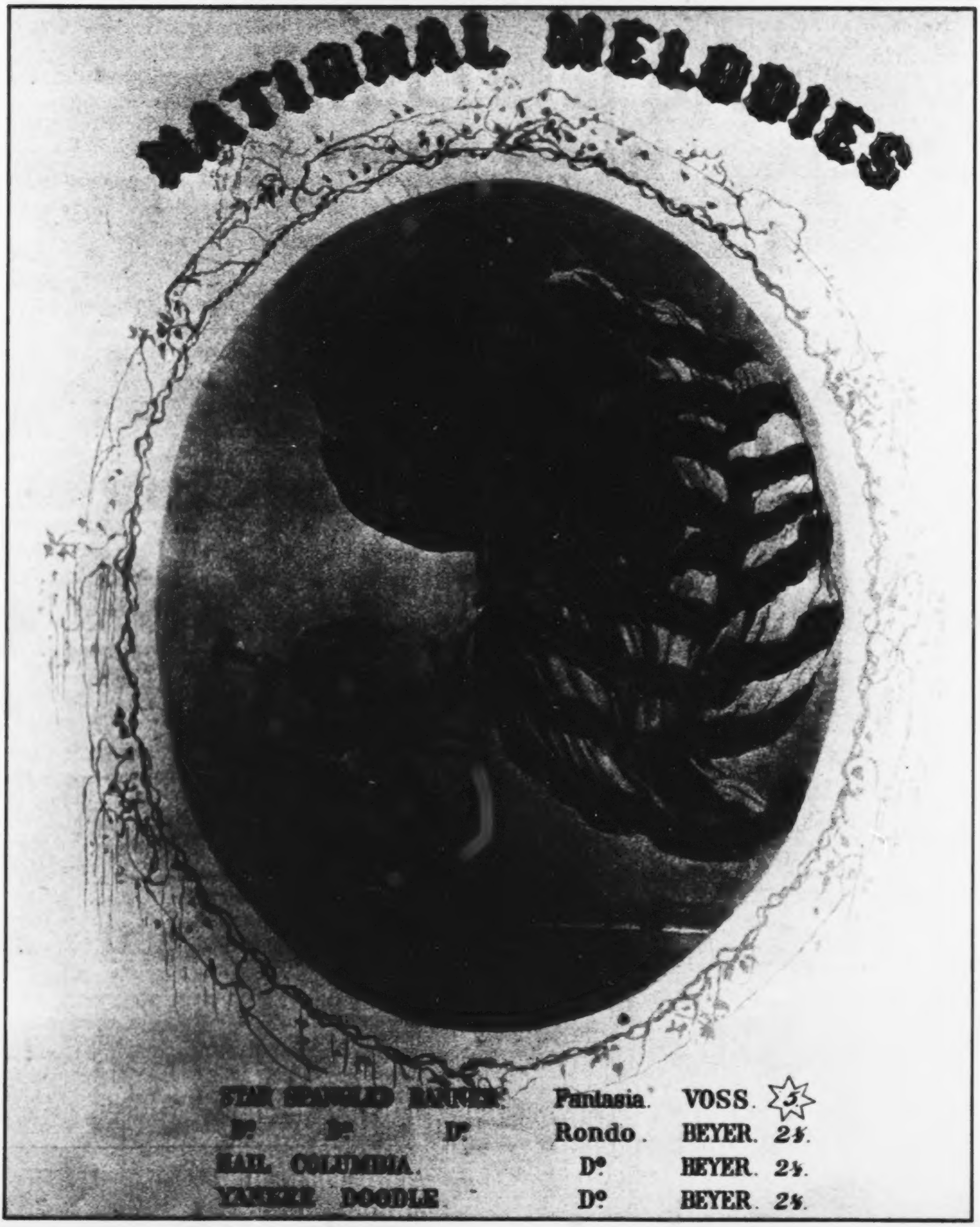
D HARTLEY John Adams B Franklin John Jay
[Seal] [Seal] [Seal] [Seal]

...do ordain and establish

this Constitution

for the United States of America.

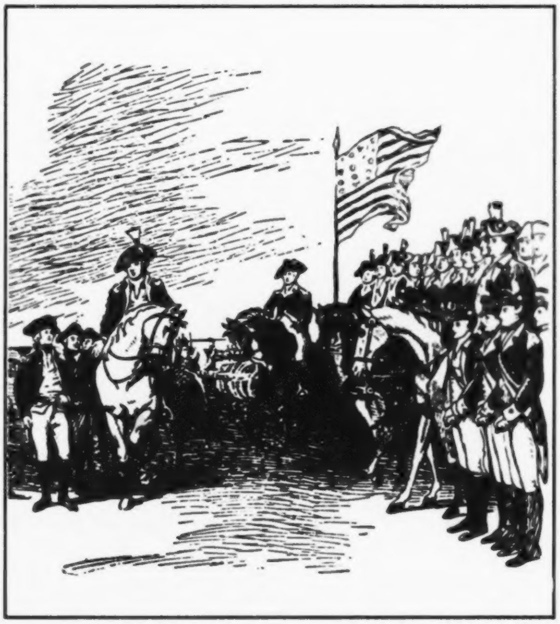
A Bicentennial Chronicle Winter 1985, No.9


NATIONAL MELODIES
STAR SPANGLED BANNER. Fantasia. VOSS. 5.
Do. Do. Do. Rondo. BEYER. 2½.
HAIL COLUMBIA. Do. BEYER. 2½.
YANKEE DOODLE. Do. BEYER. 2½.

Project '87

Chronology of Bicentennial Dates from the End of the American Revolution to the Ratification of the Bill of Rights

After the Continental Congress voted in favor of independence from Great Britain on July 2, 1776, and adopted the Declaration of Independence on July 4, it took up the proposal of Richard Henry Lee for a "plan of confederation." On July 12, 1776, a congressional committee presented "Articles of Confederation and Perpetual Union," which the Congress debated for more than a year. The body adopted the Articles of Confederation on November 15, 1777, and submitted them to the thirteen states for ratification, which had to be unanimous. By March 1, 1781, all the states had given their assent. The Articles of Confederation gave limited powers to the federal government; important decisions required a super-majority of nine states. Congress could declare war and compact peace, but could not levy taxes, or regulate trade between the states or between any state and a foreign country. All amendments had to be adopted without dissenting votes. In 1786, James Madison described the Articles as "nothing more than a treaty of amity and of alliance between independent and sovereign states." As attempts to amend the Articles proved fruitless, and interstate disputes over commercial matters multiplied, the weaknesses of the Articles of Confederation as a fundamental charter became apparent. The march toward a new form of government began.



September 3, 1783: Articles of Peace ending hostilities between Great Britain and the United States are signed by Britain in Paris.

November 25, 1783: British troops evacuate New York City.

December 23, 1783: George Washington resigns his commission as commander-in-chief of American forces and takes leave "of all the employments of public life."

March 25-28, 1785: MOUNT VERNON CONFERENCE. George Washington hosts a meeting at Mount Vernon of four commissioners from Maryland and four from Virginia to discuss problems relating to the navigation of the Chesapeake Bay and the Potomac River. After negotiating agreements, the commissioners recommend to their respective legislatures that annual conferences be held on commercial matters and that Pennsylvania be invited to join Maryland and Virginia to discuss linking the Chesapeake and the Ohio River.

January 16, 1786: Virginia's legislature adopts a statute for religious freedom, originally drafted by Thomas Jefferson and introduced by James Madison. The measure protects Virginia's citizens against compulsion to attend or support any church and against discrimination based upon religious belief. The law serves as a model for the First Amendment to the United States Constitution.

January 21, 1786: Virginia's legislature invites all the states to a September meeting in Annapolis to discuss commercial problems.

continued on page 51

Principal Sources: Richard B. Morris, ed. *Encyclopedia of American History* (New York: Harper & Row, 1976); Samuel Eliot Morison, *The Oxford History of the American People* (New York: Oxford University Press, 1965).

...do ordain and establish
# this Constitution
for the United States of America.

A Bicentennial Chronicle

No. 9 Winter, 1985

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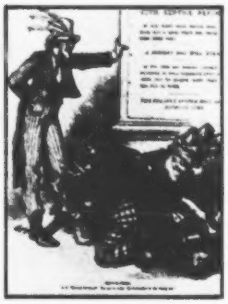
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COVER PHOTO: Sheet music for "National Melodies." Library of Congress.

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this Constitution **is published with the assistance of a grant from the National Endowment for the Humanities as part of its special initiative on the Bicentennial of the United States Constitution. Editorial offices are located at 1527 New Hampshire Avenue, N.W., Washington, D.C. 20036. All material in this publication may be photocopied if attributed as follows: "Reprinted from *this Constitution: A Bicentennial Chronicle*, Winter, 1985 published by Project '87 of the American Historical Association and the American Political Science Association." Project '87 would appreciate notification from those who photocopy material in this issue for use in presentations to other groups. Articles appearing in this magazine are annotated and indexed in *Historical Abstracts* and *America: History and Life*.** **© Copyright 1985 by the American Historical Association and the American Political Science Association**

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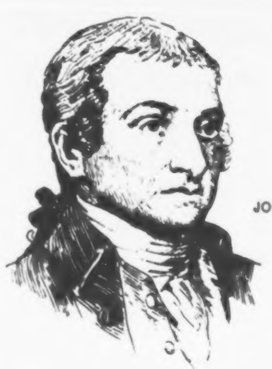
this Constitution


JOHN JAY

published by Project '87 of the American Historical Association and the American Political Science Association

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From the Editor:

September 17, 1985 marked the 198th anniversary of the adoption of the Constitution by the Federal Convention; the Bicentennial is drawing near. This summer, the Federal Commission on the Bicentennial of the United States Constitution held its first meeting amid expectations of hightened public interest in this historic era. (*A report on the Commission's meeting appears on p. 48.*) Similarly, several state commissions are engaged in planning programs that will highlight the special character of state experience under the Constitution. ***this Constitution*** looks forward to reporting on these activities and to providing resources for these events.

In this issue of ***this Constitution***, we continue our series on war powers as a crucial constitutional issue. Harold M. Hyman examines the development of presidential war-making authority in the nineteenth century, focusing on Abraham Lincoln and the Civil War.

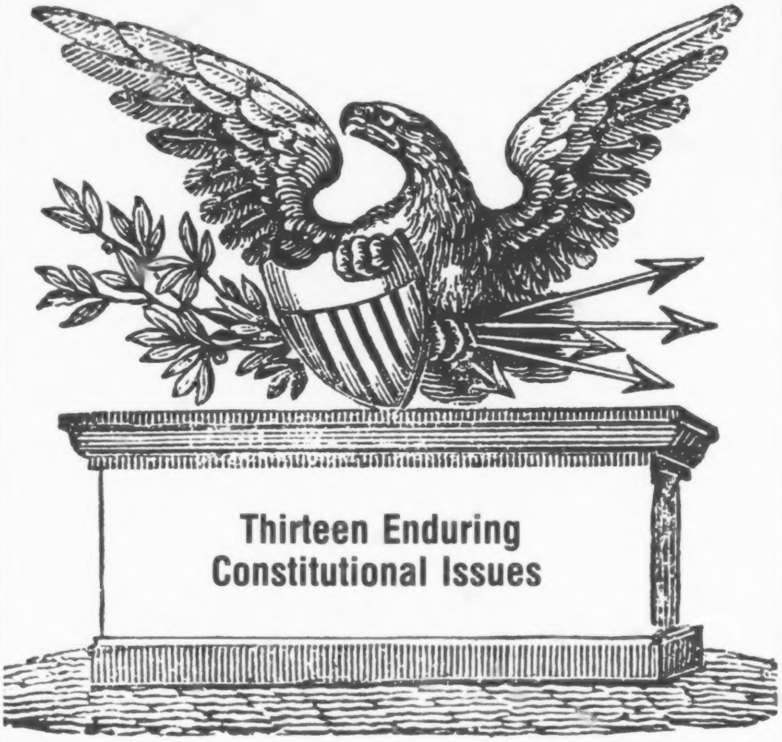
Two additional articles address issues that are fraught with constitutional implications, although they are not mentioned in the Constitution. In the first, Martin Shapiro investigates the development of the bureaucracy—the changing ideas of who should work for the federal government and the thorny question of which branch of government controls federal workers. In "Education for a Republic," David Tyack and Thomas James review the ways in which, and to what purpose, the federal government encouraged public education, although that responsibility was not one of those expressly delegated to it.

John Jay was not among those who met in Philadelphia in 1787 and made the decision of what should be included in the frame of government, but his thinking on constitutional matters influenced many who were there. In the "Documents" section, Richard B. Morris offers a look at Jay's writings on constitutional subjects.

Jay's ideas, and those of Alexander Hamilton and James Madison, the writers of *The Federalist*, are also considered in the "For the Classroom" section, along with the work of Alexis de Toqueville, in a discussion of a summer seminar conducted by Harvey C. Mansfield, Jr., and Delba Winthrop. The seminar syllabus should prove useful to others wishing to study "The American Experiment."

A special piece in the "Bicentennial Gazette" appears in response to many requests for the titles of basic books on the Constitution. Kermit Hall provides "An Introductory Bibliography to American Constitutional History."

This issues features a slightly elaborated version of the "Chronology of Bicentennial Dates," published for the first time in issue No. 1 of ***this Constitution***. We anticipate that our new readers will find it as helpful as have our initial subscribers.



Thirteen Enduring Constitutional Issues

- National Power—limits and potential
- Federalism—the balance between nation and state
- The Judiciary—interpreter of the Constitution or shaper of public policy
- Civil Liberties—the balance between government and the individual
- Criminal Penalties—rights of the accused and protection of the community
- Equality—its definition as a Constitutional value
- The Rights of Women Under the Constitution
- The Rights of Ethnic and Racial Groups Under the Constitution
- **Presidential Power in Wartime and in Foreign Affairs**
- The Separation of Powers and the Capacity to Govern
- Avenues of Representation
- Property Rights and Economic Policy
- Constitutional Change and Flexibility

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War Powers in Nineteenth-Century America: Abraham Lincoln and His Heirs

by HAROLD M. HYMAN

As the Constitution's Bicentennial approaches, we learn painfully that sensitive public issues such as war powers cannot easily be resolved by neat references to specific clauses of the Constitution. A century and a quarter ago, Lincoln's generation tested the purposes to which president, Congress and Supreme Court might apply or restrain the war powers. Perhaps this review of their experiences will help us to move closer to a point the poet T.S. Eliot described in his last *Quartet*: "The end of our exploring will be to arrive where we started and see the place for the first time."

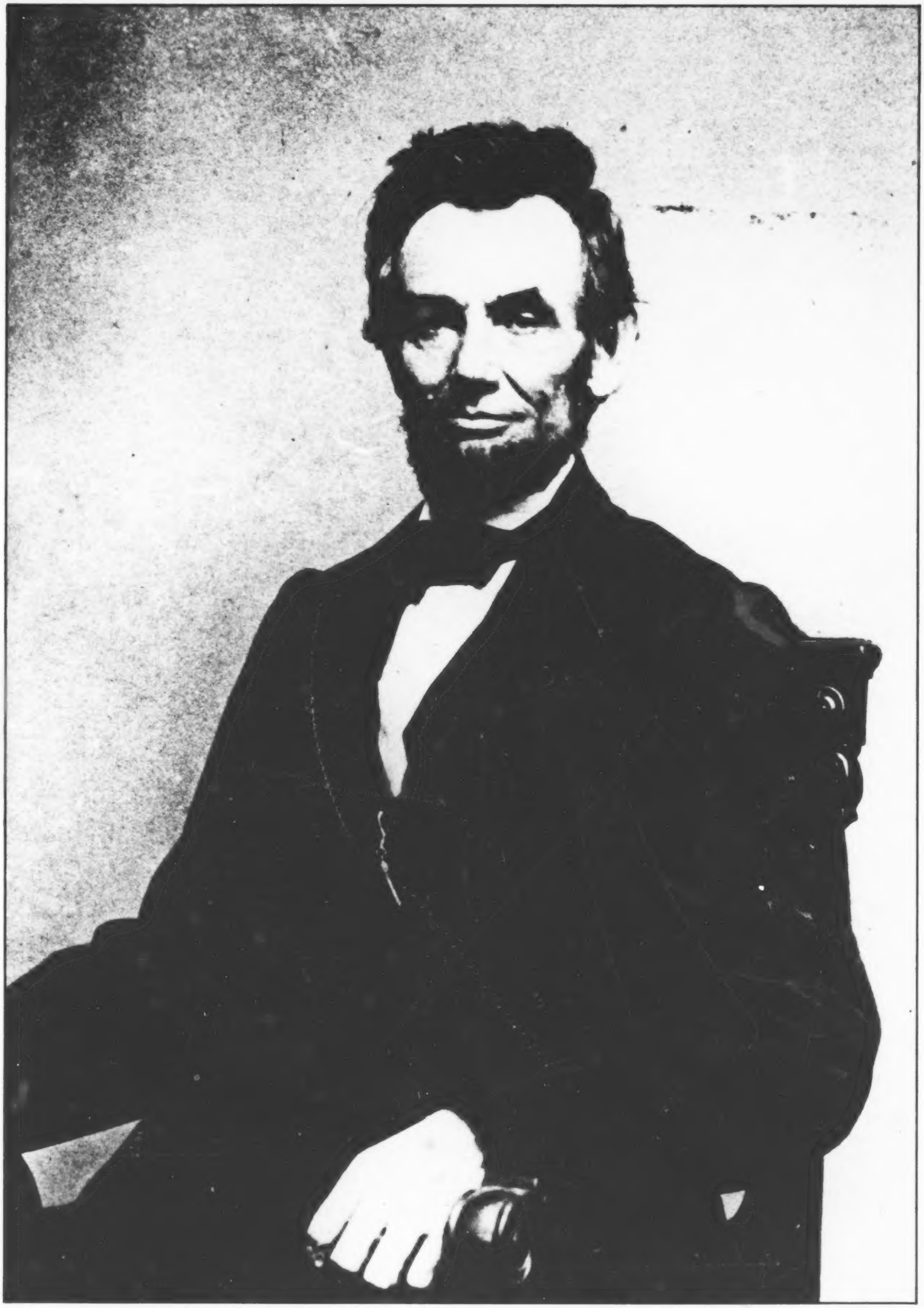
A Military Dictator

"King Linkum I," according to antiwar Democrats, was a racemixing dictator who aimed to centralize, militarize, and mongrelize the Union of states. This description of Lincoln as dictator began to be heard very soon after the Civil War began. In order to prevent Washington from becoming entirely encircled by pro-secession state governments in Maryland and Delaware, and to ensure the transit of loyal troops to the isolated capital, Lincoln, beginning in April 1861, ordered federal soldiers to arrest activist secessionists, saboteurs, and guerrillas in those areas. In peacetime, such activities would have been clearly unconstitutional. He later extended similar temporary orders to other northern areas of uncertain allegiance. And, as Union soldiers occupied parcels of Dixie, Lincoln transformed such early improvisations into coherent policies on military governments, military emancipations, and military reconstructions of state governments. He based them all on the Constitution's scattered clauses on the war powers, those of the commander-in-chief, and other emergency provisions.

The Democrats' charges about military dictatorship received endorsement from the chief justice of the Supreme Court only weeks after the Civil War started. Among the civilians that Union troops arrested by Lincoln's authority was John Merryman, the young son of an influential Maryland family. Merryman was an avowed secessionist who, when arrested, was reportedly engaged in preparing an armed troop for Confederate service, an action not then a state or even a federal crime except under the Constitution's unworkable treason clause. Federal soldiers jailed him in historic Fort McHenry. This allegedly guiltless "prisoner of state," though locked up in an "American Bastille," nevertheless enjoyed access to his family's lawyer (a globally unique privilege, then or since, for captives in civil wars). The lawyer rushed to Washington and returned to Baltimore with the chief justice of the United States, Roger B. Taney, himself a Marylander and a devout Democrat. Taney held a special session of his circuit court in order to hear a petition, captioned *Ex parte Merryman*, for the prisoner's release on a *habeas corpus* writ. On Lincoln's orders, the fort's commander refused to honor Taney's writ. The chief justice thereupon lambasted the president in an opinion that he had printed in the newspapers, creating a deep well of constitutional rhetoric from which anti-administration spokesmen drew support.

> *Article I, section 8*: The Congress shall have power . . . to . . . provide for the common defense and general welfare of the United States . . .; to declare war . . . ; to raise and support armies . . . ; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces; to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions . . .
>
> *Article II, section 2*: The President shall be Commander in Chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States . . . .
>
> *Article IV, section 4*: The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

Taney insisted in *Merryman* that no war existed because the Constitution allowed only Congress to declare war. Therefore the military arrests were twice illegal, first, because, legally, there was no war, and second, because only Congress had the power to suspend the *habeas corpus* writ. Aside from the swollen role for the judiciary this opinion asserted, Taney's interpretation treated the Constitution as inelastic and not adaptable save through the fixed procedures of amendments: Its separations of power and functions between the branches of government were high and unbridgeable, and its provisions for emergencies, though written in 1787, were the only ones that authorities of 1861 might use.



Abraham Lincoln, ***photograph by Mathew Brady. National Portrait Gallery, Smithsonian Institution, Washington, D.C.***

Excited by Lincoln's vigor and forthrightness, constitutional specialists responded quickly and accurately that civil wars were never declared, that grey areas existed between declared and undeclared wars, and that Lincoln's policies sustained rather than threatened Congress and the courts.

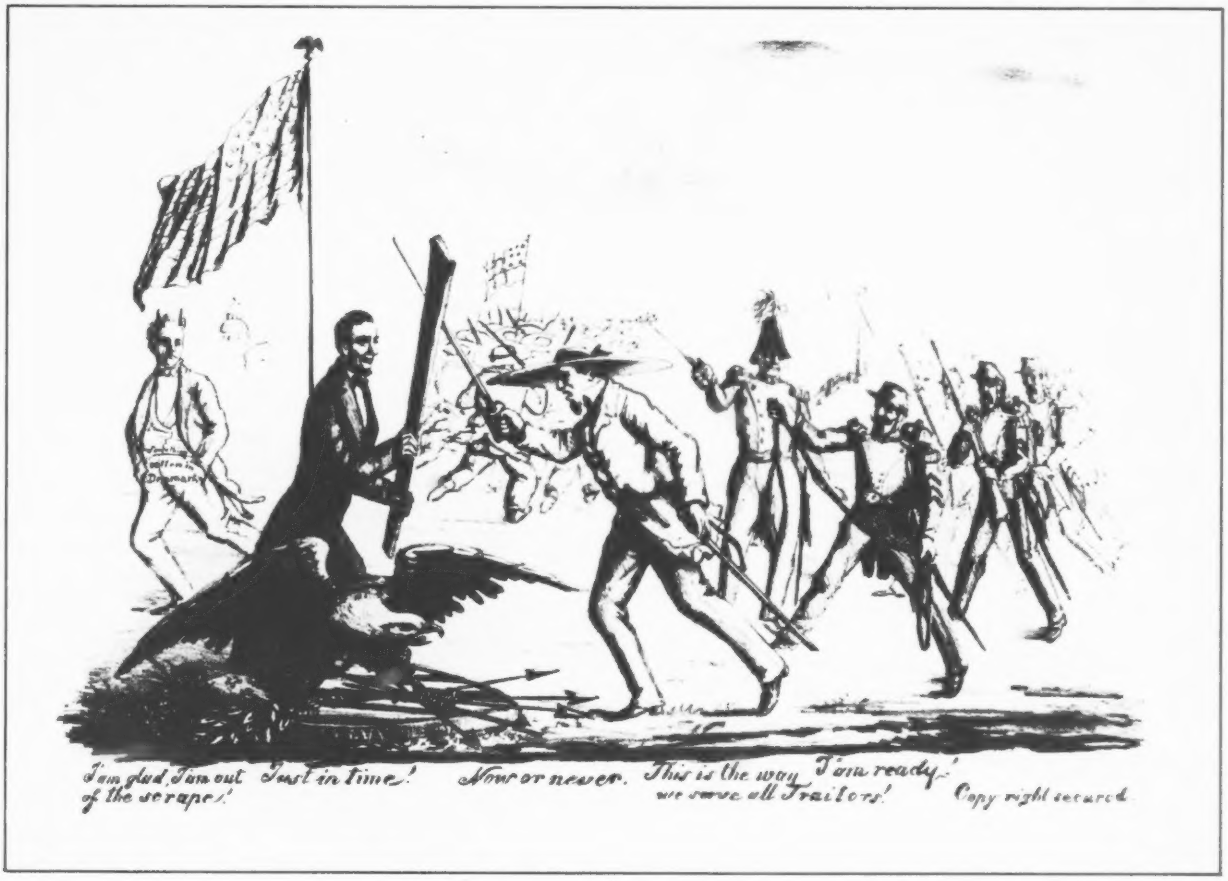
supporters, contrasted happily with the nation's weakness in preceding weeks, when it failed to sustain the tiny garrison of Fort Sumter in one of its own harbors. It spurred many persons to climb aboard the war-power bandwagon, including abolitionists, who now discerned in this president's use of emergency powers a possible link between arbitrary arrests and emancipation, and between reunion and a reconstructed or reformed nation.

Nevertheless, Lincoln's policies did greatly enlarge executive war and commander-in-chief powers, and this enlargement allowed Democrats to depict Lincoln as a wielder of unconstitutional power, especially since his policies differed so sharply with those of his predecessor, James Buchanan. During his lameduck months as president (November 1860–March 1861), while the Deep South's states seceded, Buchanan could find no resources in the Constitution to deal even with outgoing states much less a shooting war. So constrained, Buchanan allowed a significant segment of the nation's civil and military professionals to resign positions and go with their states, without impediment from the United States government.

Lincoln's Constitutional Understanding

Whence came Lincoln's understandings of the Constitution's war-emergency powers, which he so swiftly and unerringly applied to sustain national authority? Attorney Lincoln, a prominent commer-

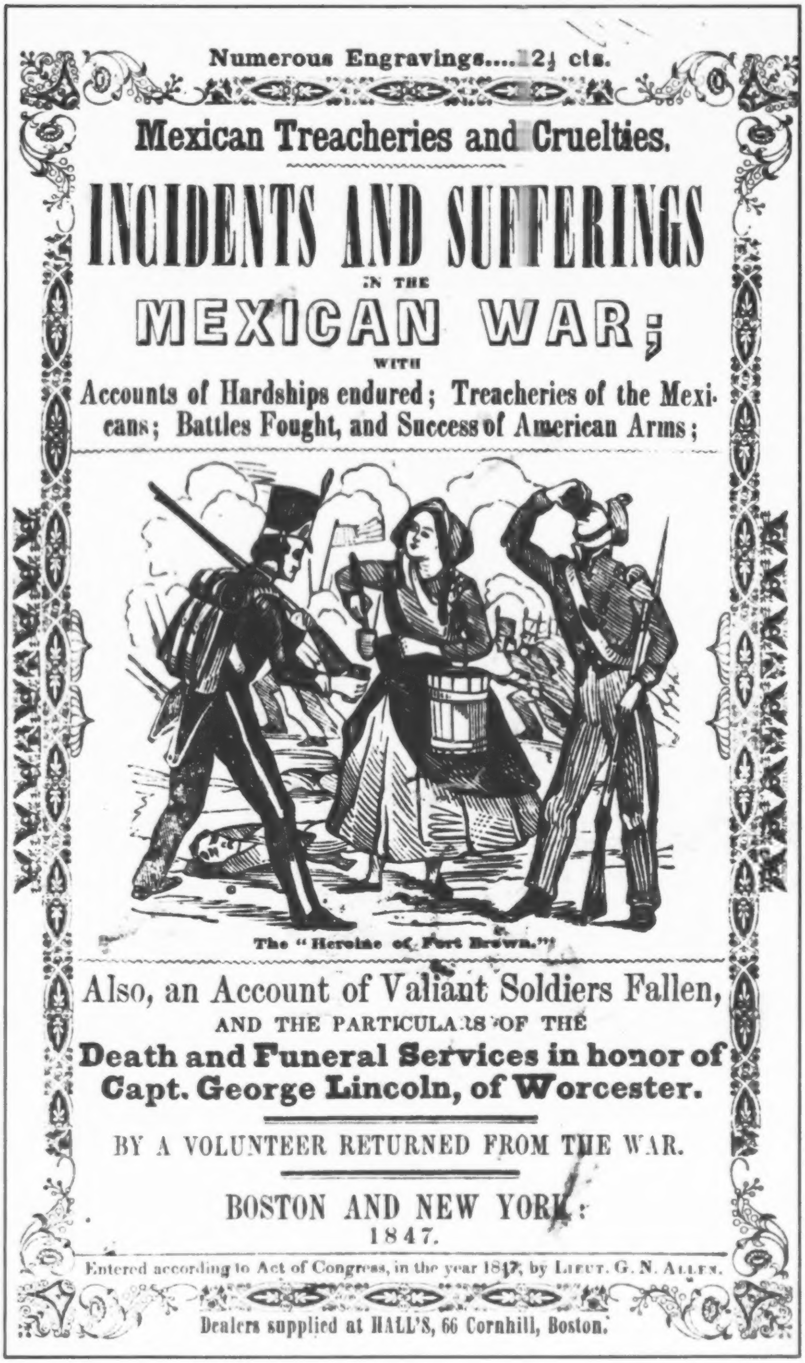
Buchanan with horns leaving, saying "I am glad I am out of the scrape . . . ." Lincoln, parrying Jefferson Davis' sword with rail, says, "Now or never. This is the way we serve all traitors! I am ready!" Behind Davis, General Scott with soldiers, one carrying hangman's rope. Southern troops fleeing. Lithograph, 1861. Library of Congress.


Something rotten in Denmark
I'm glad, I'm out of the scrapes!
Just in time!
Now or never.
This is the way we serve all Traitors!
I am ready!
Copy right secured

cial lawyer, shared his profession's concerns about individuals' legal rights to the profits of their labor and capital, and the social instabilities between liberty, authority, and anarchy developing since the French Revolution. These concerns made some lawyers try to achieve justice as well as stability, through lawsuits and politics. But even to abolitionist lawyers, private property was sacred, and American high court case law, especially the slavery-related decisions climaxing in *Dred Scott* (1857), sustained slaveowners' rights to property far more than other individuals' civil rights or liberties. Prewar lawyers were encouraged, however, by the growth of "equity" law—a judicial system based upon prevailing notions of fairness and justice.

Equity flowered as certain statutes and judicial decisions proved to be irrelevant or unjust to litigants and harmful to society, especially in light of swiftly changing social conditions. Flexibility and adaptation to change were what made equity law attractive to leading lawyers. Precisely such concerns had inspired the framers to gather in 1787. Apparently it was not difficult for Lincoln and numerous lawyers in Union states, upon news of Sumter, to extend analogous professional views to the escalating crisis, and to justify presidential decisions by a conception of the general welfare.

Further, before 1861, Lincoln had educated himself about a president's power to initiate and carry on a war, though a foreign one. A one-term Whig congressman in 1846, he opposed President James K. Polk's policies leading to war with Mexico. It appears at first glance that Lincoln reversed his position on presidential war powers between the time of his criticisms of Polk and 1861. But Lincoln was not denying the nation's power



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Self-defense as a right and duty of government had roots in the turbulent histories of England and its American colonies, and in the ideas of Locke, Montesquieu, Blackstone, and other writers.

when castigating Polk. Instead, he decried Polk's misuses of that power in diplomacy and assignments of troops to combat before the war declaration. Thereafter, as an early Republican, Lincoln accepted the central public policy inspiring the organization of his party, namely, the constitutional authority to exclude slave property from its territories, an authority that Taney denied in the *Dred Scott* decision. In short, both equity and territorial questions stressed the possibility that the Constitution was more than a network of negatives but was also an instrument to release power.

The most telling intellectual support that Lincoln and many other lawyers brought to the Civil War derived from the idea that the nation possessed positive powers and duties under the Constitution to preserve itself and to seek justice. Self-defense as a right and duty of government had roots in the turbulent histories of England and its American colonies, and in the ideas of Locke, Montesquieu, Blackstone, and other writers. Such writings had embedded into democratic thought the premise that in real emergencies, normal procedures could give way to arbitrary ones, but also that incumbent authorities had to remain accountable for their policies during crises. These mixtures of views underlay Lincoln's forthright war policies, in which coercion and democracy coexisted, though with risk to the latter.

Lincoln as president drew comfort from the spirit of Alexander Hamilton's *Federalist* No. 23, written to justify the proposed Constitution's war-emergency provisions. These powers, Hamilton had insisted, "ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national emergencies, or the correspondent variety of the means which may be necessary to satisfy them." Lincoln knew also of George Washington's martial suppression of the Whiskey Rebellion and the fact that the revered Jefferson had dispatched anti-pirate naval expeditions to the shores of Tripoli and, like John Adams before him, sustained American naval commanders who, in undeclared mini-wars, fought French and British warships. In 1812, Congress and President James Madison stressed the self-defense theme heavily in the formal declaration of war against Britain, and in subsequent debates on statutory controls over enemy aliens. All these precedents received Republicans' attention, as did the fact that by 1815, when that declared war ended in what Americans could at least claim was a victory, the foundation existed for a legal theory of emergency powers.

Foreign affairs, continuing to affect American policies, brought forward President James Monroe's Declaration of 1823 against future European colonization in Central and South America. From Monroe to Lincoln, presidents had dispatched many navy-marine units to distant shores, to combat private offenders such as pirates, to protect merchants and missionaries, to open trade, to advance science, and to stake claims to empire. Congress, providing funds and rules for the military services as the Constitution required, rarely objected to these distant, obscure, and brief exercises of national, executive, commander-in-chief powers. At home, the military functioned all but invisibly on the western frontiers against Indians, and in the Atlantic and Gulf coastal forts designed to fend off a future British oceanic assault that never came.

Lincoln's generation grew up applauding, if not always agreeing with, these nationalist implications of both general and constitutional history, even though Lincoln, like most Whigs, was suspicious of over-vigorous presidents, and critical of the ill-famed Sedition Acts of the Federalist party in 1799–1800. (No similar statute became public policy in the Civil War and Reconstruction).

A dozen years before the Civil War began, Chief Justice Taney himself had drawn many of these strands of American history together. In 1841–42, Thomas Dorr and his supporters established a state government in Rhode Island in opposition to the existing one, as a response to a dispute over suffrage limitations. President Tyler offered federal support to the old government. A court case emerged from the conflict, *Luther* v. *Borden* (1849). In *Luther*, Taney created a "doctrine" of legitimate self-defense by a government threatened by civil war, which the justice tried to ignore in his own *Merryman* opinion. Taney, in *Luther*, held that judges could not decide essentially political questions such as which government was legitimate in a state. A state (and, by implication, the nation) had legitimate duties to defend itself when attacked by armed force from within or outside. The uprising in Rhode Island in 1842, Taney continued, was a war, though not a declared one between nations. The incumbent government rightfully resorted to the contemporary usages of war, including military arrests of activist civilian dissidents, to defend itself.

Lincoln and other Republican legalists would not let Taney forget *Luther*, especially when antiwar, anti-emancipation Democrats paraded *Merryman* before the public. For himself, as the Civil War ground on, Taney secretly wrote decisions without cases, declaring unconsti-

If dictatorship is measured by unaccountability, deliberate and wholesale cruelties, and contempt for constitutionalism, Lincoln was no dictator.

tutional military emancipation, reconstruction, and conscription. But his brethren, in the 1863 *Prize Cases* decision, rejected, if only by a 5-4 margin, a chance to advance the chief justice's negative views, by sustaining the prior duties of the Congress and president to determine the existence of armed threats to the nation and to choose the appropriate means to meet those threats. On balance, subsequent Supreme Court verdicts sustained Lincoln's position and helped to make the Lincoln White House years the central ones in the history of war powers.

Lincoln's Heirs

They remained central in part because, almost at once after Appomattox, Andrew Johnson, Lincoln's successor, proved to be unwilling to use national power to sustain blacks' rights in states, and adopted *Merryman*-like positions. However, from the 1870s through the early 1980s, presidents exploited Lincolnian precedents. In domestic crises presidents used troops to break strikes, control essential industries, initiate internal security programs, and obstruct anti-Vietnam War activists. In foreign affairs, presidents after Lincoln cited his elastic doctrines of executive power to sustain their assignments of troops to numerous obscure, often hazardous "gunboat diplomacy" duties abroad. Some of these interventions profoundly and permanently affected our foreign relations. Without war declarations, American troops fought many "presidential wars," including those against Chinese Boxers, Philippine nationalists, Mexican border raiders, Bolshevik revolutionaries, Vietnamese anticolonialists, and Central American insurrectionists. Korea, Vietnam, Lebanon, and Grenada attest that we still know no fixed formulas for using the commander-in-chief's powers abroad. (The 1973 War Powers Act remains an uncertain reed for Congress to use as a staff).

Yet, despite these imprecisions, over the past century, assertions have issued from the White House that presidents, in order to respond swiftly, must remain untethered in using war-crisis powers both domestically and abroad. Opponents repeat the equally precise response that the Constitution is never silent and that its constraints govern at all times; moreover, they argue, unless they do govern, a runaway president will become a military dictator, as Lincoln allegedly did.

Was Lincoln a dictator? Distinguished scholars, describing him as America's first "constitutional dictator," implicitly dignified the ultra-Democrats' partisan accusations of the 1860s. But if dictatorship is measured by unaccountability, deliberate and wholesale cruelties, and contempt for constitutionalism, Lincoln was no dictator. This conclusion appears to be the more valid when considering the coercive and punitive policies that nineteenth century dictators (not to mention those of the twentieth century) imposed on dissenters and losers during and after civil wars. These policies commonly included gang executions and even attempts at genocide, mass torturings, imprisonments, property confiscations, exilings, suppressions and censorships of the press, disfranchisements, and, in the rare places where elections existed, cancellations or manipulations of ballotings. On such a scale, Lincoln rates no place at all.

Should historians absolve Lincoln of responsibility for creating precedents that later presidents used to excess, because he lacked intent to harm, and, though exercising war powers in unprecedented ways, nevertheless kept himself and his subordinates accountable to all traditional constraints of the democratic process? Or is he less subject to criticism because his laudable, and rare, educability allowed him to escalate his uses of war powers from "mere" internal security functions to higher ones, especially emancipation?

It is sensible to absolve Lincoln from the "dictator" accusation, and to perceive that he himself was so wretched at the need to use the war power that he expected his successors to avoid recourse to it, especially in an arbitrary manner or if anything less than fundamental, immediate dangers threatened government and society. Our national history since Appomattox suggests that he was too optimistic on this last assumption. Still, in December 1863, Lincoln reminded Congress and the nation that "we must not lose sight of the fact that the war power is still our main reliance." Much remains to be learned from the Civil War and Reconstruction experience with war-emergency powers, so central in the development of this "main reliance," before presidents, Congressmen, jurists or historians interpret them with excessive confidence.

Suggested additional reading:

H. M. Hyman and W. M. Wiecek, *Equal Justice Under Law: Constitutional Development, 1835-1875* (1982) offers details and extended sources for further reading on the nineteenth century. The enormous literature on the war powers that spun off from Viet Nam is best evaluated in *The Tethered Presidency: Congressional Restraints on Executive Power*, ed. T. M. Franck (1981).

Harold M. Hyman holds the William P. Hobby chair of history at Rice University. His most recent book, with William Wiecek, is *Equal Justice Under Law*.

The Constitution and the Bureaucracy

by MARTIN SHAPIRO

Americans think of their Constitution as doing a number of basic things. One is to protect the rights of individuals. A second is to set out the basic blueprint of the structure of government. Article I establishes a Congress to wield legislative power. Article II establishes a presidency to wield executive power. Article III creates a Supreme Court which, along with such other courts as Congress shall create, wields the judicial power. The Constitution appears to set out quite a simple, logical and complete plan for a national government. Yet the Constitution fails to provide for one of the largest and most important institutions of every national government, the bureaucracy. Without a bureaucracy the executive power would be meaningless, for the one man or woman who is president cannot personally "take care that" all the myriad laws of a modern nation "be faithfully executed."

This glaring constitutional omission was in part accidental. The very idea of bureaucracy becomes prevalent only with the writings of Max Weber, over a hundred years after the Constitution was written. The framers knew that the executive could not operate without a body comparable to the servants of the crown in England. Indeed, the Constitution does make one explicit reference to what we would call a bureaucracy: "The President ... may require the Opinion in writing, of the principal Officer in each of the executive Departments, ..." It has nothing more to say, however, largely because people had not yet come to think of the executive's servants as a body of persons with a distinct set of rules, roles, procedures and values that set them apart from the person who inhabited the presidency or kingship.

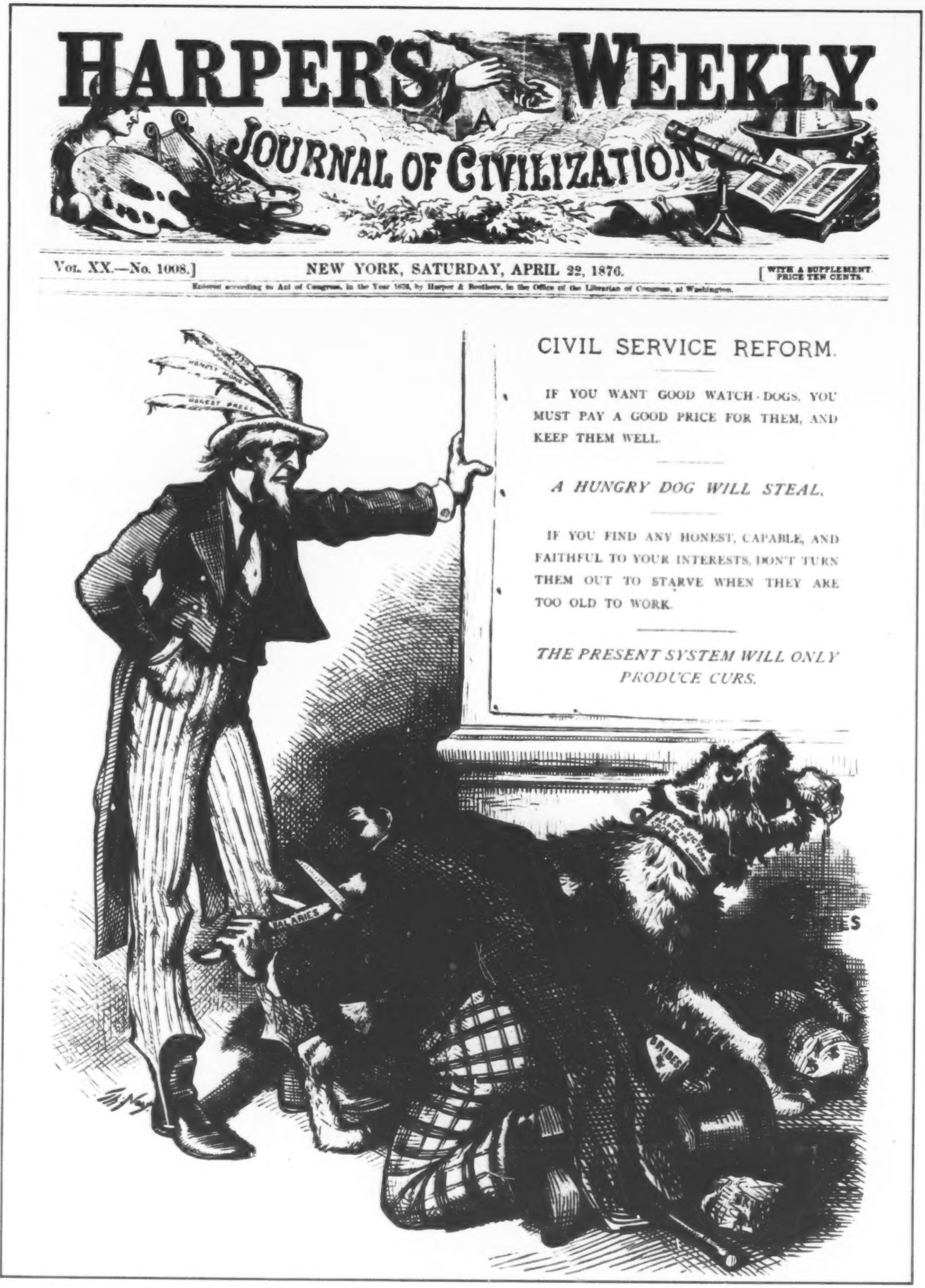
Yet the omission of bureaucracy was in part deliberate. The Constitution could easily have said more about the bureaucracy. It does specify how government officers are appointed—some by the president alone and others by the president after an opportunity for the Senate to advise and consent. The Constitution also provides that members of Congress may not hold offices in the executive branch, thus preventing the sort of cabinet government that was emerging in England. The Constitution empowers Congress to establish a post office, an army and a navy. It could have gone on to specify what executive departments, such as treasury and state, should exist and, like many state constitutions, to provide a detailed organization chart for the whole executive branch. The framers did not undertake this task in part because they felt that the details of government organization should change from time to time in response to changes in the rest of the world. In part, however, they said little in the Constitution because they anticipated that the first president would be George Washington who would surely set the first administration on the right path. Thus the framers deliberately left the evolution of the personnel and organization of the executive branch to be worked out by Congress and the president in the future.

Because the Constitution contains this large hole and because bureaucracies touch the lives of so many Americans, the courts have had to create the constitutional law of bureaucracies. It is not that the courts are ever asked directly what a bureaucracy is or what its role is in our constitutional system. Instead these questions arise in cases that look like they are primarily about the legal or constitutional rights of individuals.

From a 'Spoils System' to the Career Service

Some constitutional litigation involves the intersection of bureaucracies and another institution about which the Constitution is even more silent, the political party. The Jacksonian Democrats developed a theory of bureaucracy in the 1820s, although they did not call it by that name. They argued that if government agencies were staffed by career employees, these governors would become an elite separated in spirit and outlook from the people they governed. The cure was "rotation in office." Each time one political party ousted the other from the control of the presidency or other elected executive post such as governor or mayor, all those appointed by the previous executive should be removed from office and replaced by appointees of the new executive. Thus, everyday citizens would move in and out of government as political fortunes changed. We would not need to worry about keeping the governing bureaucracy under control of the people because the people would be the bureaucracy.

This theory of bureaucracy was also a theory of party finance. As they evolved, European political parties supported themselves in a number of ways. Many, such as the British Labor or French Socialist party, became dues-paying, closed membership clubs. In return for paying dues, a member got a card and a right to vote in party elections. Others, like the British Conservative party, long supported themselves on private wealth. Wealthy families sent one of their sons into politics and provided him an annual income while he pursued his political career. Others yet, like the Communist and Monarchist parties, depended largely on ideo-



HARPER'S WEEKLY.

A JOURNAL OF CIVILIZATION

Vol. XX.—No. 1008.] NEW YORK, SATURDAY, APRIL 22, 1876. [WITH A SUPPLEMENT. PRICE TEN CENTS.

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CIVIL SERVICE REFORM.

IF YOU WANT GOOD WATCH-DOGS, YOU MUST PAY A GOOD PRICE FOR THEM, AND KEEP THEM WELL.

A HUNGRY DOG WILL STEAL.

IF YOU FIND ANY HONEST, CAPABLE, AND FAITHFUL TO YOUR INTERESTS, DON'T TURN THEM OUT TO STARVE WHEN THEY ARE TOO OLD TO WORK.

THE PRESENT SYSTEM WILL ONLY PRODUCE CURS.

Cartoon by Thomas Nast on civil service reform showing "Mr. Statesman" cutting the tail (salaries) off a mangy dog (civil service "spoils system") as Uncle Sam says, "You are, as usual, at the wrong end." He leans against a poster with civil service reform guidelines, which recommend better salaries and working conditions. Harper's Weekly, April 22, 1876. Library of Congress.

The Constitution fails to provide for one of the largest and most important institutions of every national government, the bureaucracy.

logical fervor of their partisans to yield many, voluntary, unpaid hours of party work.

American parties have rarely had dues-paying memberships. Neither family support nor ideological commitment has been sufficient to bring out enough party workers to staff election campaigns or to keep the parties alive between elections. In the nineteenth century, American parties instead relied on "rotation in office," or, as it is known less grandly, the "spoils system." With this system, the party simply promises that, while it can pay its workers nothing now, faithful workers will be given government jobs if the party wins the election. These jobs do pay and will continue to pay as long as the party keeps getting elected. Thus, the party is financed partly by the government.

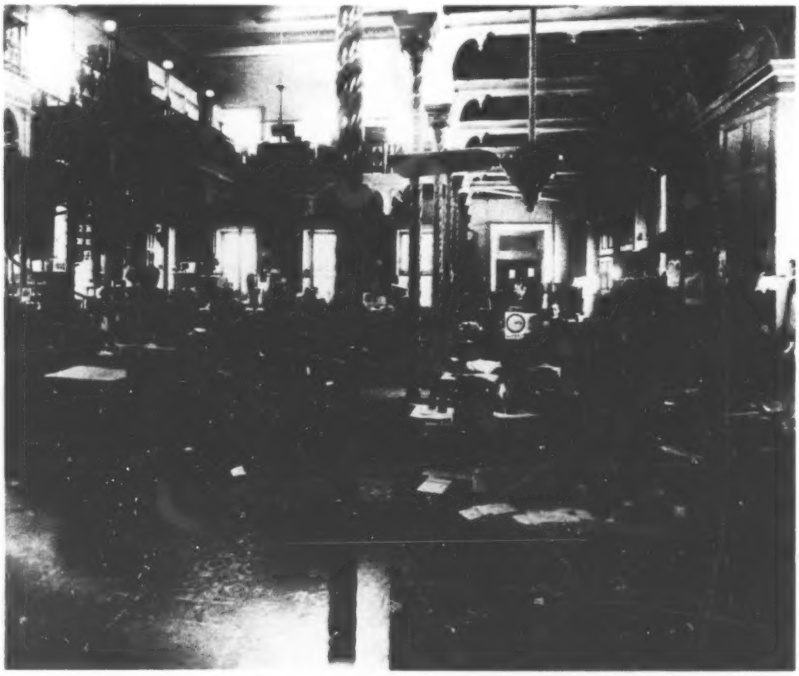
The Jacksonian theory of bureaucracy and party held that government administration really was simple stuff. Any citizen rotated into office to enjoy the spoils that go to election victors could do the job for a while until replaced by a new set of winners. From the earliest days of the Republic, this premise was challenged by those who believed that the business of governing was a highly technical one requiring great experience, impartiality and expertise. First announced by the Federalists, this theory of bureaucracy as neutral expertise, and thus of the separation of government administration from the hurly burley of democratic politics, reached its high point in the Progressive movement around the turn of the century. The Progressives wanted to replace "rotation in office" with a professional career civil service, appointed on the basis of competitive examinations and shielded by law from political influence. Their greatest victory was the Pendleton Act of 1883 which established such a federal civil service.

The Progressive theory of bureaucracy sought to undermine traditional party supports. The Progressives saw the traditional party machines as the principal enemies of good public administration. The machines were the source of the graft, corruption and simple incompetence that marred American government. If "rotation in office" were ended, and with it the promise of jobs, the machines could not enlist the precinct captains and ward healers who were their front line troops. As a result the machines would run down and eventually disappear.

The Supreme Court entered the fray not in the form of direct decisions about whether the Constitution had approved one theory or the other, but indirectly. One of the statutes amending and improving the Pendleton Act was the Hatch Act of 1939 which forbade federal employees from contributing to or participating in party election campaigns. Its basic intent was to protect civil servants from political pressure. If they were forbidden by law from engaging in political activity on behalf of any party, they could not be pressured by the president or those he appointed as secretaries and assistant secretaries of the various government departments to be active on the side of the president's party.

A number of civil servants saw things differently, however, and challenged the Hatch Act as a violation of their constitutional, First Amendment, right to participate in politics. The Supreme Court usually holds that First Amendment rights

Federal postal workers, Washington, D.C., 1890s. Brady-Handy collection, Library of Congress.



George Hunt Pendleton, *Brady-Handy collection, Library of Congress.*

are not absolute. If the government is limiting speech for a sufficiently compelling reason, it may do so constitutionally. In the course of explaining the compelling government interest that was to be balanced against the individual civil servants' First Amendment rights, the Supreme Court provided a ringing endorsement of the Progressive theory of bureaucracy. The Court held that the government's interest in an expert, neutral, career civil service clearly separated from politics outweighed First Amendment considerations. In upholding the Hatch Act, the Supreme Court read "rotation in office" out of the Constitution.

Some years later, the Court used the Constitution to abolish the remnants of the "spoils system" that had survived the Progressive era. A number of attorneys employed by Cook County, the county in which Chicago is located, had been appointed to their jobs as prosecutors when one party won a county election. The next time around, the other party won, and in 1971 it sought to replace these prosecutors with its own party faithful. The old prosecutors argued that their First Amendment rights were being abridged—they were being fired from their jobs solely because of their political beliefs. The Supreme Court did not exactly ignore the time-honored place of the "spoils system" in American political life, but it did treat it as irrelevant. Focusing on the First Amendment claim, a majority of the Court confirmed that firing government workers just because of their political views was a violation of their rights to free speech and association.

In order to encourage the acceptance of the civil service concept, new civil service statutes often contained clauses providing for "blanketing in" present employees. Whenever more federal, state and/or local government jobs were brought under civil service designation, workers already on those jobs were allowed to keep them rather than having to compete for them in new examinations. "Blanketing in" was politically essential to the passage of most civil servant legislation. It meant that existing government workers appointed under the "spoils system" would not only cease to oppose civil service laws but would vigorously support them because the new laws would secure their jobs even if the other party won an election. In its Cook County decision, the Supreme Court in effect "blanketed in" every one of the remaining spoils appointees in the United States. The Progressive theory of a bureaucracy of neutral "experts," free from political party control, had become part of the Constitution not as separate clauses but as an interpretation of the First Amendment.

Whose Bureaucracy?

Today, the most important dispute about the constitutional position of the federal bureaucracy is being fought out in cases that appear not to relate to the Constitution at all. In these cases, the parties are not claiming that a particular government action is unconstitutional but only that it is unlawful; not that it violates the Constitution, but only that it violates some statute enacted by Congress. These cases raise the most difficult constitutional question of all about the bureaucracy—to which branch of government does it belong?

Carl A. Hatch. *Library of Congress.*

The simple schema of the first three articles of the Constitution—Article I which describes Congress, Article II which establishes the presidency, and Article III which provides for the judiciary—would seem to place the executive departments, such as treasury and interior, and the bureaucrats who work in them, squarely under the control of the president who holds not a part of but all of "the executive Power of the United States." Particularly from the time of the New Deal onward, constitutional and political commentators have urged more and more centralized control by the president over an executive branch that was constantly growing in size and complexity. The Nixon presidency, however, brought denunciations of the "imperial presidency" from the same people who had espoused the strong presidency earlier. And the Reagan presidency, with its campaign to cut back on big government, including the big executive branch, has led those who favor more rather than less government activity to re-examine the actual legal status of the executive departments.

When they do so they encounter a very curious phenomenon of

In spite of what would seem to be the clear structure of the first three articles of the Constitution, the federal departments are not the servants of the president but the creatures of Congress.

American law. In spite of what would seem to be the clear structure of the first three articles of the Constitution, the federal departments are not the servants of the president but the creatures of Congress. Precisely because Article II does not authorize any specific executive departments or provide an organization chart of the executive branch, each federal executive department and agency must be created by a statute enacted by Congress. The agencies not only exist by virtue of such statutes but each and every one of their powers and programs must be authorized by statute and each and every dollar they spend must be appropriated by statute.

It is not that Americans suddenly discovered this legal arrangement. In some sense they knew it all along. In the middle and later 1970s, however, with the presidency in the hands of one party and Congress in that of the other, more observers came to recognize the contradiction between the legal basis of the executive departments as congressional creations and the position of the president as chief executive.

This contradiction is now being discussed in the federal courts. The Reagan administration has inherited hundreds of executive branch programs and regulations that it would like to eliminate, cut back or redirect. In some cases, the administration believes that a regulation imposes impossible tasks on the companies being regulated, and/or creates costs that far outweigh any possible benefits and/or is based on factual data that is wrong or incomplete and/or misreads the intent of the statute that the regulation is designed to implement. Wielding the powers of the chief executive, administration officials have rescinded some regulations, refused to go forward with others that were in the bureaucratic pipe line when Mr. Reagan took office, and reduced the tempo of enforcement of yet others. The Reagan administration has argued that many of these regulations and styles of enforcement had been adopted by the departments in pursuit of the policy ideas of President Carter and his appointees. That course, Reagan's aides say, was perfectly legitimate, but it is equally legitimate for a newly elected president with different ideas to modify the practices of *his* executive branch to conform to *his* ideas. Those who oppose President Reagan's policies have responded that the regulations and programs that existed when he took office were mandated by Congress and to stop or change them now violates those statutes. Typically, the issue has reached the courts when those who favor retention and extension of the old regulations ask the court to require the agency to enforce the statute. These cases involve the huge body of statutory and case law about the procedures that agencies must use in making, unmaking and enforcing their own regulations that lawyers call "administrative law."

Because these are complex administrative law cases, few people become aware of the underlying constitutional debate. The debate arises because many congressional statutes not only authorize or empower executive agencies to do things but, at least according to some interpretations, order them to do things. Not just President Reagan, but all presidents, have argued that the president has the authority under Article II to decide just how the laws shall be "faithfully executed" and thus the discretion to decide when, against whom, and under what circumstances the law should be carried out.

Agencies live between the duties imposed upon them by statute and the executive discretion wielded by the president as head of the executive branch. In a common sort of law suit in this area, an environmental group might insist that a particular statute, say the Clean Air Act, imposes a duty on the Environmental Protection Agency [EPA] to achieve clean air now. The agency thus has a duty to formulate the best possible air pollution regulations based on available data and enforce them immediately. The EPA will reply that no statute can ever be read as commanding an agency to make regulations and punish people for violating them before the agency is sure that it knows enough to make a good regulation. Thus the EPA must have discretion to decide when it will make a regulation. Furthermore, the EPA has only so much time, staff and money to enforce its regulations and never enough to enforce all of them on everybody. Thus it must have discretion to pick and choose its enforcement actions to get the most "bang" for its enforcement "buck". And precisely because these judgments are discretionary, they must be exercised in accord with the policies of the only person who has constitutional authority to control the discretion of the executive branch—the president.

When a court decides whether, in a particular instance, an agency has a statutory duty or, alternatively a measure of discretion, the court is deciding whether the agency belongs to Congress or the president. Depending on the circumstances, the statutory language and the underlying constitutional theory of the judge, individual decisions go one way or the other. Over the years, however, the collective impact of these decisions will move the federal bureaucracy more to-

Although the Constitution does not specifically provide for bureaucracies, courts decide bureaucracy cases under a wide array of constitutional and non-constitutional provisions that do not even use the words. In doing so, the courts shape not only the constitutional law of bureaucracy, but the relationship between Congress and the president.

ward Article I (congressional authority) or more toward Article II (presidential control) and thus determine a fundamental aspect of our constitutional law even though these cases do not overtly raise constitutional questions. This issue, like many constitutional issues, is never totally resolved, but the courts are currently deeply engaged in determining the extent of presidential control of the actions of the executive departments.

Legislative Veto

The Supreme Court has spoken specifically about the constitutionality of congressional control of the bureaucracy in one recent case involving the "legislative veto." In a number of statutes, Congress has delegated to executive agencies the power to make rules and other kinds of decisions, but it retained for itself the right to veto these rules within a specified time. Only after Congress approved the agency action, or refused to disapprove it, did the agency's action become legally binding. These provisions allowed Congress to grant a great deal of discretion to the agencies while at the same time maintaining control over the final decision.

In *Immigration and Naturalization Service* v. *Chadha* (1983), the Supreme Court held one such veto provision unconstitutional and did so in broad enough language to suggest that most such provisions were invalid. The Court focused not on the constitutional problems of bureaucracy and administration but on the president's veto power. The details of legislative veto clauses varied, but all provided that the congressional veto be exercised by votes and resolutions not subject to presidential veto. The Court held that Congress' action of disapproving an agency decision was itself a legislative action like the passage of a new law. Thus, it was unconstitutional for Congress to take such actions in ways that denied the president his constitutional authority to veto new legislation.

Jagdish Rai Chadha, *photograph by Terrence McCarthy/NYT PICTURES.*

Chadha generally has been interpreted as a pro-president, anti-Congress decision. It does reduce the power of Congress to limit the discretion exercised by the federal bureaucracy. It does not, however, increase presidential control over that bureaucracy. Indeed, it tends simply to grant more autonomy to the bureaucracy. Recent presidents have sought to increase their authority over agency rule-making by executive orders requiring that proposed agency rules be cleared through the Office of Management and Budget, which is part of the president's own staff. These executive orders, and particularly any attempt by the president to prevent a proposed rule from coming into legal effect, raise their own serious constitutional problems.

Conclusion

Although the Constitution does not provide specifically for bureaucracies, courts decide bureaucracy cases under a wide array of constitutional and non-constitutional provisions that do not even use the words. In doing so, the courts shape not only the bureaucracy, but the relationship between Congress and the president. We are used to thinking of that dynamic relationship as a direct struggle between Congress and president over such questions as whether the president has the power to withhold documents from Congress or to send troops into combat without a congressional declaration of war. But there is also a struggle between Congress and president about just how much power each should have over the work of the federal bureaucracy, work that constitutes almost all of the activity of government that actually touches the daily lives of the citizenry. As the courts referee this rivalry, we can expect different constitutional balances to be struck at different times depending on changing political circumstances and changing political theories of Congress and the presidency. The developing constitutional law of the bureaucracy shows that the Constitution can be made to respond to circumstances unforeseen, indeed even to institutions unmentioned, in the original document.

Martin Shapiro received his Ph.D. from the Department of Government at Harvard and has taught there and at a number of campuses of the University of California. He is now a Professor of Law at Berkeley and has written several books and articles about the Supreme Court.

Education for a Republic: Federal Influence on Public Schooling in the Nation's First Century

by DAVID TYACK AND THOMAS JAMES

Today, as people argue over federal aid to public education, we tend to view the first century of the American nation as an era when public schools were entirely a grassroots affair. Compared to the bureaucratic schools systems of the present, the schools of the past looked like community institutions, quite unconnected with federal policy or national politics. But the story of federal influence on the creation of public or "common" schools is more complex, and its implications for education more profound, than we often realize.

Starting with an eastern span of thirteen states at the time of the Constitution, the nation grew during its first century into a union of states that reached across a continent. The states shared, as Article 4, Section 4 of the Constitution said they must, "a Republican form of Government." Only Congress could create new states from the territories springing up in the vast new regions of West and South. Congress had the duty of ensuring that each territory aspiring to statehood did establish through its own constitution just such a "Republican form of Government." In the negotiations over statehood between territorial assemblies and Congress, it became clear over time that political leaders both in the nation's capital and in the new states assumed that education was an essential feature of a republican government based upon the consent of the people. Thus in the United States, national and state governments played complementary roles in the spread of the American common school.

Land Grants and Schools in the Wilderness

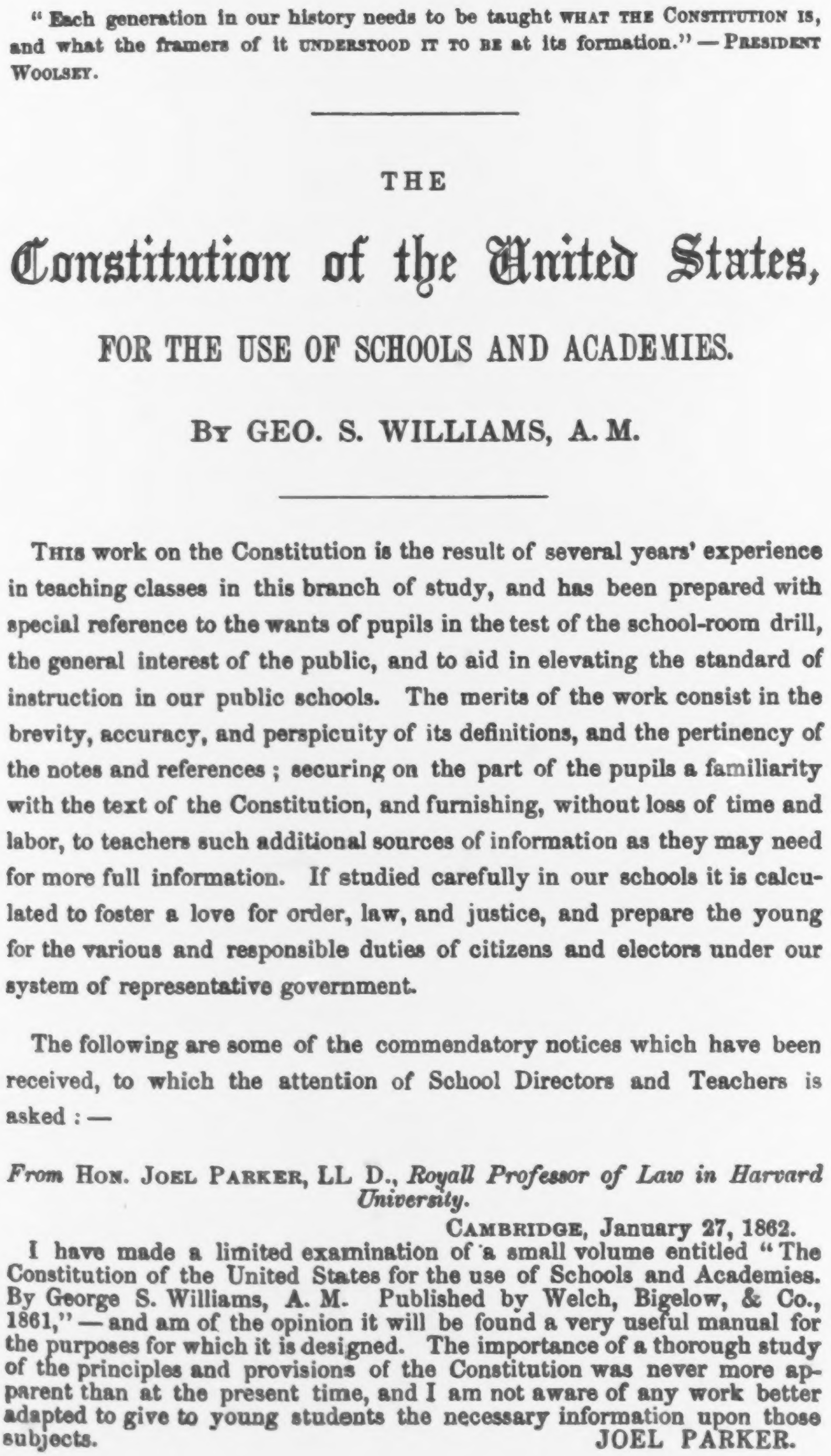
Even before the federal constitution was ratified, the story of the federal government's involvement with schools began with the Ordinance of 1785, which was passed by the congress established under the Articles of Confederation. The ordinance specified how property lines in the western territory should "be measured with a chain ... plainly marked by chaps on the trees, and exactly described on a plat, whereon shall be noted ... all mines, salt-springs, salt-licks, and mill-seats." The document stipulated that land should be divided into townships, each six miles square and subdivided into 36 lots each a mile square. In businesslike fashion, it established the terms of the deed between the United States and citizens buying lands from the public domain. One clause linked the congressional ordinance explicitly to schooling: "There shall be reserved the lot No. 16, of every township, for the maintenance of public schools, within the said township." The intention of the framers was that the land would be sold to settlers and the income from the sales would be used to support the school.

Two years later, the Confederation Congress passed the Ordinance of 1787. This measure went further than its predecessor by setting the rules for governing the territory northwest of the Ohio River. The ordinance stipulated a plan for a governor, general assembly, and courts for each territory to be created from that immense wilderness. It established the procedure whereby each might become a state. Between the existing states of the Confederation and the new ones, the ordinance proclaimed a compact that prohibited slavery and guaranteed religious freedom and basic legal rights like those later embodied in the Bill of Rights. Laying down fundamental conditions for building new states, the ordinance also included a sentence asserting that "religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

During the first century of the new nation, Congress granted more than 77 million acres of the public domain as an endowment for the support of public schools. In times of pressing national debt, congressional leaders were eager to sell the western lands owned by the federal government; land speculators persuaded Congress to include subsidies for schools as an inducement to attract settlers.

The tracts ceded to states for the support of public schools grew steadily over the years. In 1841, Congress passed an act that granted 500,000 acres to eight states, later increased to make grants to a total of nineteen states, to be used for "internal improvements." A majority of these states devoted all or part of the income from these lands to the schools. In 1848, Congress approved the policy of reserving two lots, 16 and 36, for the support of schools when it established the territorial government of Oregon. In 1850, California was the first state to receive both lots, amounting to 5.5 percent of the public domain in the state. The desert states of Utah, Arizona, and New Mexico—where much of the land had little value—each received four sections per township for the support of public schools.

The federal government also granted money, such as distributions of surplus federal revenue and reimbursements for war expenses, to the states. Though Congress rarely prescribed that such funds be used only for schools, education constituted one of the largest expenses of state and local govern-



"Each generation in our history needs to be taught WHAT THE CONSTITUTION IS, and what the framers of it UNDERSTOOD IT TO BE at its formation." — PRESIDENT WOOLSEY.

THE

Constitution of the United States,

FOR THE USE OF SCHOOLS AND ACADEMIES.

BY GEO. S. WILLIAMS, A. M.

THIS work on the Constitution is the result of several years' experience in teaching classes in this branch of study, and has been prepared with special reference to the wants of pupils in the test of the school-room drill, the general interest of the public, and to aid in elevating the standard of instruction in our public schools. The merits of the work consist in the brevity, accuracy, and perspicuity of its definitions, and the pertinency of the notes and references; securing on the part of the pupils a familiarity with the text of the Constitution, and furnishing, without loss of time and labor, to teachers such additional sources of information as they may need for more full information. If studied carefully in our schools it is calculated to foster a love for order, law, and justice, and prepare the young for the various and responsible duties of citizens and electors under our system of representative government.

The following are some of the commendatory notices which have been received, to which the attention of School Directors and Teachers is asked: —

From HON. JOEL PARKER, LL D., *Royall Professor of Law in Harvard University.*

CAMBRIDGE, January 27, 1862.

I have made a limited examination of a small volume entitled "The Constitution of the United States for the use of Schools and Academies. By George S. Williams, A. M. Published by Welch, Bigelow, & Co., 1861," — and am of the opinion it will be found a very useful manual for the purposes for which it is designed. The importance of a thorough study of the principles and provisions of the Constitution was never more apparent than at the present time, and I am not aware of any work better adapted to give to young students the necessary information upon those subjects.

JOEL PARKER.

Introduction to a book on the Constitution for students: "If studied carefully in our schools it is calculated to foster a love for order, law, and justice, and prepare the young for the various and responsible duties of citizens and electors under our system of representative government." Library of Congress.

In the negotiations over statehood between territorial assemblies and Congress, it became clear over time that political leaders both in the nation's capital and in the new states assumed that education was an essential feature of a republican government based upon the consent of the people.

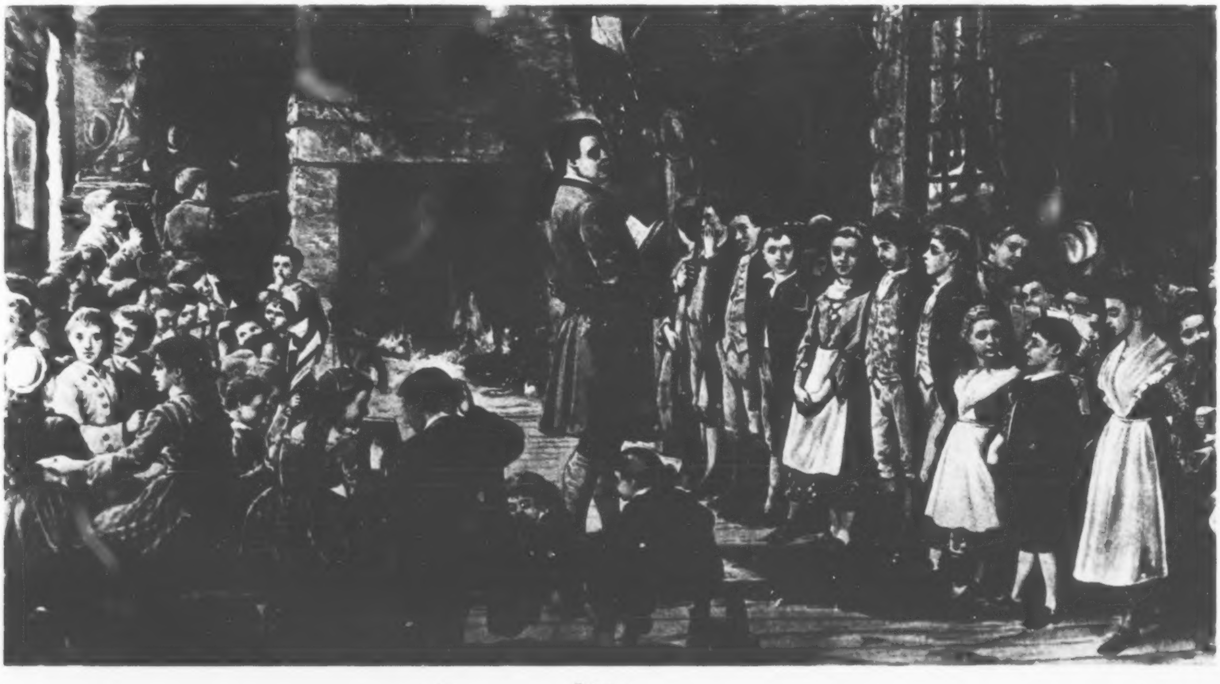
ments, and so they used federal monies for this purpose. Moreover, Congress awarded a certain percentage of proceeds from the sale of U.S. lands within the borders of the new state; the amount ranged from three to ten percent, with most states receiving five percent. Twelve states, all of them west of the Mississippi except Wisconsin, decreed in their constitutions that income from this fund should flow to the common school fund.

On the surface, the legal and constitutional framework of the new nation gave federal authorities little say over the financing and governance of public schools. In the beginning, land endowments for schools had more to do with expediency in selling land and settling communities than with a principled and fixed educational policy. But as time went on, leaders writing constitutions in the new territories came to regard the grants as fundamental to statehood. Many of these leaders hoped that the federal largesse might one day provide full support for the common schools. In some territories the income from federal lands granted to the states and then leased or sold to settlers constituted the only source of state funding. In nearly every state, the availability of the land grants served to generate revenue for public institutions.

The dark side of the story is that vast sums were lost through corruption or mismanagement. States like Ohio, Indiana and Illinois found it difficult to realize profits from the lands for use in establishing public schools. Learning from experience, Congress and state constitutions began to specify prices and conditions of sale for the lands sold to support schools. The states created supposedly inviolate common school funds to be allocated to local districts. To receive this money, local educators were expected to comply with state regulations about the length of the school term and teacher qualifications.

The gradual evolution toward state control of federal land grants was more the result of pragmatic experience than the outcome of deliberate educational policy. Partly because of a strong commitment to states' rights in the period before the Civil War, Congress stopped short of trying to control the management of education grants, even when states were abusing the terms under which they received the grants. In Illinois, for example, the

An eighteenth-century schoolroom. Library of Congress.



legislature diverted the funds intended for schools to other purposes. State officials refused to make the required reports to the U.S. Treasury. In retaliation, the federal government refused to make payments. Congress resolved the dispute by repealing the requirement that states make reports.

As years went by, state constitutions in the West became specific about such bureaucratic matters. The educational provisions that regulated land grants expanded along with other language controlling the establishment of schools. Indirectly, the federal government provided leverage to states for centralizing control over schools. By the end of the nineteenth century, Congress itself began to set the terms for the sale of lands to support schools in the enabling acts of new states. It went so far as to require several new states—Montana, North Dakota, South Dakota, and Washington—to establish free, non-sectarian public school systems as a condition for admission to the union and receipt of the land grants.

After the mid-century, congressional grants became more generous and controls over the disposition of land more strict. Citizens in the northwestern states, profiting from the mistakes of governments to the east, creatively conserved and used the funds from land sales for the public good instead of private gain. In states west of the Mississippi, roughly ten percent of the school budgets came from the sale of public land granted for school purposes. This was far less than a full subsidy of public education, but it was also far from negligible.

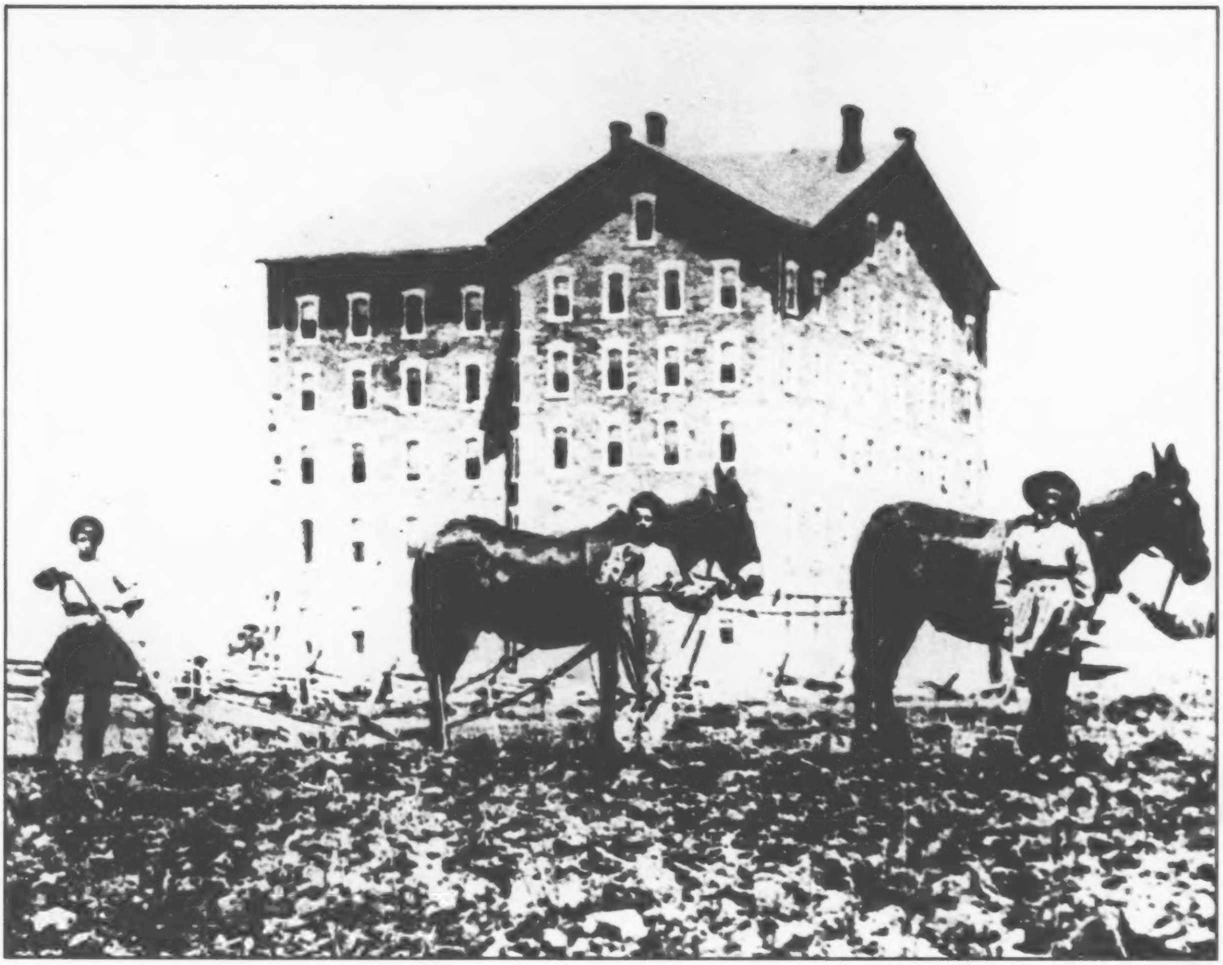
The procedure of drafting a constitution and then gaining congressional approval for statehood prompted the citizens of the territories to think systematically about public schools. The act of constructing a frame of government, and of recognizing the place of education in that structure, gave leaders the opportunity to make choices among the policies that had been tried in other states. The newer states could borrow from the experiences of the older ones. In this way, citizens shaped and reinterpreted a living constitutional tradition, embodied in the federal and original state constitutions.

The organization of American education grew more complex as public institutions and the society as a whole expanded in the nineteenth century. Constitutional provisions on schools reflected this growing complexity. In the earlier documents, idealistic preambles and brief treatments of federal land grants seemed enough when settlers were building only log schools in the wilds of the Midwest. By contrast, when territorial assemblies in the sparsely populated far Northwest states created constitutions, they wrote elaborate new bureaucratic structures into their educational provisions. They were trying to reflect the best examples of institution-building in their time.

Although more attuned to administrative detail than leaders in the early years, these educational policy-makers also continued to reflect the ideology that had fueled nearly a century of effort to create common schools as an essential feature of American government. In 1874, a group of 77 college presidents and city and state superintendents of schools issued a statement that described this process of institutional development:

> As a consequence of the perpetual migration from the older sections of the country to the unoccupied Territories, there are new states in all degrees of formation, and their institutions present earlier phases of realization of the distinctive type that are presented in the mature growth of the system as it exists in the thickly-settled and older States. Thus States are to be found with little or no provision for education, but they are rudimentary forms of the American State, and are adopting, as rapidly as immigration allows them to do so, the type of educational institutions already defined as the result of American political and social ideas.

While the educational provisions of constitutions of the original states changed but little, new states aspired to incorporate the most up-to-date public school systems. They wanted to show themselves to be enlightened and civilized as they joined the union of states. Accordingly, they wrote more and more elaborate provisions for education into their state constitutions. They codified the institutional structures that had developed through statutory law in the older states, such as state boards of education, county and state superintendents, and teacher-training institutions. Turning against earlier traditions of religious instruction, many prohibited sectarian instruction in public schools and any public aid to schools affiliated with religious groups. Some constitutional conventions in the South after the Civil War mandated compulsory school attendance in their constitutions, even though their states had only recently established a common school system. An expanding nation composed of dozens of newly-added states became a country in which the new states could copy from the old and the old were challenged to innovate to match the progress achieved by younger peers.



Students plow in front of Old Main, at Pennsylvania State University, one of the first land grant colleges, in 1859. U.S. Department of Agriculture.

Like the land ordinances of the 1780s, state constitutions in the nineteenth century became much more than documents designed to attract new residents and win statehood. They were strategies for achieving organized social life—a political system, a rule of law, a structure of governance and adequate financial incentives for creating institutions such as public schools. Similar to the town and city plats of the developers, but for an entire system of government, these documents promised that the state on the periphery would one day match the ideal of statehood most admired by its predecessors. Reflecting upon this process during the California constitutional convention of 1849, a delegate quoted the view of Robert J. Walker, U.S. Secretary of the Treasury, who argued:

> Each state is deeply interested in the welfare of every other; for the representatives of the whole regulate by their votes the measures of the Union, which must be the more happy and prosperous in proportion as its councils are guided by more enlightened views, resulting from the more universal diffusion of light, knowledge, and education.

In this process of forming new states, Congress played a subdued role, setting the terms for territorial government, shaping the requirements for admission in the enabling acts, approving the new constitutions, then granting vast amounts of federal land to stimulate improvements, including public schools, in the fledgling societies on the frontier.

Political Ideology and Public Schooling

Nowhere is the perceived importance of schooling more apparent than in the language used to describe it in state constitutions. A striking feature of the educational clauses in nineteenth century state constitutions is their idealistic tone. With the exception of language in the declarations of rights, no other sections contained so much exhortation to virtue. None of the other parts of government received such broad justifications phrased in the political discourse of the eighteenth century. Sections on the legislative branch did not extol the virtues of representative government, nor those on the judiciary the glories of justice. Clauses on suffrage, militia, corporations, revenue, and divisions of the executive branch were plain and businesslike. In contrast, the high-flown justifications of the common school declared public education to be a shared value. It was a fundamental guarantee built into government. Like those other guarantees embedded in the declarations of rights, it was a common good above the squabbles of political party or sect.

Nowhere is the perceived importance of schooling more apparent than in the language used to describe it in state constitutions. . . . It was a common good above the squabbles of political party or sect.

The Ohio constitution of 1802 reflected this belief by including a provision for schooling in the declaration of rights itself. Such idealism about education entered into the debates of constitutional conventions with an intensity that often reconciled extreme political differences. To mark a moment of concord between jousting Whigs and Democrats in the Illinois constitutional convention of 1847, a delegate said, "As the soul rises into immortality when the body falls into decay and perishes, so does the cause of education rise in splendor and grandeur above all party schemes and factions."

In ascribing such importance to public schooling, the framers of state constitutions were consciously developing a connection between education and democracy. A resonant political argument, this connection went back to the rhetoric of the nation's founding fathers. "The business of education has acquired a new complexion by the independence of our country," wrote Benjamin Rush, a Pennsylvanian who signed the Declaration of Independence and served as an articulate spokesman for republican ideas, in 1786. "The form of government we have assumed," he continued, "has created a new class of duties to every American." Rush thought it necessary to establish "nurseries of wise and good men," a system of education from common schools through colleges, to ensure the survival of the republic.

Thomas Jefferson had frequently given voice to such sentiments, as when he wrote to his friend George Wythe, "Preach, my dear Sir, a crusade against ignorance; establish & improve the law for educating the common people." On another occasion, Jefferson had written, "I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education." John Adams, James Madison and other central actors in the creation of the new republic had made similar pleas for an expanded commitment to learning as a safeguard for the republic. "In proportion as the structure of government gives force to public opinion," said George Washington in his Farewell Address as president of the United States, "it is essential that public opinion should be enlightened."

Reflecting this ideological connection between schooling and the great political experiment of democratic nationhood, at least 17 states adopted language about schooling in their constitutions that closely resembled that of the Ordinance of 1787 and the Massachusetts constitution of 1780, the latter written by John Adams. In part, this copying was an obligatory bow towards their patron, Congress, acknowledging the purpose of the public lands granted to new states for schools. North Dakota's constitution put the underlying principle in these words in 1889:

> A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary in order to insure the continuance of that government and the prosperity and happiness of the people, the legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the State of North Dakota and free from sectarian control. This legislative requirement shall be irrevocable without the consent of the United States and the people of North Dakota.

The last clause indicates that the delegates recognized not only a state interest in education but a national one as well. Like the Bill of Rights, the common school was becoming "irrevocable," an inalienable guarantee of the republican form of government. Both the Florida Reconstruction constitution of 1868 and Washington's constitution of 1889 declared it the "paramount duty of the state" to educate all children.

Education as stimulus to "internal improvement" was a theme that complemented the political and moral argument for schooling. In 1837, the Michigan constitution instructed the legislature to "encourage, by all suitable means, the promotion of intellectual, scientifical, and agricultural improvement." Iowa, one of many states that copied Michigan's language, added "moral" to the list of "improvements" in its constitution of 1846, a change that appeared in subsequent clauses in California, Kansas, West Virginia, and Nevada. Many legislators in Congress and in the states regarded public schools, like roads and canals and railroads, as part of the infrastructure needed for economic development and the settlement of new regions.

The civic, economic, moral, and intellectual benefits of schooling merged together easily into the belief in education as a common good. Supporting this conception was a web of ideological assumptions. One was the conviction that in a government depending on the will of the people, the citizens must be properly educated so that they could, in turn, influence their government in an orderly way. As the Committee on Public Lands in the U.S. House of Representatives argued in a report on land grants in 1826:

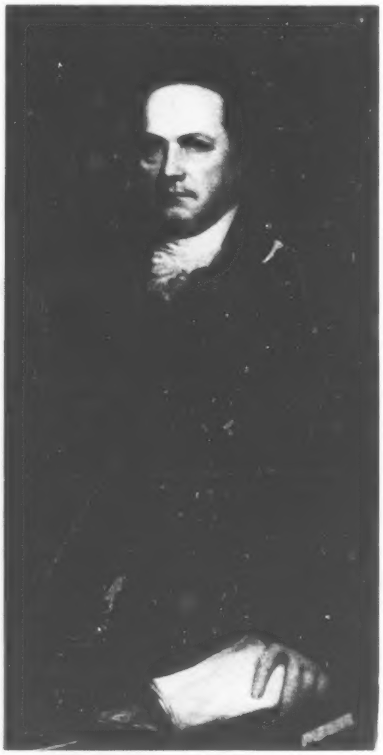
Teacher and pupils in front of school building, Hecla, Montana, 1893. Library of Congress.

> The foundation of our political institutions, it is well known, rests in the will of the People, and the safety of the whole superstructure, its temple and altar, daily and hourly depend upon the discreet exercise of this will. How then is this will to be corrected, chastened, subdued? By education—that education, the first rudiments of which can be acquired only in common schools.

For school leaders it seemed natural and not at all paradoxical that a government by the people must also restrain the people. John D. Pierce, Michigan's first state superintendent of public instruction, expressed this view in a way that was typical of the educational thought of the nineteenth century:

> However unpretending and simple in form, our government is nonetheless effective and perfect. It proceeds from the people—is supported by the people—and depends upon the people—and at the same time restrains and controls the people more effectually than the most rigid systems of despotism. But how is this political fabric to be preserved? Only by the general diffusion of knowledge. Children of every name and age must be taught the qualifications and duties of American citizens, and learn in early life the art of self-control—they must be educated. And to accomplish this object, our chief dependence must necessarily be the free school system.

A related assumption was that educated leaders would perceive the common good, and that when they did not, they could be influenced by citizens who were educated to recognize their rights and responsibilities. Justice Joseph Story, one of the nation's greatest legal minds in the nineteenth century, told a group of New England educators that "the American republic, above all others, demands from every citizen unceasing vigilance and exertion, since we have deliberately dispensed with every guard against danger or ruin, except the intelligence and virtue of the people themselves." Such assumptions about democracy and education gave rise to widespread agreement on the fundamental necessity of enlightened schooling for the survival of the republic, even among people who otherwise disagreed vehemently over many other issues. Democrats, Whigs, and Republicans



Dewitt Clinton, *painting by John Wesley Jarvis. National Portrait Gallery, Smithsonian Institution, Washington, D.C. Transfer from National Gallery of Art, Gift of Andrew W. Mellon, 1942.*

each had their own reasons for distrusting government and its actions, but each party, in its own formulation, looked to public education as a means of strengthening a republican form of government by creating upright individual citizens.

In 1822 an advocate of such a link between republicanism and education, Governor Dewitt Clinton of New York, argued that "the first duty of a state is to render its citizens virtuous by intellectual instruction and moral discipline, by enlightening their minds, purifying their hearts, and teaching them their rights and their obligations." Many leaders who sought to curb the powers of state governments and to limit their provision of social services were nonetheless willing to support vigorous public school systems partly because they believed that self-regulation by strong individuals was a substitute for external regulation by a strong state. In 1848 the Maine superintendent of common schools, echoing the education clause of the state constitution, instructed school committees to ask prospective teachers: "What method or methods would you adopt in order to inculcate the principles of morality, justice, truth, humanity, industry, and temperance?" A speaker for the American Institute of Instruction in 1878 challenged his fellow educators to make sure that the schools were living up to their republican responsibilities:

> If you wish the public schools to become strongly entrenched in the hearts of the people, especially in the hearts of the tax-payers, let such measures be taken as shall show beyond a doubt that the schools are really protecting, defending and preserving the Constitution and the government, and that they are really making the government safe.

The hope that a common education might exist above politics and sectarian strife was—and is—no more than a vision. Laden with political idealism, sometimes this vision illuminated and sometimes it obscured the problems of a pluralistic, unequal society. Public education was and always will be inherently political. The high rhetoric of the constitutions advocated a basis of universal public learning for sustaining the political community of a new nation. Yet, leaders were often willing, perhaps unwittingly as much as purposefully, to use new constructs of the public interest and the common good to favor some people's interests more than those of others.

Nevertheless, in public education Americans of different political persuasions attempted to keep alive the dream of an electorate that sought the common good because it was educated to do so. Herein lay the appeal of a system of common schools that would somehow exist above politics, nonpartisan and nonsectarian. For many founders of the nation and the states it was a deeply held commitment, a motive to action. And it was for this reason, seeing the importance of education to the formation of democratic governments across the nation, that the federal government played a role in stimulating and shaping the creation of common schools. Once embedded in political ideology and the legal structure of new states, those schools spread rapidly in the new nation. Over and over again—in constitutional debates and educational provisions, in the speeches of politicians and school leaders, in the textbooks children read in school, in sermons and newspaper editorials—people expressed the conviction that common schooling was a bulwark of the republic. Acting upon this belief in complex ways as the nation expanded in the nineteenth century, national, state and local leaders worked together to create systems of education. They believed, with Thomas Jefferson, that their survival as a political community depended upon it: "If a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be."

Suggested additional reading:

Lawrence A. Cremin, *American Education: The National Experience, 1783-1876* (1980).

Carl F. Kaestle, *Pillars of the Republic: Common Schools and American Society, 1780-1860* (1983).

David Tyack and Elisabeth Hansot, *Managers of Virtue: Public School Leadership in America, 1820-1980* (1982).

David Tyack is Vida Jacks professor of education and professor of history, Stanford University, author of *The One Best System* (1974) and co-author with Robert Lowe and Elisabeth Hansot of *Public Schools in Hard Times* (1984).

Thomas James is associate director of the Education Studies Program, Wesleyan University, and the co-author with David Tyack of a forthcoming book on law and education.

DOCUMENTS

The Constitutional Thought of John Jay

by RICHARD B. MORRIS

Although John Jay was not one of the favored fifty-five who had attended the Philadelphia Convention, John Adams considered his influence on America's constitutional development to have been more important in bringing about the adoption of the Constitution than "any of the rest, indeed of almost as much weight as all the rest." "That gentleman," Adams insisted, "had as much influence in the preparatory measures in digesting the Constitution and in obtaining its adoption, as any man in the nation."

Adams' tribute cannot be put down to characteristic hyperbole; it is solidly grounded on close observation of Jay's remarkable public career, beginning with the First Continental Congress and including his services as first Chief Justice of the United States. In between, Jay had served as the first chief justice of New York State, as president of the Continental Congress, as an unaccredited minister plenipotentiary to wartime Spain, as a commissioner in Paris centrally involved in making both the Preliminary and Definitive Peace Treaties with Great Britain in 1782-83, and during the Confederation years as secretary for foreign affairs. He shared with Hamilton and Madison the authorship of *The Federalist*, and he climaxed his federal career as first chief justice of the United States.

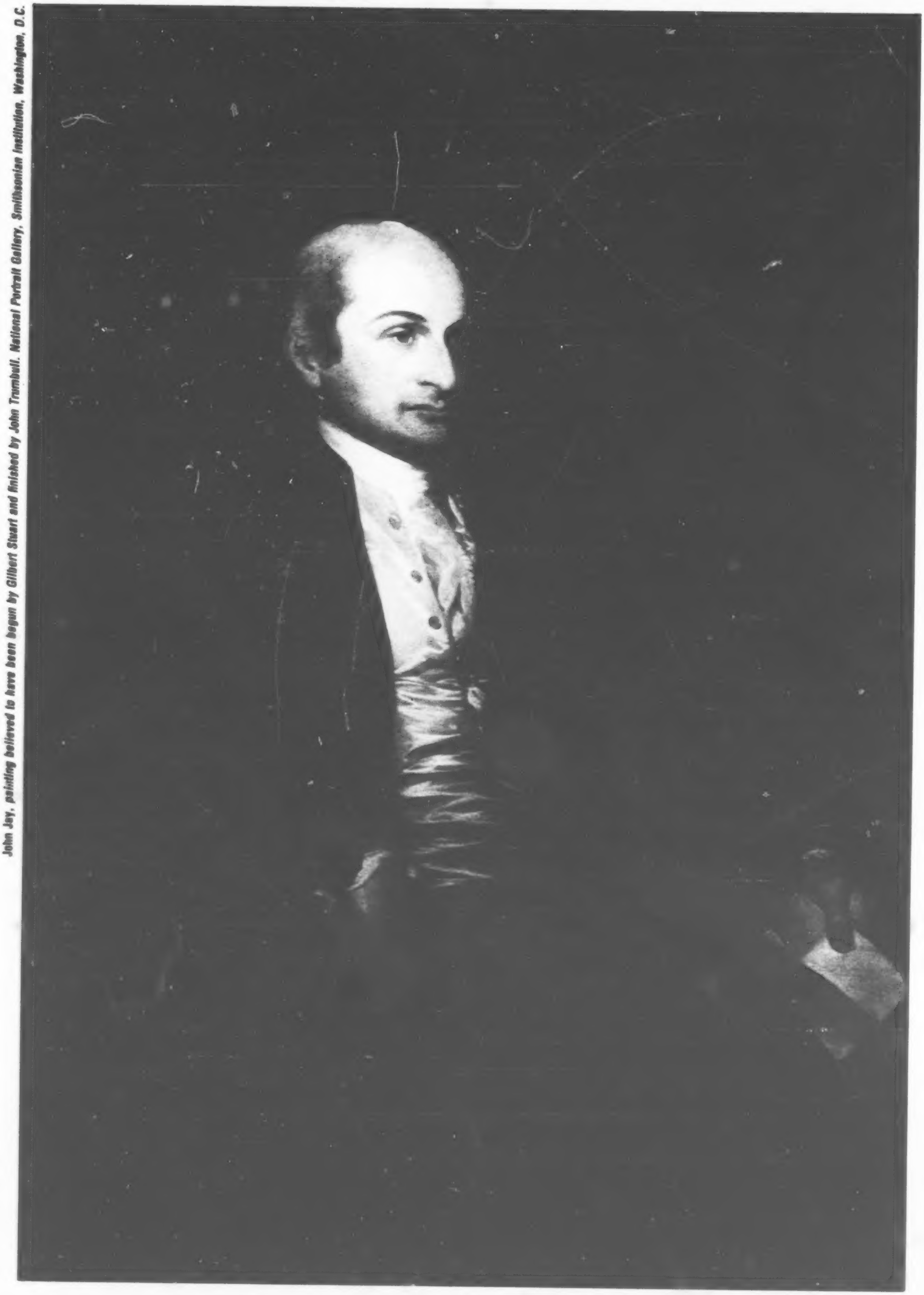
An exponent of written constitutions and constitutionalism, he acted as draftsman of the innovative New York Constitution of 1777, which revealed the influence on Jay of John Adams' *Thoughts on Government*, a pamphlet published in 1776 which advocated mixed government, separation of powers, and checks and balances—all of which were embodied in the New York Constitution. During his brief term as chief justice of the State of New York, he supported the state constitution with enthusiasm and informed grand juries of "those great and equal rights of human nature," including "the rights of conscience and private judgment."

During the nine months Jay served as president of the Continental Congress (December 1778-September 1779), his view became increasingly national, and he was determined to imbue Congress with energy, and to assert its external sovereignty. Since the final version of the Articles of Confederation contained no provision specifying the number of states needed for its ratification, President Jay, noting that by 1779 all the states except Maryland had ratified, expressed the view in a circular letter of September 13, 1779, "From Congress to their Constituents," that the Articles were already in effect and that the people and the states were now joined as one:

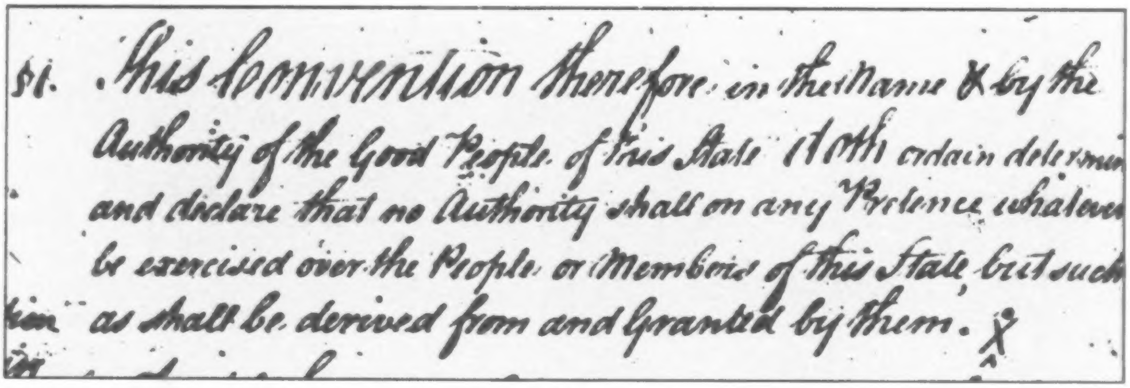
> *For every purpose essential to the defence of these states to the progress of the present way and necessary to the attainment of the objects of it, these states now are as fully, legally, and absolutely confederated as it is possible for them to be. . . . Our enemies . . . are mistaken when they suppose us kept together only by a sense of danger. . . . The people of these states were never so cordially united as at this day. By having been obliged to mix with each other, former prejudices have worn off, and their several manners become blended. A sense of common permanent interest, mutual affection (having been brethren in affliction), the ties of consanguinity daily extending constant reciprocity of good offices, similarity in language, in governments, and therefore in manners, the importance, weight and splendor of the union, all conspire in forming a strong chain of connexion, which must forever bind us together.*

Fortunately for the upholders of the doctrine of national supremacy in areas of national sovereignty, Jay was president of Congress at the time of a clash between Congress and Pennsylvania that resulted in Congress' annulling a state law. In 1778, the Pennsylvania Court condemned the sloop *Active* as a prize of war. The Standing Committee of Congress, overriding a Pennsylvania statute of the previous year, reexamined the facts and reversed the decree. When the Pennsylvania Admiralty Court refused to execute this new decree, Jay had a principal hand in writing the resolution which Congress adopted in March, 1779, resolving that "no act of any one State can or ought to destroy the right of appeals to Congress." In words assertive of the fundamental tenets of national sovereignty, Congress went on to declare:

> *That Congress is by these United States invested with the supreme sovereign power of war and peace:*
>
> *That the power of executing the law of nations is essential to the sovereign supreme power of war and peace:*



John Jay, painting believed to have been begun by Gilbert Stuart and finished by John Trumbull. National Portrait Gallery, Smithsonian Institution, Washington, D.C.



31. This Convention therefore in the Name & by the Authority of the Good People of this State doth ordain determin and declare that no Authority shall on any Pretence whatev be exercised over the People or Members of this State but such as shall be derived from and Granted by them. X

The beginning of the 1777 constitution of New York State, in the drafting of which Jay played a major role. It reads: "This Convention therefore in the Name & by the Authority of the good People of this State doth ordain, determine and declare that no Authority shall on any Pretence whatever be exercised over the People or Members of this State, but such as shall be derived from and Granted by them." New York State Library.

> *That the legality of all captures on the high seas must be determined by the law of nations:*
>
> *That the authority ultimately and finally to decide in all matters and questions touching the law of nations does reside and is vested in the sovereign supreme power of war and peace:*
>
> *That a controul by appeal is necessary, in order to compel a just and uniform execution of the law of nations. . . .*

Years later in the case now known as *Penhallow* v. *Doane* (1795), the Supreme Court took the occasion to affirm Jay's position in 1779 and upheld the jurisdiction in admiralty of the Continental Congress under its inherent war powers.

As peace commissioner in Paris and as secretary for foreign affairs during the years of the Confederation, Jay had brought home to him the weakness of the central government: its inability to make treaties of commerce with Great Britain and Spain or to compel the British to remove their troops from American soil, and its lack of force to stay the hand of the Barbary states in seizing American merchant ships and holding American seamen hostage. Convinced that only through constitutional reformation would America's standing in the world be enhanced, Jay became increasingly committed to examining the nation's problems from a continental rather than a parochial outlook and to advancing views on centralization and the subordination of the states. Alexander Hamilton, perhaps alone among the founders, shared these notions. Because he recognized the depth of feeling for state autonomy, Jay was more discreet than Hamilton about publicizing his views and usually confined them to private correspondence. But the recipients of his letters, who held his views in deep regard, were men of standing. Jay's views are expressed in two letters, the first to his father-in-law, William Livingston, Governor of New Jersey, the second to John Lowell, a Massachusetts commissioner in a current boundary dispute with New York:

John Jay to William Livingston
July 19, 1783

> *The rising power of America is a serious object of apprehension to more than one nation, and every event that may retard it will be agreeable to them. A continental, national spirit should therefore pervade our country, and Congress should be enabled, by a grant of the necessary powers, to regulate the commerce and general concerns of the confederacy.*

John Jay to John Lowell
May 10, 1785

> *It is my first wish to see the United States assume and merit the character of one great nation, whose territory is divided into counties and townships for the like purposes. Until this be done the chain which holds us together will be too feeble to bear much opposition or exertion, and we shall be daily mortified by seeing the links of it giving way and calling for repair one after another.*

As we have seen, Jay had long advocated a system of separation of powers and checks and balances, embodied to a degree in his New York Constitution of 1777. As the time for the Constitutional Convention neared, he spelled out his ideas to Jefferson in 1786;

John Jay to Thomas Jefferson
August 18, 1786

> *I have long thought, and become daily more convinced, that the constitution of our federal government is fundamentally wrong. To vest legislative, judicial, and executive powers in one and the same body of men, and that, too, in a body daily changing its members, can never be wise. In my opinion, these three great departments of sovereignty should be forever separated, and so distributed as to serve*

> *as checks on each other.*

Some months before the Constitutional Convention, he wrote at length to George Washington. He asserted his view that problems with the national government could not be solved merely by granting more power to Congress as it was then constituted. Unless governmental functions were separated, with an independent executive branch, the government could still not function effectively, even with additional authority. Jay went on to advocate a strong executive—although not a king—and an even more powerful central government, capable of removing state officials. Jay expressed concern, however, over the makeup of the pending constitutional convention. He doubted that the state legislatures had the authority to appoint delegations to this convention, and he proposed instead that representatives be chosen by the *people*, "the only source of just authority."

John Jay to George Washington
January 7, 1787

> *The situation of our affairs calls not only for reflection and prudence, but for exertion. What is to be done? is a common question not easy to answer.*
>
> *Would the giving* any *further degree of power to Congress do the business? I am much inclined to think it would not. . . .*
>
> *The executive business of sovereignty depending on so many wills, and those wills moved by such a variety of contradictory motives and inducements, will in general be but feebly done. Such a sovereignty however theoretically responsible, cannot be effectually so in its departments and officers without adequate judicatories. I therefore promise myself nothing very desirable from any change which does not divide the sovereignty into its proper departments. Let Congress legislate—let others execute—let others judge.*
>
> *Shall we have a king? Not in my opinion while other experiments remain untried. Might we not have a governor-general limited in his prerogatives and duration? Might not Congress be divided into an upper and lower house—the former appointed for life, the latter annually,—and let the governor-general (to preserve the balance), with the advice of a council, formed for that only purpose, of the great judicial officers, have a negative on their acts? Our government should in some degree be suited to our manners and circumstances, and they, you know, are not strictly democratical. What powers should be granted to the government so constituted is a question which deserves much thought. I think the more the better, the States retaining only so much as may be necessary for domestic purposes, and all their principal officers, civil and military, being commissioned and removable by the national government. These are short hints. Details would exceed the limits of a letter, and to you be superfluous.*
>
> *A convention is in contemplation, and I am glad to find your name among those of its intended members. To me the policy of such a convention appears questionable; their authority is to be derived from acts of the State legislatures. Are the State legislatures authorized, either by themselves or others, to alter constitutions? I think not; they who hold commissions can by virtue of them neither retrench nor extend the powers conveyed to them. Perhaps it is intended that this convention shall not ordain, but only recommend; if so, there is danger that their recommendations will produce endless discussion, perhaps jealousies and party heats.*
>
> *Would it not be better for Congress plainly and in strong terms to declare that the present Federal Government is inadequate to the purposes for which it was instituted; that they forbear to point out its particular defects or to ask for an extension of any particular powers, lest improper jealousies should thence arise; but that in their opinion it would be expedient for the people of the States without delay to appoint State conventions (in the way they choose their general assemblies), with the sole and express power of appointing deputies to a general convention who, or the majority of whom, should take into consideration the Articles of Confederation, and make such alterations, amendments, and additions thereto as to them should appear necessary and proper, and which being by them or-*

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> *dained and published should have the same force and obligation which all or any of the present articles now have? No alterations in the government should, I think, be made, nor if attempted will easily take place, unless deducible from the only source of just authority*—the People.

In April, 1787, just weeks before the Constitutional Convention met in Philadelphia, Congress sent a circular letter to the states that Jay had drafted. In it, Congress chastised the states for not adhering to the terms of the Treaty of Paris and pointed out that in this realm of diplomacy, Congress had supreme authority. The supremacy clause of the new Constitution incorporated this view.

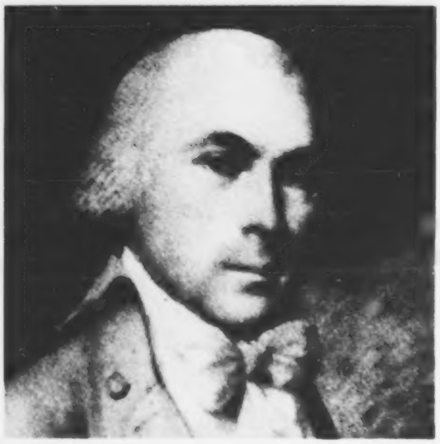
Circular Letter to the States
April 13, 1787

> *We have deliberately and dispassionately examined and considered the several facts and matters urged by Britain as infractions of the treaty of peace on the part of America, and we regret that in some of the States too little attention appears to have been paid to the public faith pledged by that treaty. Not only the obvious dictates of religion, morality and national honor, but also the first principles of good policy, demand a candid and punctual compliance with engagements constitutionally and fairly made. Our national constitution having committed to us the management of the national concerns with foreign States and powers, it is our duty to take care that all the rights which they ought to enjoy within our Jurisdiction by the laws of nations and the faith of treaties remain inviolate. And it is also our duty to provide that the essential interests and peace of the whole confederacy be not impaired or endangered by deviations from the line of public faith into which any of its members may from whatever cause be unadvisedly drawn. Let it be remembered that the thirteen Independent Sovereign States have by express delegation of power, formed and vested in us a general though limited Sovereignty for the general and national purposes specified in the Confederation. In this Sovereignty they cannot severally participate (except by their Delegates) nor with it have concurrent Jurisdiction, for the 9th Article of the confederation most expressly conveys to us the sole and exclusive right and power of determining on war and peace, and of entering into treaties and alliances &c. When therefore a treaty is constitutionally made ratified and published by us, it immediately becomes binding on the whole nation and superadded to the laws of the land, without the intervention of State Legislatures. Treaties derive their obligation from being compacts between the Sovereign of this, and the Sovereign of another Nation, whereas laws or statutes derive their force from being the Acts of a Legislature competent to the passing of them. Hence it is clear that Treaties must be implicitly received and observed by every Member of the Nation; for as State Legislatures are not competent to the making of such compacts or treaties, so neither are they competent in that capacity, authoritatively to decide on, or ascertain the construction and sense of them.*

The Federalist

Jay's constitutional thinking was sharpened and to some extent reshaped in the battle waged over ratification, in which he played a major role. After the Philadelphia Convention, he quickly joined Hamilton in preparing a series of replies to adverse New York newspaper comments appearing in the last week of September 1787 and the first week of October of that year, in articles signed "Cato," a pseudonym attributed to various Antifederalists ranging from Governor George Clinton to Abraham Yates, Jr. Hamilton's conception of *The Federalist* letters captured Jay's fancy at once and he provided the press with "Publius" letters numbers two through five. Turning out copy at a breakneck pace, Jay had his initial letter, No. 2, published in the New York *Independent Journal* on October 31, No. 3 on November 3, No. 4 on November 7, and the fifth letter three days later. Fortunately, James Madison joined the team at this point, for between November 10, when the fifth *Federalist* letter appeared, and some weeks before March 7, 1788—the date of publication of Jay's famous 64th *Feder-*

Alexander Hamilton, painting by Charles Willson Peale. Independence National Historical Park collection.



James Madison, pastel by James Sharples. Independence National Historical Park collection.

alist, the next and final contribution of Jay to that great seminal work—Jay suffered a serious bout of ill health.

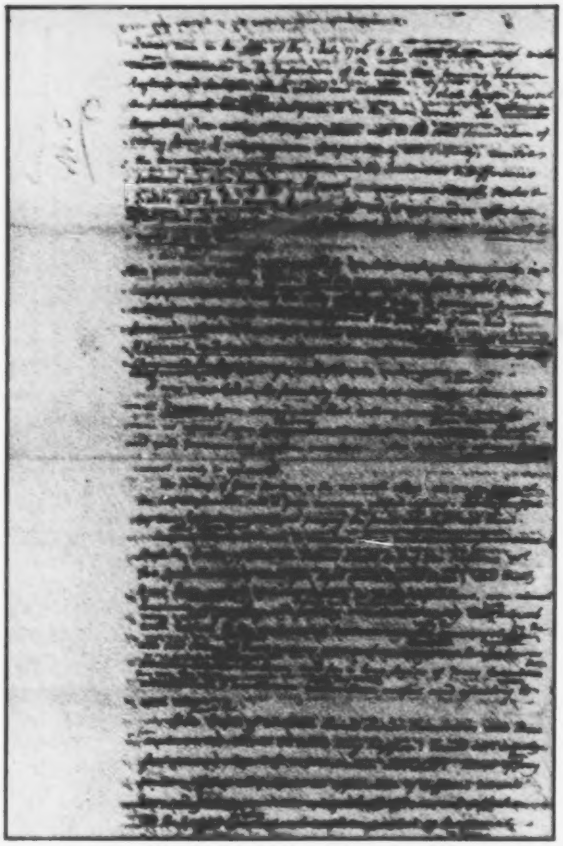
Of the original holograph drafts of the eighty-five *Federalist* letters, all published under the pseudonym "Publius" (the name probably derived from Publius Valerius Publicola, a founder and defender of the Roman Republic), only four are extant, and all four are drafts in Jay's hand.

A careful workman under pressure, Jay labored over his *Federalist* essays, and the published versions differ in some cases in significant ways from the drafts. Thus, in *Federalist* No. 3 Jay deleted the phrase "national courts," which appears in the draft and substituted "courts appointed by, and responsible only to one national government." This change reflected his sensitivity to the fear shared by the Antifederalists of a large federal judiciary administering a body of federal common law and undermining the authority of the state courts. The federal convention had side-stepped the issue in Article III, which vests the judicial power in a Supreme Court "and in such inferior Courts as the Congress may from time to time ordain and establish." Jay tried to handle the ticklish issue with circumspection.

In his draft of *The Federalist* No. 4, Jay anticipated the treatment of parties and factions which developed in Madison's celebrated initial contribution, the tenth *Federalist*. Pursuing the theme of the importance of national union in averting conflicts with foreign powers, Jay begins with a quotation attributed to Addison on the effects of party conflicts. "The Parties and Divisions amongst us may [in] several Ways bring destruction upon our Country at the same time that one united house would secure us against all the Attempts of a Foreign Enemy." Then in the final paragraph of the draft Jay speculated that if foreign governments "find us either . . . destitute of an effectual Government . . . or split into Factions of three or four independent . . . Republics or Confederacies . . . what a poor pitiful Figure will America make?" Jay therein acknowledges the weight of one of the most forceful contemporary arguments against party and faction, the likelihood that they would lead to foreign penetration and the establishment of outposts of alien influence in American public life. In these fleeting references, *which he subsequently suppressed and did not publish*, Jay was obviously referring to the relationship between factions and geographic divisions. He or Hamilton must have concluded that the subject deserved more concentrated attention in a future installment, and it was to be Madison, not Jay, who would pick up the theme of "the spirit of party and faction."

The fifth *Federalist* is an example of how Jay reworked his drafts to cut down verbiage, to use pithier language and to avoid offending the sensibilities of the opponents of the Constitution. His draft for No. 5 strikes this discordant note: "*Wicked Men of great Talents and ambition are the growth of every Soil, and seldom hesitate to precipitate their Country into any Wars and Connections which promote their Designs.*" Surely there was enough history to substantiate the assertion, with its prophetic cast, but sober second thoughts prompted its omission.

Federalist No. 64 constitutes Jay's seminal contribution to the Constitution and foreign affairs. He reworked this essay more than any of its predecessors, constantly seeking a crisper style and deleting evidences of anti-democratic bias. Among these points which he deleted are: (1) "The People at large may sometimes by Negligence or other Causes be led . . . into indiscreet appointments." (2) "The State Legislatures very seldom lose Sight of their obvious Interests, or commit their Management to Men in whom they have little or no Confidence." (3) "The People of America have not been hitherto sufficiently sensible of [the] importance" of "the absolute Necessity of order and System in the Conduct of . . . national Affairs." (4) "We must suppose that Members from each State, however well disposed to promote the general good of the whole, will yet be still more strongly disposed to promote that of their immediate Constituents." These four statements reflect Jay's own doubts about the judgment of the people and his conviction that state legislatures were actuated by parochial rather than national interests. On second thought he must have realized that an essay de-



Draft of The Federalist, No. 5, in Jay's hand, with emendations. Rare Book and Manuscript Library, Columbia University.

signed to have popular appeal and conciliate those jealous of maintaining state sovereignty should not strike either note.

Again in his original draft of No. 64, Jay revealed his bias toward consolidation. "Every objection to the federal Constitution which [these criticisms] imply may at least with equal force be applied to this State [New York]. Will the Governor and the Legislature of New York make Laws with an equal Eye to the Interests of all the Counties." On reflection Jay deleted this passage from his final text. The notion of reducing the status of the states vis-à-vis the federal government to that comparable of the standing of their own counties within the state—a notion privately expressed in the letter to Lowell written back in 1785—would have ignited those very fires of suspicion which *The Federalist* was designed to allay.

Address to the People of New York

Finally, some time after *Federalist* No. 64, Jay, in the early spring of '88, published his eloquent *Address to the People of New York*. Written prior to the spring election of delegates to the state ratifying convention, the *Address* was indubitably aimed at influencing the electors' choices. Unlike the relative short letters of "Publius," Jay's relatively lengthy *Address* not only presented a masterly critique of the weakness of the Confederation government under the Articles but dealt with specific Antifederalist criticisms, most importantly those dealing with the absence of a bill of rights in the proposed Constitution and the desirability, as the Antifederalists saw it, of calling a second convention to introduce a variety of amendments. Below are some of the most pertinent sections from Jay's *Address*.

Jay begins with the powerlessness of the Congress of the Confederation:

> *. . . By the Confederation as it now stands, the direction of general and national affairs is committed to a single body of men—viz., the Congress. They may make war, but they are not empowered to raise men or money to carry it on. They may make peace, but without the means to see the terms of it observed. They may form alliances but without ability to comply with the stipulations on their part. They may enter into treaties of commerce, but without power to enforce them at home or abroad. They may borrow money, but without having the means of repayment. They may partly regulate commerce, but without authority to execute their ordinances. They may appoint ministers and other officers of trust, but without power to try or punish them for misdemeanors. They may resolve, but cannot execute either with despatch or with secrecy. In short, they may consult and deliberate, and recommend, and make requisitions, and they who please may regard them.*

He then goes on to lament the condition of American commerce:

> *From this new and wonderful system of government it has come to pass that almost every national object of every kind is at this day unprovided for; and other nations, taking the advantage of its imbecility, are daily multiplying commercial restraints upon us. Our fur trade is gone to Canada, and British garrisons keep the keys of it. Our ship-yards have almost ceased to disturb the repose of the neighbourhood by the noise of the axe and the hammer; and while foreign flags fly tri-*

> *umphantly above our highest houses, the American stars seldom do more than shed a few feeble rays about the humbler masts of river sloops and coasting schooners. The greater part of our hardy seamen are ploughing the ocean in foreign pay, and not a few of our ingenious shipwrights are now building vessels on alien shores. Although our increasing agriculture and industry extend and multiply our productions, yet they constantly diminish in value; and although we permit all nations to fill our country with their merchandises, yet their best markets are shut against us. Is there an English, or a French, or a Spanish island or port in the West Indies to which an American vessel can carry a cargo of flour for sale? Not one. The Algerines exclude us from the Mediterranean and adjacent countries; and we are neither able to purchase nor to command the free use of those seas. Can our little towns or larger cities consume the immense productions of our fertile country? or will they without trade be able to pay a good price for the proportion which they do consume? . . . Our debts remain undiminished, and the interest on them accumulating; our credit abroad is nearly extinguished, and at home unrestored; they who had money have sent it beyond the reach of our laws, and scarcely any man can borrow of his neighbour. Nay, does not experience also tell us that it is as difficult to pay as to borrow; that even our houses and lands cannot command money; that law-suits and usurious contracts abound; that our farms fall on executions for less than half their value; and that distress in various forms and in various ways is approaching fast to the doors of our best citizens? . . .*

Next, Jay refutes those who allege a threat to individual liberty under the proposed Constitution:

> *We are told, among other strange things, that the liberty of the press is left insecure by the proposed Constitution; and yet that Constitution says neither more nor less about it than the constitution of the State of New York does. We are told that it deprives us of trial by jury; whereas the fact is, that it expressly secures it in certain cases, and takes it away in none. It is absurd to construe the silence of this, or of our own constitution, relative to a great number of our rights, into a total extinction of them. Silence and blank paper neither grant nor take away anything. Complaints are also made that the proposed Constitution is not accompanied by a bill of rights; and yet they who make the complaints know, and are content, that no bill of rights accompanied the constitution of this State. In days and centuries when monarchs and their subjects were frequently disputing about prerogative and privileges, the latter then found it necessary, as it were, to run out the line between them, and oblige the former to admit, by solemn acts, called bills of rights, that certain enumerated rights belonged to the people, and were not comprehended in the royal prerogative. But, thank God, we have no such disputes; we have no monarchs to contend with or demand admissions from. The proposed government is to be the government of the people; all its officers are to be their officers, and to exercise no rights but such as the people commit to them. The Constitution serves only to point out that part of the people's business which they think proper by it to refer to the management of persons therein designated; those persons are to receive that business to manage, not for themselves and as their own, but as agents and overseers for the people, to whom they are constantly responsible, and by whom only they are to be appointed. . . .*

Finally, Jay warns that no better document could emerge from a second convention:

> *Suppose this plan to be rejected, what measures would you propose for obtaining a better? Some will answer: "Let us appoint another Convention; and, as everything has been said and written that can well be said and written on the subject, they will be better informed than the former one was, and consequently be bet-*

Yours
"John Jay—"

Jay's signature, taken from letter to Gouverneur Morris, October 13, 1782. Gouverneur Morris papers, Rare Book and Manuscript Library, Columbia University.

> *ter able to make and agree upon a more eligible one."*
>
> *This reasoning is fair, and, as far as it goes, has weight; but it nevertheless takes one thing for granted which appears very doubtful; for, although the new Convention might have more information, and perhaps equal abilities, yet it does not from thence follow that they would be equally disposed to agree. The contrary of this position is most probable. You must have observed that the same temper and equanimity which prevailed among the people on former occasions no longer exist. We have unhappily become divided into parties, and this important subject has been handled with such indiscreet and offensive acrimony, and with so many little unhandsome artifices and misrepresentations, that pernicious heats and animosities have been kindled, and spread their flames far and wide among us. . . . A Convention formed at such a season, and of such men, would be too exact an epitome of the great body that named them. The same party views, the same propensity to opposition, the same distrusts and jealousies, and the same unaccommodating spirit which prevail without, would be concentrated and ferment with still greater violence within. . . . Suspicion and resentment create no disposition to conciliate, nor do they infuse a desire of making partial and personal objects bend to general union and common good. The utmost efforts of that excellent disposition were necessary to enable the late Convention to perform their task; and although contrary causes sometimes operate similar effects, yet to expect that discord and animosity should produce the fruits of confidence and agreement, is to expect "grapes from thorns and figs from thistles."*

Ironically, it was Jay who, to conciliate the Antifederalists at the New York State Ratifying Convention, drafted the circular letter to the states calling for a second convention, perhaps a tongue-in-cheek performance, but one that caused dismay to James Madison. The rapid adoption of Madison's first ten amendments fortunately made a second convention superfluous, but its spectre has still not been laid to rest.

In sum, Jay may well have been a patrician with a revolutionary past, but he remained committed to the ideals of a republic in which the people, directed by an elite of virtue and education, would govern, and to a national government with power to act. His call for the establishment of a strong national government and for the creation of a new kind of republican federalism constituted a sharp break with the political ways of the past, to which his opponents, the states' rights advocates, wished to adhere. Because of the coherence of his thinking and the eloquence of his expression, his views profoundly influenced the product of the Constitutional Convention.

His closing public life was marked in rapid succession by his chief justiceship (1789-1795), during which he negotiated the 1794 treaty that bears his name settling some, but by no means all, of the differences with Great Britain; and a two-term governorship of New York. The Jeffersonian revolution of 1800 spelled finis to the political ambitions of High Federalists like John Jay. But those who would dismiss him as sounding like the tired voice of the repudiated leadership fail to acknowledge that he was one of those who had brought a great revolution to a successful conclusion, who had shaped the Constitution built on revolutionary principles, and who had remained at heart a man convinced that inequality, the European caste system, and all the trappings of the *ancien regime* had no place in a New World, to whose peace and security he himself had contributed so much.

Suggested additional reading:

Richard B. Morris, ed., *John Jay: The Making of a Revolutionary, Unpublished Papers, 1745-1780* (1975).

———, *John Jay: The Winning of the Peace, Unpublished Papers, 1780-1784* (1980).

———, *John Jay: Confederation and Union; State Papers and Private Correspondence, 1784-1789* (forthcoming).

———, *John Jay: The Nation and the Court (1967).*

———, *Witnesses at the Creation: Hamilton, Madison, Jay and the Constitution* (1985).

Frank Monaghan, *John Jay* (1935).

George Pellew, *John Jay* (1890; reprinted, 1980).

Richard B. Morris is Gouverneur Morris professor of history emeritus at Columbia University, editor of the papers of John Jay, and co-chair of Project '87. He is author of numerous works in the period, including the Bancroft-award-winning *The Peacemakers: The Great Powers and American Independence* (1965; new ed., 1983), and the recently published *Witnesses at the Creation*, cited above.

For the Classroom

A Summer Seminar on "The American Experiment"

by HARVEY C. MANSFIELD, JR. AND DELBA WINTHROP

The seminar we taught for secondary school teachers in the summer of 1982 on "The American Experiment" was part of a greatly expanded program of the National Endowment for the Humanities and its energetic Chairman, William J. Bennett. With the goal of improving secondary education, Dr. Bennett puts his weight behind an effort to send secondary school teachers of humanities back to the classic books in their fields. Since we are firm believers in the superiority of the best books to current fashion, whatever that may be, we joined eagerly in this idea. It seemed to us that such a program applied to American politics would be so far from enslaving teachers to tradition that it would best reveal what is novel and distinctive about America. That is why we called the seminar "The American Experiment."—The Authors

Because America is so familiar to Americans, we take for granted the experimental nature of our politics. But this is the very theme of the two best books on American politics, *The Federalist* and Alexis de Tocqueville's *Democracy in America*. The seminar we conducted read these books as books, not merely as flat statements or documents in which to find famous phrases. We wanted to discover their authors' intent and, as the way to this, to consider their literary form, their style, and their mode of persuasion.

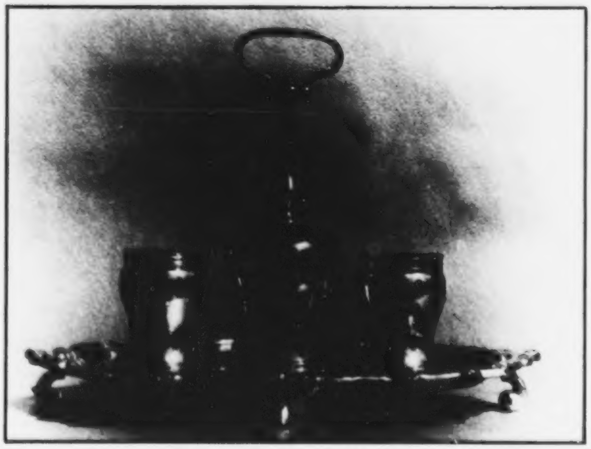
The Federalist, consisting of 85 essays, first appeared in New York newspapers in 1787–88 in order to urge ratification of the Constitution by that state. Immediately afterwards the essays were published as a book with the more serious aim of providing an authoritative, though unofficial, commentary on the Constitution. The authors — Alexander Hamilton, John Jay, and James Madison — wrote under a single pen name, "Publius," the popular savior of the Roman republic. Alexis de Tocqueville, the French statesman and scholar, wrote his *Democracy in America* after a brief trip to America and published it in two volumes, in 1835 and 1840. He too addressed both an immediate audience of partisans in his country and those in the present and future who might want to reflect on the nature of democracy.

That America is an "experiment" is announced by Alexander Hamilton on the first page of *The Federalist*, where he says that the American people are deciding for mankind whether self-government is possible; and it is repeated by James Madison in *The Federalist*, where he speaks of "that honorable determination . . . to rest all our political experiments on the capacity of mankind for self-government." These statements were not unique. Many other Americans, speaking just before *The Federalist* was written and long after, said the same, most memorably Lincoln in his Gettysburg Address. Tocqueville too looked to the New World to see the first and most complete modern democracy. He hoped the United States might be a model for Europe, not in the particulars of its laws, but as a more or less successful attempt at "the organization and establishment of democracy."

What does it mean to say that America is an *experiment*? As an experiment, it is first of all something chosen. America did not come about gradually in the course of time; it was *founded* at a certain time by certain men known as "Founders" who deliberated together in a constitutional convention. Although all looked to George Washington to be the first president, he was not the sole founder choosing the regime by himself. The Constitution was proposed by a few, then debated and ratified by many.

Second, as an experiment the American regime was something new. Although much was inherited — institutions of the British constitution and of state constitutions, and ideas from political philosophers in Europe — America was not a regime devoted to tradition. Its best inheritance—the space of a continent—was an opportunity. The first Americans, the Puritans, chose to come to the New World, and they were followed by waves of immigrants. These immigrants came over to escape persecution and poverty in their homelands, but they were not mere refugees or exiles wandering where chance might take them. The Puritans came purposefully to the new world to live a life of their own; later immigrants were attracted by the promise of America. The essential Americans have not been those born in America so much as those who chose it, or those, once in America, who left for the frontier. Today, Americans pick where they will live; few of us live where we were born, and none of us does so without ever thinking of moving.

Third, the American constitution is an experiment on behalf of all mankind. It would fail if it proved not to be valid for all peoples but for Americans alone because of their particular circumstances or national superiority. Whereas the English pride themselves on "the rights of Englishmen," Americans take pride in the rights of man or, as we say today, in human rights. Americans



Silver ink stand designed by Philip Syng in 1752 for the Pennsylvania Assembly, used by the delegates to sign the federal Constitution. Independence National Historical Park collection.

say to the world: "You can have what we have, and we are superior only because we have shown this to you." Americans are not content with liberty merely for themselves, but they would be untrue to their principles, especially the right of consent, if they were to attempt to force their way of life on others as do most other revolutionaries. So they tout it or "sell" it to the world.

The American experiment is an experiment of an hypothesis. When America was founded, one could not be sure that self-government would work. At that time the question was not "decided," as we tend to believe today. And it was an innovation to found a nation by constructing a government that had not yet been tried, indeed to make its founding the trial of a theory as yet untested in experience or tradition. American political practice has not merely been shaped by theory, but it was deliberately intended to serve as the test of theory.

Last, America is an experiment of self-government, of human beings governing themselves. However much Americans at the founding may have sought the guidance of God, or prayed for His blessing on their undertaking, their principle was not divine right, their laws did not come from above, their government was not a theocracy, and their people were not chosen by God for a divine mission.

Self-government in America was popular government—but of a new kind. How was this new kind presented in *The Federalist*? All previous popular government had failed (as we learn from *The Federalist* Nos. 9, 10, 14) when the majority of the people behaved tyrannically as a faction hostile to the rights of others or to the interest of the community. Two new remedies for this general failure were found in modern political science, especially in Locke and Montesquieu. These were the principle of representation, by which government is delegated to a small number elected by the rest, and the idea of an extensive republic, in which the imperial size that had previously been thought fatal to a republic is deliberately embraced as a means of its salvation. If you "extend the sphere" or enlarge the orbit, you include many more "fit characters" to serve as representatives, who are more likely to be elected from large constituencies; and, most important, you take in a greater variety of parties and interests less likely to combine in a majority faction than a homogeneous majority.

This "wholly popular government" is derived in all its parts from the people, on the one hand, but on the other, being wholly representative, it never allows the people to rule directly. Thus it gains the legitimacy of democratic consent while not sacrificing the advantages of aristocracy arising from the election of representatives who choose better than the people would choose on their own. But the advantages of aristocracy are not presented as such in *The Federalist*, for to do so would risk affronting the "republican genius" of the American people and hand a winning card to the Antifederalists who were already gravely suspicious of aristocracy in the new constitution.

Therefore, *The Federalist* is much more careful in explaining the third great innovation of modern political science in the Constitution, the separation of powers. This cannot be so easily described as a "republican remedy" to a republican disease, as can representation and extensive size, which cure faction by making government responsible to the people and by adding more people. It is indeed described as an "auxiliary precaution" (*The Federalist* No. 51) — auxiliary, that is, to representation; and it might more candidly be called a nonrepublican auxiliary to republican government.

Accordingly, *The Federalist* developed a justification for the separation of powers in two stages. The first is a more popular presentation that stresses the negative, republican concern of preventing tyranny, to be found in *The Federalist* Nos. 47–51. But a less popular account, addressed to the ambitious or even to the "fit characters" mentioned in *The Federalist* No. 10 as one advantage of representation but left undiscussed there, appears in the later sections of *The Federalist* devoted to explaining the terms and the tasks of the three branches of government. Actually, the tasks are inferred from the terms. The merits required for each branch are presented as the expected consequences of merely formal characteristics; the number and term of Senators and of the President; and the lifetime tenure of judges. Thus the argument of *The Federalist*, in respect to separation of powers and in general, moves from what is republican to what is good for republican government. Its rhetoric is "politic," not in the low sense of pandering to current prejudices but in the best sense of reforming those prejudices insofar as possible. To see the political science in *The Federalist* one must read it as a book and learn to appreciate its politic rhetoric.

When Tocqueville came to America, its experiment was nearly a half-century old. By that time democracy, understood as the principle of equality of condition by contrast to aristocratic rank, was established, and could no longer be chosen or rejected by Americans or by Tocqueville's European audience; it could only be accepted. But whether such equality could be maintained in conjunction with liberty and human dignity was still an open question.

The first volume of *Democracy in America* surveys the "forms" and "matter" of American politics. Beginning with the physiognomy of the New World and the mores of its first settlers, Tocqueville moves to an analysis of the political institutions of the United States and, above all, its federal constitution. He then examines her "matter," the citizens who live both under and above these forms. How form and matter come to be unified we learn in the second volume. Its theme is the modern soul—its intellect, sentiments, and habits. To this democratic soul is contrasted the soul bred by aristocratic, or pre-modern politics. Knowledge of this forgotten or despised alternative informs the critique of modern politics with which the book ends.

If *The Federalist* is imbued with a guarded optimism about the future of republicanism, Tocqueville intends to supplement it with a salutary pessimism. While explicitly praising our Founding Fathers for their earnest deliberations, he tacitly questions the remedies they had adopted for republican diseases. Representation as a remedy for majority faction is insufficient because it hinders citizens from seeing that their interest lies in political activity and discourages them from participation. To participate in politics can inculcate the habit of reasoned choice while at the same time revealing the limits of reasoned choice. The second remedy, an extended republic, by which *The Federalist* means a commercial republic, exacerbates popular disinterest in politics by fostering a preoccupation with material well-being. The separation of powers, which is designed to permit "fit characters" to come to the fore, cannot free even the ablest from the dominion of an unreflective and often unjust or unsound public opinion.

Democratic public opinion is egalitarian, individualistic, and materialistic. In theory each citizen is equal in his ability to look after matters of his own exclusive concern. But Tocqueville points out that in fact we are often unable to provide for all our interests by our own efforts. Individualism intensifies our preoccupation with providing for our own material needs. Yet even the modest goal of providing for oneself is beyond the reach of some. Those who are incapable will hardly desire to discover that an "equal" might be more capable than they are, nor can they expect freely given assistance from other individuals. It is all too tempting to rely instead on a powerful and impersonal bureaucracy, first to do what we ask and then to tell us what can be done and therefore should be asked. Democratic citizens are soon relieved of the necessity and finally of the ability to make even the smallest choice.

For Tocqueville, America's experiment in republican government is endangered not only by imprudent popular willfulness, but especially by thoughtless, almost slavish affection for big government. In the face of this danger Tocqueville proposes his own remedies which are somewhat different from *The Federalist*'s: freedom of association, local self-government, jury service, judicial protection of individual rights, and a general respect for legal and constitutional forms. These are the remedies needed to preserve liberty and dignity in American democracy.

* * *

As the following syllabus indicates, we began our seminar with Alexander Solzhenitsyn's celebrated Harvard commencement address questioning the success of the American experiment. We then presented *The Federalist* and *Democracy in America* in a context of the liberal political philosophy, or political science, which preceded them and to which both books referred. This political science, found in Locke and Montesquieu, was "liberal" in the widest sense of putting liberty before anything else, and of protecting liberty with a constitution limiting the powers of government. The American experiment made use of liberal political science but improved on it in ways explained by the *The Federalist* and by Tocqueville. Discussion of one of the greatest obstacles to America's success, the problem of slavery and its aftermath, concluded the seminar.

SYLLABUS
"The American Experiment"
NEH Summer Institute
July 11 – August 6, 1983

Meeting

1 Has the American experiment succeeded?
Alexander Solzhenitsyn, *A World Split Apart* (Harper & Row, 1979).

2 The State of Nature as the basis of modern politics:
Locke, *Second Treatise of Government*, chs. 1–9.

3 Modern constitutionalism:
Locke, *Second Treatise*, chs. 10–19.

4 Moderation and the Regime of Liberty:
Montesquieu, *Spirit of the Laws*, I; II, 1–2;
III, 1–3; IV, 4–5, 8; VIII, 1–4; XI, 1–6;
XII, 1–4; XIX, 27.

5 The Right of Revolution:
The Declaration of Independence and "Two Letters on the Declaration" in Thomas Jefferson, *Selected Writings* (H. C. Mansfield, Jr., ed., AHM Publishing Co., 1979).

6 Union and popular government:
The Federalist, Nos. 1–14.

7 Necessary powers for the union:
The Federalist, Nos. 15–36; Marvin Meyers, *The Mind of the Founder* (rev. ed., University Press of New England, 1981), pp. 13–43, 69–86.

8 Energy and stability, and separation of powers:
The Federalist, Nos. 37–51.

9 Congress:
The Federalist, Nos. 52–66.

10 Energy in the Executive:
The Federalist, Nos. 67–77.
Meyers, *The Mind of the Founder*, pp. 199–214; Alexander Hamilton, *Pacificus*, No. 1 (Harold Syrett, ed., *Papers of Alexander Hamilton*, v. 15, pp. 33–43 (Columbia University Press, 1969)).

11 Judiciary and a Bill of Rights:
The Federalist, Nos. 78–85; Meyers, *The Mind of the Founder*, pp. 155–59.

12 America's Point of Departure:
Tocqueville, *Democracy in America* (Doubleday/Anchor, 1969), pp. 1–98.

13 The American Constitution and Popular Sovereignty:
Tocqueville, pp. 99–315.

14 The Three Races:
Tocqueville, pp. 316–413.

15 Democracy and the Intellect:
Tocqueville, pp. 417–502.

16 Individualism and Democratic Associations:
Tocqueville, pp. 503–558.

17 Democratic Mores:
Tocqueville, pp. 561–664.

18 Democratic Despotism:
Tocqueville, pp. 667–705.

19 Freedom and Popular Sovereignty:
Robert W. Johannsen, *The Lincoln-Douglas Debates* (Oxford University Press, 1965), pp. 14–74,
75–79, 86–92, 145–149, 162–163, 195–200,
206–226, 229–239, 242–244;
Meyers, *The Mind of the Founder*, pp. 313–336;
Thomas Jefferson, *Selected Writings*, pp. 50–52.

20 A Debate on Affirmative Action:
Ronald Dworkin, "Why Bakke Has No Case," *New York Review of Books*, Nov. 10, 1977. Thomas Sowell, "*Weber* and *Bakke*, and the Presuppositions of Affirmative Action," in *Civil Rights: Rhetoric or Reality* (William Morrow, 1984), 37–60.

Bicentennial Gazette

An Introductory Bibliography to American Constitutional History

by KERMIT L. HALL

Since its creation, the American Constitution has stimulated a steady stream of literature about both its history and operation. This bibliography is an introduction to that vast literature. It is selective in the truest sense of the word. The numbers of books devoted to the Constitution run into the thousands; writings in history and political science journals and law reviews are even more extensive. This brief bibliography should nonetheless have value for teachers of American history and civics and the general reading public curious about our constitutional history. A fuller listing of the historical literature on the Constitution, especially that available in article form, can be found in Kermit L. Hall, comp., ***A Comprehensive Bibliography of American Constitutional and Legal History,*** 5 vols. (Millwood, N.Y., Kraus Thomson International, 1984).

Creation of the Constitution and the Founding

Bailyn, Bernard. ***The Ideological Origins of the American Revolution*** (Cambridge: Belknap Press of Harvard University Press, 1967).

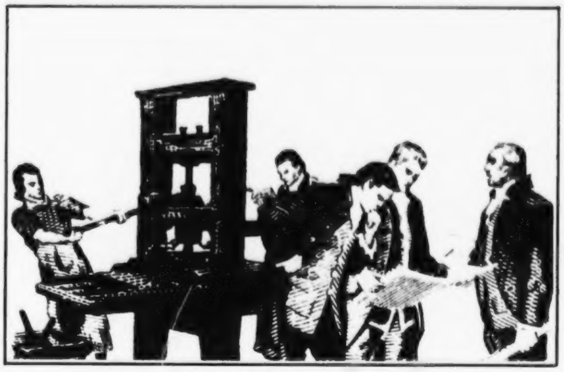
A penetrating analysis of the ideas that shaped both the revolutionary era's politics and the development of a distinctive form of American constitutionalism. Bailyn identifies English republican writers as the chief source of American constitutional thought.

Becker, Carl L. ***The Declaration of Independence: A Study in the History of Political Ideas*** (New York: Alfred A. Knopf, 1956 [1st ed., 1922].)

An indispensable introduction to the text of the Declaration of Independence. Becker believed that the ideas of John Locke shaped not only the Declaration but the American Constitution, a position hotly disputed in Garry Wills, ***Inventing America: Jefferson's Declaration of Independence*** (Garden City, New York: Doubleday & Company, 1978). Wills contends that Locke counted for little and that the ideas of the Scottish Moral Enlightenment better explain the Declaration.

Bowen, Catherine Drinker. ***Miracle at Philadelphia: The Story of the Constitutional Convention, May to September 1787*** (Boston: Little, Brown & Co., 1966).

A highly readable and reliable account of the day-to-day events in the Constitutional Convention.



Brant, Irving. ***The Bill of Rights; Its Origin and Meaning*** (New York: New American Library, 1967 (paperback); Indianapolis: Bobbs-Merrill, 1965 (hardback)).

A history of the Bill of Rights from its beginnings to the recent past. Brant, who was also the biographer of James Madison, offers valuable insights into the intellectual background of the founding era. On the politics of the Bill of Rights, a fascinating subject in its own right, see: Robert A. Rutland, ***The Birth of the Bill of Rights, 1776-1791*** (Chapel Hill: University of North Carolina Press, 1955).

Corwin, Edward D. ***The "Higher Law" Background of American Constitutional Law*** (Ithaca, N.Y.: Cornell University Press, 1955).

An eloquent introduction to the idea of the Constitution as "Higher Law." From the time of its first publication in the *Harvard Law Review* in 1929 this exploration of the remote sources of the American Constitution has been one of the most universally admired and heavily used essays in the history of constitutional law and political thought.

Levy, Leonard W. ed. ***Essays on the Making of the Constitution*** (New York: Oxford University Press, 1969).

A fascinating collection of some of the best writing on the political and social forces, as well as the philosophical notions, that shaped the Constitution. The essays range from Charles Beard's famous "economic" interpretation of the Convention to Stanley M. Elkins and Eric McKitrick's provocative analysis of the relationship of the framers' youth to their continental vision.

McDonald, Forrest. ***We the People: The Economic Origins of the Constitution*** (Chicago: University of Chicago Press, Midway Reprint Series, 1976 [1st ed. 1958]).

The most convincing attack on the Beard thesis. McDonald shows that the framers operated under a complex set of motives and that the factions in the Constitutional Convention were a good deal more fluid than Beard had believed.

Morris, Richard B. ***Seven Who Shaped Our Destiny*** (New York: Harper & Row, Publishers, 1973).

A lively account of the most important figures in the revolutionary era and the creation of the Constitution. Biographical in nature, but filled with insights about the development of American attitudes toward liberty and authority.

Rakove, Jack N. ***The Beginnings of National Politics: An Interpretive History of the Continental Congress*** (New York: Alfred A. Knopf, 1979).

A clearly written and forcefully argued account of why the Articles of Confederation eventually gave way to the Constitution. Certainly the best account of political activity leading to the calling of the Constitutional Convention.

Wood, Gordon S. ***The Creation of the American Republic, 1776-1787*** (New York: W. W. Norton, 1972 [1st ed., 1969]).

One of the most important books ever written about the Constitution. Wood stresses the inherent conservatism of the Federalists in writing the Constitution, and he also shows that they made a distinctive contribution to western political thought through republican ideology.

The Nineteenth Century

Beth, Loren P. ***The American Constitution, 1877-1917*** (New York: Harper & Row, 1971).

A volume in the New American Nation Series, this book provides the single best synthesis of constitutional developments during these years. Beth, a political scientist, does particularly well at relating institutional developments to broad changes in constitutional policy-making by the Supreme Court.

Fehrenbacher, Don E. ***The Dred Scott Case; Its Significance in American Law and Politics*** (New York: Oxford University Press, 1978).

A brilliant examination of one of this nation's most famous constitutional law cases. This Pulitzer Prize-winning study probes the issues of slavery, the coming of the Civil War, and the meaning of judicial power in our constitutional order.

Hyman, Harold, and William Wiecek. ***Equal Justice Under Law: Constitutional Development 1835-1875*** (New York: Harper & Row, 1982).

A scholarly study filled with insights based on the most recent historical writing. The authors analyze extensively the 13th, 14th, and 15th amendments, and they argue provocatively that the significance of each must be understood in relationship to the others.

Levy, Leonard W. ***Legacy of Suppression: Freedom of Speech and Press in Early American History*** (Cambridge: Belknap Press of Harvard University Press, 1960).

A critical assessment of the early struggles over freedom of speech and press, particularly the attitudes which fueled the famous Alien and Sedition Acts. Levy gives low marks to the Jeffersonians as well as the Federalists on matters of civil liberties.

Newmyer, R. Kent. ***The Supreme Court under Marshall and Taney*** (New York: Crowell, 1968).

A readable synthesis of the work of the Marshall and Taney Courts which stresses their fundamental nationalism. It is also a good introduction to the basic workings of the Supreme Court.

Stites, Francis N. ***John Marshall: Defender of the Constitution*** (Boston: Little, Brown and Company, 1981).

A brief, highly readable account of the nation's greatest Supreme Court justice. It also provides an excellent sense of the interaction of law and politics in the early Republic.

The Twentieth Century

Carter, Dan T. ***Scottsboro: A Tragedy of the American South*** (Baton Rouge: Louisiana State University Press, 1979 [1st ed., 1969]).

A fascinating analysis of the famous Scottsboro, Alabama rape case and the problem of Southern racism during the 1930s. The book is especially important in relating the constitutional commitment to fair trial and the right to counsel in the context of super-heated social tensions.

Cortner, Richard C. ***The Supreme Court and the Second Bill of Rights*** (Madison, Wisconsin: The University of Wisconsin Press, 1981).

A systematic description of the nationalization of the Bill of Rights through decisions of the Supreme Court. Cortner explains how the Supreme Court interpreted the "due process" clause of the 14th amendment to mean that the Bill of Rights, originally a limitation only on the federal government, also protected individuals against state government action.

Kluger, Richard. ***Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality*** (New York: Vintage, 1977).

A fascinating account of the battle against segregated schools. Kluger starts with Reconstruction and ends with the civil rights turbulence of the 1960s. Particularly good in explaining the litigation strategy pursued by the NAACP's Legal Defense Fund in *Brown* and other civil rights cases.

Kutler, Stanley I. ***The American Inquisition: Justice and Injustice in the Cold War*** (New York: Hill and Wang, 1982).

A provocative yet balanced analysis of the interaction of anticommunism and constitutional values during the Cold War. Kutler draws expertly on case studies to drive home the personal and institutional consequences of political persecution.

Lewis, Anthony. ***Gideon's Trumpet*** (New York: Random House, 1964).

A highly readable account of the Supreme Court's 1962 landmark decision in *Gideon* v. *Wainwright*. The Court extended the right to counsel to the poor, and Lewis shows forcefully how human actors in the constitutional process contributed to the development of this important right.

Murphy, Paul L. ***The Constitution in Crisis Times, 1918-1969*** (New York: Harper & Row, 1972).

An historical overview of constitutional developments with emphasis given to their social and cultural roots. Murphy gives heavy, but not exclusive, attention to the emergence of civil liberties and civil rights.

General

Berger, Raoul. ***Government by Judiciary: The Transformation of the Fourteenth Amendment*** (Cambridge: Harvard University Press, 1977).

A trenchant attack on the Supreme Court's development of the 14th amendment. Berger throws darts at all of the twentieth-century liberal proponents of an activist judiciary. He hits the target often enough to make the book important, although flawed.

Bickel, Alexander M. ***The Least Dangerous Branch: The Supreme Court at the Bar of Politics*** (Indianapolis: Bobbs-Merrill Co. Inc., 1962).

A brief, forceful meditation on the relationship of the Supreme Court to the two other branches. Bickel carefully defines the limited role of judicial review in the American system while simultaneously arguing that the principled nature of American constitutionalism depends upon judicial power.

Burns, James MacGregor. ***The Deadlock of Democracy: Four Party Politics in America*** (Englewood Cliffs, N. J.: Prentice-Hall, 1963).

A penetrating discussion of the divisions within American political parties between their executive and legislative wings. Burns, one of the nation's foremost political scientists, brings a sharp analytical sense to the practical operation of parties in the American constitutional system.

Kelly, Alfred H., Winifred A. Harbison, and Herman Belz. ***The American Constitution: Its Origins and Development,*** 6th ed. (New York: W. W. Norton & Co., 1983 [1st ed., 1948]).

The 6th edition is newly revised and rewritten. It provides a sweeping and detailed examination of the development of American constitutionalism from its English origins to the present. It also contains an excellent annotated bibliography.

McCloskey, Robert G. ***The American Supreme Court*** (Chicago: University of Chicago Press, 1960).

A lucid account of the development of the Supreme Court and its power of judicial review. Although the book covers only the period through the 1950s, it remains perhaps the single best introduction to the history of the Court.

McLaughlin, Andrew C. ***The Foundations of American Constitutionalism*** (New York: New York University Press, 1932).

A brief, lively analysis of the historical origins of the principle of constitutionalism. McLaughlin emphasizes the role of New Englanders in transforming seventeenth- and eighteenth-century ideas into workable frames of government.

Schlesinger, Arthur M., Jr. ***The Imperial Presidency*** (Boston: Houghton Mifflin, 1973).

A shrewd analysis of the growth of presidential power written from the perspective of Richard Nixon and the Watergate disaster. Schelsinger deftly blends the development of constitutional law with political drama and international relations.

White, G. Edward. ***The American Judicial Tradition: Profiles of Leading American Judges*** (New York: Oxford University Press, 1976).

White skillfully puts biography into the service of constitutional and legal history through an examination of the lives of the nation's most prominent judges. Its panoramic coverage provides a sense of change within unity in the American judicial tradition.

Suggested additional bibliographical sources:

Earlean M. McCarrick, ed. *U. S. Constitution: A Guide to Information Sources*. Gale Research Company, 1980.
Stephen M. Millett, ed. *A Selected Bibliography of American Constitutional History*. ABC/Clio Press, 1975.

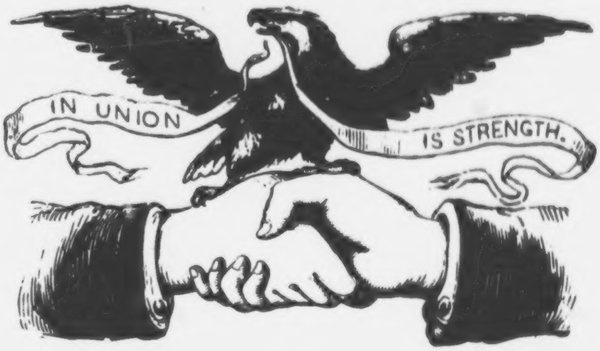
Kermit L. Hall is professor of history and law at the University of Florida. He has held grants from the National Science Foundation and the National Endowment for the Humanities, and he is the author of *The Rule of Law in American History* (forthcoming from Oxford University Press). He is currently engaged in a study of the impact of popular election on state judicial decision-making.

THE NATIONAL ENDOWMENT FOR THE HUMANITIES

Special Initiative for the Bicentennial of the United States Constitution

NEH Grants for Individual Fellowships and Stipends

The following list includes grants made through February 1985. Grants for earlier years are those which have not been listed before in ***this Constitution.***



1982

John P. Diggins
University of California
Irvine, CA 92717
Project: The Autumn of Authority: Dilemmas of Liberal Social Thought in America, 1875-1975.

A. Roger Ekirch
Virginia Polytechnic Institute
& State University
Blacksburg, VA 24061
Project: Convict Labor and Social Order in the 18th-Century Chesapeake.

Lawrence C. Goodwyn
Duke University
Durham, NC 27706
Project: Analysis of Democratic Components, Both Cultural and Structural, in Advanced Industrial Societies in US & Europe.

Eva N. Hodgson
Essex County College
Newark, NJ
Project: Selected Topics in the History of Human Rights

Ellis Katz
Temple University
Philadelphia, PA 19122
Project: Political Theories of Pennsylvania Constitutionalism

1983

David G. Barnum
DePaul University
Chicago, IL 60614
Project: Anglo-American Civil Liberties: Comparative Protection of Human Rights in Britain and the United States.

Edmund D. Carlson
Virginia Wesleyan College
Virginia Beach, VA 23452
Project: Ethical Roots of the American Regime: Statecraft and Citizenship in a Liberal Democracy.

John J. Carroll
Southeastern Massachusetts University
North Dartmouth, MA 02747
Project: The Development of Theories of a Higher Law and of Theories of State Constitutions in the U.S.

John L. Gwaltney
Syracuse University
Syracuse, New York 13210
Project: Different Drummers: Dissent in America.

Elizabeth P. McCaughey
Columbia University
New York, NY 10028
Project: Framing the Federal Constitution: the Convention of 1787.

Carl L. Swidorski
College of Saint Rose
Albany, NY 12203
Project: The Supreme Court and the American Experience with Democracy, 1789-1801.

Andreas Teuber
University of Washington
Seattle, WA 98195
Project: The Secret Ballot: Philosophy, Politics and History.

Professor G. Edward White
School of Law
University of Virginia
Charlottesville, VA 22901
Project: The Marshall Court, 1816-35: Volume Three of the Holmes Devise History of the Supreme Court of the United States.

1984

Sotirios A. Barber
University of South Florida
Tampa, FL 33620
Project: Theories of Judicial Review: The Importance of the Original Theory for the Future.

James H. Broussard
Lebanon Valley College
Annville, PA 17003
Project: Redefining the Republican Constitution: The Debate over Republican Nationalism, 1815-1820.

Harvey M. Flaumenhaft
St. John's College
Annapolis, MD 21401
Project: The Administrative Republic of Alexander Hamilton.

Hendrik Hartog
School of Law
University of Wisconsin
Madison, Wisconsin 53706
Project: Customs in the Courts: American Legal History and the Semi-Autonomous Social Field

Robert S. Hill
Marietta College
Marietta, OH 45750
Project: Hume and the Founding.

Howard Jones
University of Alabama
University, AL 35486
Project: The Amistad Mutiny: Republicanism on Trial.

Michael G. Kammen
Cornell University
Ithaca, NY 14853
Project: The Cultural Impact of the U.S. Constitution, 1789-Present.

Robert D. Loevy
Colorado College
Colorado Springs, CO 80903
Project: The Civil Rights Act of 1964.

David B. Lyons
Cornell University
Ithaca, NY 14850
Project: Justification, Political Morality, and the Constitution.

Paul C. Peterson
University of South Carolina
Coastal Carolina College
Conway, SC 29526
Project: The Political Science of The Federalist.

Ronald M. Peterson
California State Polytechnic University
Pomona, CA
Project: Montesquieu's Integration of Natural Law with His Findings on Historical Determinism.

Jack N. Rakove
Stanford University
Stanford, CA 94305
Project: Original Meanings: Political Experience and Thought in the Framing of the Constitution.

Martin J. Schultz
Pennsylvania State University
Sharon, PA 16146
Project: Divorce in the Early Republic: Evidence from State Supreme Court Records.

John W. Shy
University of Michigan
Ann Arbor, MI 48109
Project: The Effects of the American Revolution on Three American Communities.

John A. Wettergreen
San Jose State University
San Jose, CA 95192
Project: What the Founders Meant by Regulation.

Bradford P. Wilson
California State University
San Bernardino, CA 92407
Project: The American Constitutional Order and the Rights and Liberties of Criminal Defendants.

Jean M. Yarbrough
Loyola University of Chicago
Chicago, IL 60626
Project: The Moral Foundations of the American Republic.

1985

Robert A. Becker
Louisiana State University
Baton Rouge, LA
Project: Consent of the Governed: Election of the State Ratifying Conventions.

Steven R. Boyd
University of Texas
San Antonio, TX
Project: The Impact of the Constitution: The Effects of the Adoption of the Constitution, 1789–1815.

Anne M. Cohler
Chicago, IL
Project: Spirit and Moderation: Montesquieu and the Constitution.

William F. Connelly, Jr.
Clemson University
Clemson, SC
Project: The Federalist and Anti-Federalist Roots of Pluralist and Elite Theories of Interest Group Politics.

Walter E. Dellinger
Duke University
Durham, NC
Project: Constitutional Change: The Amendment Process.

Murray P. Dry
Middlebury College
Middlebury, VT
Project: The Founding Principles and the Modern Supreme Court's Treatment of Race and Gender-Based Classifications.

Paul D. Erickson
Harvard University
Cambridge, MA 02138
Project: The Romantic Myths of the American Constitution from 1789 to 1865.

Paul Finkelman
SUNY/Binghamton
Binghamton, NY
Project: Fugitive Slaves and the American Constitution: A History of the Fugitive Slave Laws.

Tony A. Freyer
University of Alabama
University, AL
Project: British Influence and the American Antitrust Tradition, 1888-1914.

Hilail Gildin
CUNY/Queens College
Flushing, NY
Project: Aristotle on the Rights to Rule and Modern Constitutional Democracy

Gerald Gunther
Stanford University
Stanford, CA 94305
Project: The Biography of Learned Hand: The Judge and the Man

Ralph C. Hancock
Hillsdale College
Hillsdale, MI
Project: The Role of Religion in Tocqueville's Account of American Democracy.

Eugene W. Hickok
Dickinson College
Carlisle, PA
Project: Constitutionalism in Congress.

Owen S. Ireland
State University College of New York
Brockport, NY 14420
Project: Culturally-Based Partisan Politics in Pennsylvania, 1776-1790, and the Creation of the U.S. Constitution.

Sanford H. Kessler
North Carolina State University
Raleigh, NC 27695
Project: Tocqueville on Freedom and the American Character.

Russell A. Kirk
Mecosta, MI 49332
Project: Edmund Burke and the American Constitution.

Ronald M. Labbe
University of Southwest Louisiana
Lafayette, LA
Project: SLAUGHTER HOUSE CASES: Civil Rights, Property Rights, and Judicial Power at the Crossroads.

William Lasser
Clemson University
Clemson, SC
Project: The Supreme Court in Crisis.

Robert D. McClure
Syracuse University
Syracuse, NY 13210
Project: The Civic Implications of the Modern Rejection of the Founder's Concept of Public Opinion.

Drew R. McCoy
University of Texas
Austin, TX 78712
Project: The Last of the Fathers: James Madison and the Republican Legacy, 1817 to 1836.

Charles W. McCurdy
University of Virginia
Charlottesville, VA
Project: Stephen J. Field and the Growth of Judicial Power in America, 1816-1899.

Thomas L. Pangle
University of Toronto
Toronto, Canada
Project: The Philosophic Principles Informing the American Constitution.

Michael J. Sandel
Harvard University
Cambridge, MA
Project: The Predicament of Liberal Democracy in America.

Harry N. Scheiber
University of California
Berkeley, CA 94720
Project: Federalism & Constitutional Values: California & the Nation, 1849-1985.

James F. Shepherd
Whitman College
Walla Walla, WA
Project: United States Tariff History During the 1780's.

Thomas P. Slaughter
Rutgers University
New Brunswick, NJ 08903
Project: Liberty, Order, and the Excise: The Whiskey Rebellion and the Politics of Frontier Unrest in Early America.

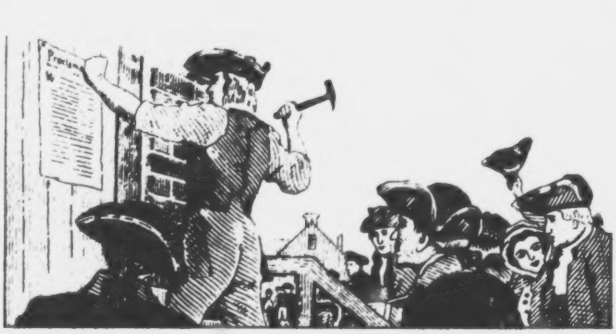
NEH Grants for General Programs, January, 1985

University of Georgia
Carl Vinson Institute of Government
Athens, GA 30602
Contact: Mary Hepburn
PROJECT: CONSTITUTION 200 is a project proposed to celebrate the bicentennial of the U.S. Constitution with public assemblies and a book, *The Constitution 200 Reader*, based on papers, questions, and commentary in those assemblies. The assemblies will be held in different areas of three southern states—Alabama, Georgia, and South Carolina. The assemblies and the publication are designed to bring scholars in the humanities into interaction with people from various community groups to review and reflect on enduring constitutional principles, issues, and value conflicts. The assemblies will be held September 1985 through December 1986. The reader will be used with numerous smaller groups to carry on the observance and discussion in the three states throughout 1987-88.

The Claremont Institute
480 N. Indian Hill Blvd.
Claremont, CA 91711
Contact: Ken Masugi
PROJECT: "A New Order of the Ages," 1986-1988. The first two years of this project (1983-85) were supported by a NEH grant. All activities of the project are devoted to examining and elucidating the American Founders' claim that the American Founding marked a new epoch in human history, "a new order of the ages." The project is centered in Claremont and reaches a national audience through annual conferences, Constitutional Statesman Lectures, community speaking engagements, local library exhibits, and publications.

Wake Forest University
Box 7568, Reynolda Station
Winston-Salem, NC 27109
Contact: Robert Utley
PROJECT: The Tocqueville Forum is a three-year program of studies and public examination honoring the Bicentennial of the U.S. Constitution to articulate the comprehensive intention of the Founders to create a political order and way of life based on principles which they considered to be intrinsic to human nature. "We the People" seeks to transcend narrow legalistic or selective partisan emphasis, as well as a view of the Constitution as simply a superstructure beneath which is to be found the real elements of our political life. Funds will support Bicentennial Scholars in Residence, publication of books, faculty institutes, public courses, public speaking engagements, in-service programs, bibliographic essays, thematic essays, program guides, readers, and audio tapes.

Center for Judicial Studies
Cumberland, VA 23040
Contact: Eugene M. Hickok
PROJECT: To examine the role played by the Bill of Rights in our Constitutional system, to consider the original intention of the Bill of Rights and to trace the development and evolution of its principles throughout our political history. A series of symposia will be held throughout the United States from February 1986 through December 1987. The lectures will be taped for classroom and institutional use and for possible use on local cable television networks. These will be provided without charge. The lectures will be abridged for distribution to newspapers throughout the country by Public Research, syndicated. The lectures will be published by James River Press.



NEH Division of Education Programs 1985 Programs for Elementary and Secondary School Teachers and Administrators

Education for Civic Responsibility: The Historical and Philosophical Sources

Council of Chief State
School Officers
400 North Capitol Street, N.W.
Suite 379
Washington, D.C. 20001
(202) 393-8167
Director: Hilda L. Smith
PROJECT: This project will help the instructional staffs of state education agencies enhance their knowledge and understanding of the humanities. Teams of four persons from each of the several participating states will attend a two-week seminar in which they study such authors as Machiavelli, Locke, Jefferson, Lincoln, and Dewey.

The Meaning of Citizenship: An Institute on Basic Political Principles

Center for Civic Education
5115 Douglas Fir Road, Suite I
Calabasas, California 91302
(818) 340-9320
Director: Charles N. Quigley
PROJECT: For three weeks during the summer of 1985, ten three-member teams of educators at the elementary, middle, and high school levels from selected Los Angeles area school districts will read, discuss, and write about the Constitution and the rights and responsibilities of citizenship.

Constitutional Issues and Early Republican Culture

Archiocese of Washington
5001 Eastern Avenue
P.O. Box 29260
Washington, D.C. 20017
(202) 635-5801
(301) 853-4587
Directors: Patricia Bauch
Patricia Hughes
PROJECT: Thirty secondary school principals from the Washington, D.C. area will participate in an intensive three-week program of lectures, research, and discussions focused on Constitutional issues with established scholars and educators.

United States History: A Constitutional History Project

Department of History
California State University
Los Angeles
Los Angeles, California 90032
(213) 224-3726
Director: Donald O. Dewey
PROJECT: During this four-week summer institute fifty eighth-grade social studies teachers will strengthen their knowledge of the Constitution and its historical sources through lectures, readings, and group discussions. The participants will read major primary and secondary sources in the field. Curricular planning sessions will focus on improved ways of teaching the Constitution in the eighth grade.

NEH Division of Education Programs 1985 Institutes for College Faculty

Toward a More Perfect Union: Studies in American Federalism

Middlebury College
June 2-22, 1985
Faculty:
Richard H. Dollase, Middlebury College
John McCardell, Middlebury College
Barbara L. Bellows, Middlebury College
William J. Cooper, Jr., Louisiana State University
Pauline Maier, Massachusetts Institute of Technology
Gordon Wood, Brown University
Information:
Richard Dollase or Ron Nief
Munroe Hall
Middlebury College
Middlebury, VT 05753
(802) 388-3711

ORGANIZATIONS AND INSTITUTIONS

CENTER FOR THE STUDY OF FEDERALISM

Temple University
Philadelphia, PA 19122
Contact: Ellis Katz

The Center for the Study of Federalism at Temple University conducted an NEH summer institute for high school teachers on teaching about American federal democracy. The purpose of the institute was to explore ways in which basic documents of the American political tradition could be brought into the classroom and used to bring students into direct contact with the sources of the American political experience. The institute was based on the assumption that one of the most effective ways to introduce students to the American political tradition and the Constitution is through contact with the original documents of that tradition. Participants in the Institute came from 13 states from coast to coast.

The documents explored were divided into five units: (1) Colonial documents of constitutional import illustrating the establishment of free political institutions in British North America; (2) the Declaration of Independence, U.S. Constitution, *The Federalist* and other documents of the founding of the United States; (3) *Democracy in America*, Tocqueville's classic analysis of American civil society; (4) Speeches of Abraham Lincoln, selections from the Lincoln-Douglas debates, selections of works of Frederick Douglass, and (5) Supreme Court decisions which helped shape the contemporary welfare state and the present conception of constitutionally protected civil liberties and civil rights. Participants read the documents themselves, commentaries on them, and *Teaching about American Federal Democracy*, the book produced by the Center under contract with the National Institute of Education for use by high school teachers in dealing with the subject. The institute met at Big Sky Lodge located between Bozeman, Montana and Yellowstone National Park for four weeks and was conducted by Daniel J. Elazar, Ellis Katz, John Kincaid, Donald Lutz, Stephen L. Schechter, and Fellows of the Center.

The institute participants developed initial guides for utilizing the materials in junior high schools, standard senior high school classes, honors courses, and advanced placement courses. These materials are now being tested in their respective classrooms. A list of the source materials used and copies of the proposed curricula are available from the Center for the Study of Federalism.

AMERICAN CIVIL LIBERTIES UNION OF LOUISIANA

348 Baronne St., Suite 324
New Orleans, LA 70112
(504) 522-0617

In celebration of the Bicentennial of the Constitution, the ACLU of Louisiana held a series of four free public forums around the state on constitutional issues in March and April, 1985. The forums were cosponsored by several Louisiana organizations and supported by the Louisiana Committee for the Humanities. The topic of the forums included the origins, meaning and character of the Bill of Rights; affirmative action; rights of criminal defendants; and national security. Panelists included lawyers, journalists, scholars and public officials.

NATIONAL PORTRAIT GALLERY

Smithsonian Institution
F Street at Eighth Street N.W.
Washington, D.C. 20560
Contact: Leni Buff

As part of its regular "Lunchtime Lecture" series, on May 16 and 18, 1985, the NPG offered a lecture on "Swords into Plowshares: Citizen Statesmen and the Shaping of the Constitution, 1783-1789," by Frank Aucella, staff lecturer. The lecture focused on the problems of the returning soldier to private life, and how commercial difficulties of the nation under the Articles of Confederation led to the Constitution.

CONSTITUTIONALISM IN AMERICA:

University of Dallas Project for the Bicentennial
of the Constitution of the United States

The University of Dallas has been awarded a grant from the National Endowment for the Humanities to conduct a three-year program of scholarly research and public education in celebration of the Bicentennial of the United States Constitution. This project will consist of three types of activities: an academic conference each year, beginning in the fall of 1985, a major public speaker each year, beginning in the spring of 1985, and community activities throughout the three-year period, 1985–1987.

Each year's activities will be organized around two central events, the April Bicentennial Lecture and the October conference. The public-oriented "In the Spirit of the Constitution" activities, which will be concentrated for the most part during the periods leading up to the Lecture and the Conference, will prepare a particular segment of the area public for these two events. A bibliographic pamphlet and the "Conference Notes" will be printed for use in these programs. Finally, publication of the Bicentennial Lecture monograph, and of the book containing the conference papers, will extend the scope of the Lecture and conference to a regional and national audience.

The first annual Bicentennial Lecture was given on April 24, 1985, by Michael Kammen, the Nelson C. Farr Professor of American History and Culture at Cornell University. His lecture topic was "'A Machine That Would Go of Itself': The Changing Role of Constitutionalism in American Culture," drawn from his new book on the same subject to be published in 1986.

The three conferences are as follows:

Conference I (October 17–19, 1985): "TO SECURE THE BLESSINGS OF LIBERTY: First Principles of the Constitution"
- Panel 1: Popular Government: Liberty
  - The founders' views: Sanderson Schaub, Foundation for the Private Sector
  - Today's views: Wilson Carey McWilliams, Rutgers University
  - Moderator: Jeffrey Tulis, Princeton University
  - Discussant: Marvin Meyers, Brandeis University
- Panel 2: Popular Government: Equality
  - The founders' views: Linda Kerber, University of Iowa
  - Today's views: Henry J. Abraham, University of Virginia
  - Moderator: Wayne Ambler, University of Dallas
  - Discussant: Sanford A. Lakoff, University of California, San Diego
- Panel 3: Majority Rule and Freedom: the First Amendment
  - The founders' views: Hadley P. Arkes, Amherst College
  - Today's views: Thomas I. Emerson, Yale University
  - Moderator: Sarah Thurow, University of Dallas
  - Discussants: Susan M. Leeson, Willamette University (Judicial Fellow, U. S. Supreme Court, 1983–84) and Peter Schramm, President of the Claremont Institute
- Panel 4: Citizenship and Human Rights
  - The founders' views: Ellis Sandoz, Louisiana State University
  - Today's views: Benjamin R. Barber, Rutgers University
  - Moderator: Rogers M. Smith, Yale University
  - Discussant: William B. Allen, Harvey Mudd College
- Panel 5: Economics and the Constitution
  - The founders' views: Jennifer Nedelsky, Princeton University
  - Today's views: L. P. Arnn, The Claremont Institute
  - Moderator: John Adams Wettergreen, San Jose State University
  - Discussant: Drew R. McCoy, University of Texas
- Panel 6: The Declaration of Independence and the Constitution
  - The founders' views: Lance Banning, University of Kentucky
  - Today's views: Glen E. Thurow, University of Dallas
  - Moderator: John Alvis, University of Dallas
  - Discussant: Ross M. Lence, University of Houston

Conference II (October, 1986): "E PLURIBUS UNUM: Constitutional Principles and the Institutions of Government"
- Panel 1: Separation of Powers and Limited Government
- Panel 2: Congress: Representation and Deliberation
- Panel 3: The President: Executive Energy and Republican Safety
- Panel 4: The Judiciary: Supreme Interpreter of the Constitution?
- Panel 5: Federalism and Freedom
- Panel 6: Constitutional Amendments and Constitutional Principles

Conference III (October, 1987): "CONSTITUTIONALISM IN AMERICA"
- Panel 1: The Constitution and Natural Law
- Panel 2: Written and Unwritten Constitution
- Panel 3: Is Bureaucracy Constitutional?
- Panel 4: How Should the Constitution Be Read and Interpreted?
- Panel 5: Why Should a Constitution Be Obeyed?
- Panel 6: The Constitution and the American Character

The greatest public impact of the project is expected to come from the secondary school teachers in-service program. A major purpose of this program is to prepare secondary school teachers for active participation in the conferences. In-service programs will be led by constitutional scholars from the local area. Study leaders will also be available to such organizations as the League of Women Voters, AAUW, and church groups.

The public speakers bureau is designed to serve as a coordinating center to provide speakers knowledgeable on topics relevant to the Bicentennial for local clubs and civic organizations. The speakers listed with the bureau include faculty from the University of Dallas, Southern Methodist University, the University of Texas and the Dallas County Community College District, as well as lawyers and public officials.

For further information contact Dr. Sarah Thurow, Coordinator, Bicentennial Project, The University of Dallas, Irving, Tx 75061. Phone: (214) 721-5279

VIRGINIA MILITARY INSTITUTE

Department of History and Politics
Lexington, VA 24450

In June 1985, the VMI held a two-day conference on the U.S. Constitution and the Military, for fifty secondary school social studies teachers. The conference, which was funded by the National Endowment for the Humanities, comprised four panel sessions and a special lecture. Conferees examined the nation's tradition of civilian control over the military, including the existence of a massive, permanent peacetime military establishment and the balance between civilian and military spheres; participants received continuing education credit.

THE FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES

1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 822-8138
Contact: Eugene B. Meyer

The Society is planning a two-year program for the Bicentennial. It comprises two major symposia: one in Chicago in 1986 on federalism and checks and balances and one in Atlanta in 1987 on constitutional protections of economic activity. These will be video-taped for later distribution. In addition, the Society will support a series of panel discussions, debates and lectures in eight other locations around the country. Publications will be provided for both public and scholarly audiences.

PUBLICATIONS

SOLDIER-STATESMEN OF THE CONSTITUTION: A BICENTENNIAL SERIES

The U.S. Army Center of Military History, under the aegis of the Secretary of the Army, John O. Marsh, Jr., is preparing a series of pamphlets to recognize the 22 of the 39 signers of the Constitution who were veterans of the Revolutionary War. Each pamphlet offers a brief biography, illustrations and suggestions for additional reading, to illuminate the signers' experiences in the War that "made them deeply conscious of the need for a strong central government that would prevail against its enemies, yet one that would safeguard the individual liberties and the republican form of government for which they had fought." The first pamphlet was on George Washington; the second, on John Dickinson. They will be published monthly. For further information, contact Major Terry E. Juskowiak, Office of the Secretary of the Army, Washington, D.C. 20310–0101.

Revolutionary War soldiers. Library of Congress.

THE RELUCTANT PILLAR: NEW YORK AND THE ADOPTION OF THE FEDERAL CONSTITUTION

Russell Sage College has just published *The Reluctant Pillar*, edited by Stephen L. Schechter. Contributors include Martin Diamond, Daniel J. Elazar, John P. Kaminski, Gaspare J. Saladino, Richard Leffler and Jack VanDerhoof. The volume contains essays and several resource chapters, including a guide to sources for studying the ratification in New York, a biographical gazeteer of New York Federalists and Antifederalists, a guide to historic sites and chronologies. For further information, write: Publications office, Russell Sage College, Troy, N.Y. 12180.

MEDIA PROGRAMS

TODAY'S CONSTITUTION AND YOU

From March to June 1985, WBEZ in Chicago sponsored a special 13-week series as part of its weekly "Youth and Justice" program. The special series celebrated the upcoming Bicentennial of the Constitution; topics included debates on the issues of school search and seizure and the struggle for military power within the government. The program was supported by the Chicago Bar Foundation and the Illinois Humanities Council.

Project '87

Project '87 would like to know about events being planned for the Bicentennial of the United States Constitution, which we will report on in ***this Constitution.*** Please send notices to:

this Constitution
1527 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Photographs and camera-ready art of logos, posters, etc. are welcome and will be returned.

Around the States

The Pennsylvania Historical and Museum Commission and the Bicentennial of the Federal Constitution

Both as the site of the Convention which in 1787 drafted the United States Constitution and as the second state in the Union to ratify that document, Pennsylvania has a special interest in the forthcoming commemoration of the Constitution's Bicentennial.

For its contribution to the Commonwealth's observances of this event, the Pennsylvania Historical and Museum Commission plans a number of programs, representing a variety of approaches. Attention will be given to the events of 1787 and the difficulties that were overcome in winning public approval of the proposed new government. Particular focus, however, will be placed on how the Constitution and the great decisions which have marked its evolution have affected the lives of Pennsylvanians.

The latter theme will characterize an exhibit, "The Constitution, Our Living Legacy," on display from June 1987 to mid-January 1988, the smaller part in the State Museum and the principal portion in the Rotunda of the State Capitol. Suitable artifacts and illustrations will portray each of the principles laid down in the Preamble of the Constitution and trace the development of their influence to the present time. A catalog will accompany this exhibit.

In the same vein, the Pennsylvania Historical and Museum Commission is preparing a booklet narrating in popular style the details of landmark court cases involving Pennsylvania which helped shape the Constitution's interpretation and development. This booklet will be published during the fall of 1986.

During the fall of 1986 and into 1987, the Pennsylvania Historical and Museum Commission's quarterly journal, *Pennsylvania Heritage*, will carry a series of articles, each dealing with a different aspect of the Constitution's growth and change. Established authorities will offer their views of such issues as the constitutional establishment of guarantees of civil liberties, the rights of labor, and women's suffrage.

In order to assist Pennsylvania social studies teachers in presenting the history and significance of constitutional development in challenging and stimulating ways, the Pennsylvania Historical and Museum Commission has already sponsored one workshop (in May 1985). It will sponsor additional workshops on this subject in conjunction with the State History Day contests in the spring of 1986 and 1987.

Although a major effort is being devoted to aspects of the subject with which the public can most readily associate the conditions of their daily lives, appropriate attention will also be given to the dramatic conflict of concepts which characterized the events of 1787. In addition to publishing a revised edition of its booklet, "Pennsylvania and the Federal Constitution" (also to be available in 1986), the Pennsylvania Historical and Museum Commission will mount in the State Museum an exhibit, "The Center State of the Union." This exhibit, which will also feature an exhibit catalog, will use portraits of major Pennsylvania participants in the Convention and in the State Constituent Assembly, contemporaneous documents, and appropriate objects to portray the competing principles involved, and to bring the issues home by showing how some of them underlie basic differences of political viewpoints today.

In order to reach one of its most important audiences, and certainly to have the most far-reaching impact, the Pennsylvania Historical and Museum Commission is preparing an exhibit to be mounted in its Mobile Museum. This exhibit, whose theme will blend key elements of both the other exhibits, will travel during the period 1986–1988 to all sixty-seven Pennsylvania counties, so as to be made available to viewers, with special emphasis on schoolchildren, in every section of the Commonwealth.

Aside from these projects, the Pennsylvania Historical and Museum Commission will publish a quarterly calendar of forthcoming events in Pennsylvania being conducted by public and private agencies to commemorate the Constitution's Bicentennial. The initial issue of this calendar is expected in early 1986. For further information, contact John B. B. Trussell, Pennsylvania Historical and Museum Commission, William Penn Memorial Museum and Archives Building, Box 1026, Harrisburg, Pa. 17108-1026.

200th ANNIVERSARY
UNITED STATES CONSTITUTION
We the People
SEPTEMBER 17, 1987

Bronze medallion struck for the Bicentennial of the Constitution by Independence National Historical Park. The obverse shows Independence Hall in the background and James Madison and Gouverneur Morris in the foreground. The reverse of the medallion shows a map of the United States in 1787 and a detail of the "sun chair" used by George Washington while presiding over the Constitutional Convention.

Virginia Commission Convenes in Charlottesville

A thirteen-member state commission, established by the Virginia legislature, held its first meeting at the University of Virginia to consider its program for the Bicentennial of the Constitution. Under the leadership of chairman A.E. Dick Howard, appointed by Governor Charles S. Robb, the commission heard from a number of national and state organizations that have already begun to plan programs. The commission will submit an annual report to the Governor and the General Assembly containing recommendations for the commemoration and accounts of the events taking place through June 1992. According to Chairman Howard, White Burkett Miller Professor of Law and Public Affairs at the University of Virginia, "a main purpose of the commemoration will be to promote greater understanding of constitutional issues [as well as] recognition of Virginia's role in the Constitution's formation and ratification and in the adoption of the Bill of Rights." Timothy G. O'Rourke serves as the staff director of the Virginia Bicentennial Commission. For further information, contact the Institute of Government at the University of Virginia, 207 Minor Hall, Charlottesville, VA 22903; telephone: (804) 924-3396.

The Rotunda, at the University of Virginia, designed by Thomas Jefferson. Virginia Department of Conservation and Economic Development.

South Carolina Creates Bicentennial Commission

The South Carolina legislature has created "The United States Constitution Bicentennial Commission of South Carolina" to plan the state's observance of the Bicentennial through June 1990. The commission is staffed by the state departments of Archives and History and of Parks, Recreation and Tourism. The commission is chaired by the Hon. P. Bradley Morrah, Jr. Dr. Charles E. Lee, Director of the Department of Archives and History, is executive secretary. For further information, write to the South Carolina Department of Archives and History, P.O. Box 11669, Capitol Station, S.C., 29211–1669; telephone: (803) 758-5816.

Colorado Commission Established by Joint Resolution

The Colorado Senate and House of Representatives have established the Colorado Commission on the Bicentennial of the Constitution of the United States by joint resolution. It is composed of nine members appointed by the governor, who are to prepare a program for the commemoration. The commission expires on January 1, 1988. For further information, contact Kathy O'Rourke, Colorado Bar Association, 1900 Grant Street, suite 950, Denver, Colorado 80203; telephone: (303) 860-1112.

North Dakota Supreme Court Names Bicentennial Committee

The North Dakota Supreme Court has named a Constitution Celebration Committee to plan the celebration in that state. The Honorable Herbert L. Meschke, Justice of the North Dakota Supreme Court, serves as chairman of the special committee, which began its planning in September 1985. The committee will formulate a program to mark both the Bicentennial of the U.S. Constitution and the Centennial of the Constitution of the state of North Dakota on August 17, 1989. For further information, contact: William G. Bohn, State Court Administrator, State of North Dakota, Supreme Court, State Capitol, Bismarck, N.D. 58505; telephone: (701) 224-4216.

Kentucky Department of Education Plans Two-Year Program

The Kentucky Department of Education has initiated plans for a two-year program of activities on the Constitution based in the schools, but including community and civic groups. For further information, contact George Logan, Kentucky Department of Education, Capitol Plaza Tower, Frankfort, KY 40601.

Federal Bicentennial Agenda

Federal Bicentennial Commission Meets

The inaugural meeting of the Commission on the Bicentennial of the United States Constitution took place on July 29 and 30 in Washington, D.C. under the direction of its chair, Chief Justice Warren E. Burger. At its first meeting, the commission, which includes three U.S. senators, two members of the House of Representatives, and three federal judges, in addition to lawyers, educators, clergy and business leaders, established ad hoc committees dealing with personnel, fund-raising, education, community groups and media. The members also asked for changes in the statute establishing the commission to allow it to permit the use of its logo for fund-raising, to expand the number of staff to be paid from appropriated funds, and to raise the ceiling on private contributions. The commission also voted to support the creation of a national holiday on September 17, 1987, the Bicentennial of the day the Constitutional Convention adopted the Constitution in Philadelphia. A bill for this purpose has already been introduced in Congress.

At its second meeting, which was held in Salt Lake City, Utah, on August 22 and 23, the commission chose an executive director, Mark W. Cannon. Dr. Cannon has been administrative assistant to the Chief Justice since 1972. His previous experience includes administrative positions with the Institute of Public Administration in New York and with members of Congress. Dr. Cannon holds a Ph.D. from Harvard University in Economics and Government.

In order to gather information about programs already underway for the Bicentennial, the commission held a public hearing in Washington, D.C. on the 198th anniversary of the Constitution's adoption, September 17, 1985.

A preliminary list of the commission's members appeared in ***this Constitution***, Fall 1985. Since that time, two new members have been named. On August 1, 1985, Speaker Thomas P. O'Neill, Jr., designated Representative Lindy Boggs (D., La.) to sit on the commission in his place, and on September 9, 1985, President Reagan announced the appointment of William Lucas, the Executive of Wayne County, Michigan. The commission's membership is now complete.

The National Archives Plans for the Bicentennial of the Constitution

The National Archives and Records Administration has announced its plans for the celebration of the Bicentennial of the signing of the United States Constitution. Since this great document is enshrined in the rotunda of the National Archives Building, it is only fitting that the Archives be one of the major focal points for the Bicentennial celebrations. The Archives' plan is composed of projects in five separate areas: special events, exhibits, films, conferences, and publications. Together, the more than two dozen projects will provide a fitting constitutional tribute in Washington and at National Archives Centers across the country.

Among the special events planned is an 87-hour vigil beginning on September 13 and ending on September 17, 1987. Such a vigil will allow tens of thousands of Americans to see all four pages of the Constitution for the first time. The vigil will begin with a major address by a public dignitary and end with a naturalization ceremony swearing in new citizens of the United States. In addition, the National Archives will sponsor simultaneous public readings of the Constitution at federal buildings across the country on September 17.

Exhibits will be a major aspect of the Archives' celebration plans. In September 1986, the Archives will open "Formation of the Constitution," a documentary exhibit in the rotunda of the Archives building that will concentrate on the origins of the federal government. A second exhibit, one that will explore some of the changes and interpretations of the Constitution since its adoption, will open in the circular gallery of the Archives in May of 1987. Facsimile exhibits will be mounted in each of the National Archives Centers during the Bicentennial year, and these facsimiles will be available for sale to the public.

Films will be another important part of the Archives' celebration of the Bicentennial. A specially commissioned slide show on the Constitution will link the major exhibits in the Archives Building. A "constitutional film festival," including both documentary films and popular motion pictures, will be featured in the Archives theater during the summer of 1987. Each film will focus on some aspect of the Constitution or constitutional issues. Similar film festivals also will be held at several of the National Archives Centers across the country.

The Archives is also planning a series of conferences on constitutional issues to be held in the National Archives Centers and the presidential libraries across the country. Among the topics will be the influence of the Constitution on particular regions of the country, constitutional holdings of the Archives' regional branches, women's rights and the Constitution, Harry S. Truman and the Constitution, the Civil Rights Act of 1957, and Gerald Ford and the Constitution.

A wide variety of books and other printed items will be published by the Archives during the Bicentennial era. The Fall 1985 issue of *Prologue: Journal of the National Archives* will focus on the theme of "Celebrating the Constitution." In an effort to reach secondary school students, the Archives will publish a documentary study packet entitled *The Constitution: Evolution of a Government* which includes facsimile documents and a teacher's manual. In 1986, the Archives will publish a facsimile edition of *The Story of the Constitution*, the popular and still useful booklet of the U.S. Constitution Sesquicentennial Commission. Other books in preparation are a biographical dictionary of the founders of the Constitution, a four-volume documentary history of the foreign relations of the United States, 1783–1989, and a guide to non-congressional pre-federal records in the National Archives. Additional brochures and materials will be published in 1987 to assist the public in celebrating this great anniversary.

The Archives' celebration of the two hundreth anniversary of the Constitution will be the first of many celebrations honoring the Bicentennial of our federal government over the next several years. The celebrations will extend from 1987 with the Bicentennial of the Constitution through 1991, the Bicentennial of the ratification of the Bill of Rights. In addition to these two major anniversaries, the Archives will honor the Bicentennials of the First Federal Congress and the inauguration of George Washington as first President both in 1989, and the Bicentennials of the Supreme Court and the first four executive branch agencies in the years from 1989 to 1991. All of these celebrations are intended to encourage a greater understanding of the federal government by its citizens.

SUBSCRIPTION INFORMATION

The National Endowment for the Humanities is underwriting the publication of ***this Constitution*** as a quarterly magazine so that it may be distributed free to organizations planning programs for the Constitution's Bicentennial. The officer of the organization who is responsible for planning programs is invited to write us and ask to be placed on the free mailing list; requests should include a short statement about the program being planned. Free subscriptions begin with the next issue after receipt of the letter. Institutions wishing to receive more than one copy may do so by subscribing for additional copies at the rates below.

Individuals and organizations who are not planning Bicentennial programs but who wish to receive the magazine may subscribe as follows:

Individuals	$10.00 per year (4 issues)
Institutions	$16.00 per year (4 issues)

(Individuals and institutions outside the United States please add $5.00 per subscription.)

Subscriptions for 1986 begin with issue no. 10 (Spring, 1986) and end with no. 13 (Winter, 1986).

Single copies (less than 10) of back issues can be purchased for $4.00 each. Each issue of the magazine will also be available for purchase at bulk rate. (Issue no. 1 is no longer available.)

Bulk rate (10 or more copies)	$1.75 each

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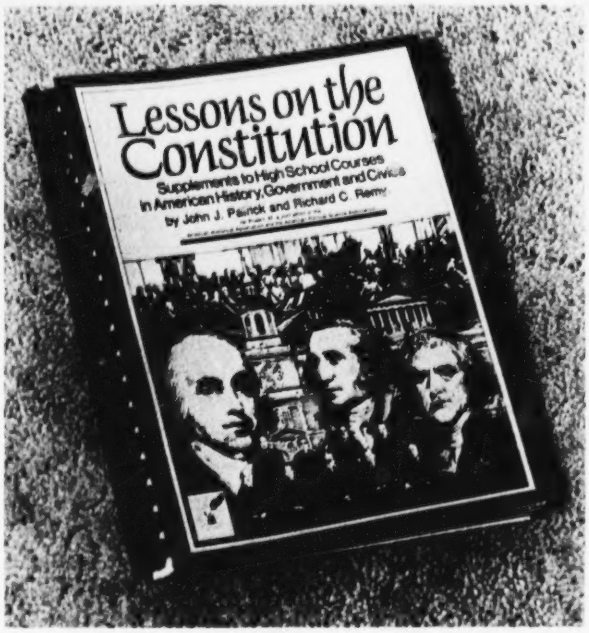
Lessons on the Constitution
Supplements to High School Courses in American History, Government and Civics
by John J. Patrick and Richard C. Remy

PROJECT '87
announces the publication of

LESSONS ON THE CONSTITUTION

Supplements to High School Courses in American History, Government and Civics

Lessons on the Constitution **features sixty lessons designed to enhance teaching about the Constitution in secondary schools. The lessons are designed to fit into existing curricula and to complement standard high school textbooks. Lesson plans for teachers accompany each of the sixty lessons, which are organized into chapters on the origins and principles of the Constitution, the principles of constitutional government, specific constitutional issues, and, last, digests of landmark Supreme Court cases, accompanied by student worksheets. These lessons are introduced with a chapter devoted to the text of the Constitution, a list of amendments to the Constitution proposed by Congress but not adopted, and selected essays from** ***The Federalist.***

Lessons on the Constitution **was developed for Project '87 by John J. Patrick, Department of Curriculum and Instruction, Indiana University, and Richard C. Remy, Mershon Center, Ohio State University. The lessons have been field-tested by teachers and reviewed by scholars. Paul Finkelman, History Department, State University of New York, Binghamton, served as consulting historical editor.**

Development of the lessons was supported by a grant from the National Endowment for the Humanities. Scott, Foresman Publishing Company provided a contribution toward producing the manuscript. Core support to Project '87 from the William and Flora Hewlett Foundation provided additional administrative expenses.

Lessons on the Constitution **is being published by Project '87 and the Social Science Education Consortium. The cost of the** ***Lessons*** **is $19.50 per copy with a 20% discount for orders of 10 or more copies.** ***Note: Individuals who are ordering 10 or more copies must have them shipped to the same address in order to qualify for the 20% discount.*** **Prepayment must accompany any order under $20.00 and orders of 10 or more copies placed by individuals. (Mastercharge and Visa charges are acceptable.) Information for postage and handling is as follows:**

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Chronology

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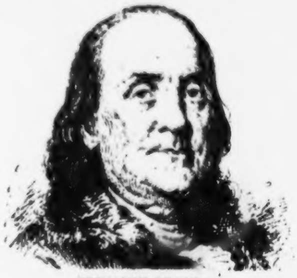


BENJAMIN FRANKLIN

August 7, 1786: The Congress of the Confederation considers a motion offered by Charles Pinckney of South Carolina to amend the Articles of Confederation in order to give Congress more control over foreign affairs and interstate commerce. Because amendments to the Articles require the unanimous consent of the states, an unlikely eventuality, Congress declines to recommend the changes.

September 11-14, 1786: ANNAPOLIS CONVENTION. New York, New Jersey, Delaware, Pennsylvania and Virginia send a total of twelve delegates to the conference which had been proposed by Virginia in January to discuss commercial matters. (New Hampshire, Massachusetts, Rhode Island and North Carolina send delegates but they fail to arrive in time.) The small attendance makes discussion of commercial matters fruitless. On September 14, the convention adopts a resolution drafted by Alexander Hamilton asking all the states to send representatives to a new convention to be held in Philadelphia in May of 1787. This meeting will not be limited to commercial matters but will address all issues necessary "to render the constitution of the Federal Government adequate to the exigencies of the Union."

February 4, 1787: THE END OF SHAYS' REBELLION. General Benjamin Lincoln, leading a contingent of 4,400 soldiers enlisted by the Massachusetts governor, routs the forces of Daniel Shays. A destitute farmer, Shays had organized a rebellion against the Massachusetts government, which had failed to take action to assist the state's depressed farm population. The uprisings, which had begun in the summer of 1786, are completely crushed by the end of February. The Massachusetts legislature, however, enacts some statutes to assist debt-ridden farmers. The disorder fuels concern about the need for an effective central government.

February 21, 1787: The Congress of the Confederation cautiously endorses the plan adopted at the Annapolis Convention for a new meeting of delegates from the states "for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein."

May 25, 1787: OPENING OF THE CONSTITUTIONAL CONVENTION. On May 25, a quorum of delegates from seven states arrives in Philadelphia in response to the call from the Annapolis Convention, and the meeting convenes. Ultimately, representatives from all the states but Rhode Island attend. Of the 55 participants, over half are lawyers, and 29 have attended college. The distinguished public figures include George Washington, James Madison, Benjamin Franklin, George Mason, Gouverneur Morris, James Wilson, Roger Sherman and Elbridge Gerry.

May 29, 1787: VIRGINIA PLAN PROPOSED. On the fifth day of the meeting, Edmund Randolph, a delegate from Virginia, offers 15 resolutions making up the "Virginia Plan" of Union. Rather than amending the Articles of Confederation, the proposal describes a completely new organization of government, including a bicameral legislature which represents the states proportionately, with the lower house elected by the people and the upper house chosen by the lower body from nominees proposed by the state legislatures; an executive chosen by the legislature; a judiciary branch; and a council composed of the executive and members of the judiciary branch with a veto over legislative enactments.

June 15, 1787: NEW JERSEY PLAN PROPOSED. Displeased by Randolph's plan which placed the smaller states in a disadvantaged position, William Patterson proposes instead only to modify the Articles of Confederation. The New Jersey plan gives Congress power to tax and to regulate foreign and interstate commerce and establishes a plural executive (without veto power) and a supreme court.

June 19, 1787: After debating all the proposals, the Convention decides not merely to amend the Articles of Confederation but to devise a new national government. The question of equal versus proportional representation by states in the legislature now becomes the focus of the debate.

June 21, 1787: The Convention adopts a two-year term for representatives.

June 26, 1787: The Convention adopts a six-year term for Senators.

July 12, 1787: THE CONNECTICUT COMPROMISE(I). Based upon a proposal made by Roger Sherman of Connecticut, the Constitutional Convention agrees that representation in the lower house should be proportional to a state's population (the total of free residents ("excluding Indians not taxed") and three-fifths of "all other persons," i.e., slaves).

July 13, 1787: NORTHWEST ORDINANCE. While the Constitutional Convention meets in Philadelphia, the Congress of the Confederation crafts another governing instrument for the territory north of the Ohio River. The Northwest Ordinance, written largely by Nathan Dane of Massachusetts, provides for interim governance of the territory by

PATRICK HENRY

congressional appointees (a governor, secretary and three judges), the creation of a bicameral legislature when there are 5,000 free males in the territory, and, ultimately, the establishment of three to five states on an equal footing with the states already in existence. Freedom of worship, right to trial by jury, and public education are guaranteed, and slavery prohibited.

July 16, 1787: THE CONNECTICUT COMPROMISE (II). The Convention agrees that each state should be represented equally in the upper chamber.

August 6, 1787: The five-man committee appointed to draft a constitution based upon 23 "fundamental resolutions" drawn up by the convention between July 19 and July 26 submits its document which contains 23 articles.

August 6-September 10, 1787: THE GREAT DEBATE. The Convention debates the draft constitution.

August 16, 1787: The Convention grants to Congress the right to regulate foreign trade and interstate commerce.

August 25, 1787: The Convention agrees to prohibit Congress from banning the foreign slave trade for twenty years.

August 29, 1787: The Convention agrees to the fugitive slave clause.

September 6, 1787: The Convention adopts a four-year term for the president.

September 8, 1787: A five-man committee, comprising William Samuel Johnson (chair), Alexander Hamilton, James Madison, Rufus King and Gouverneur Morris, is appointed to prepare the final draft.

September 12, 1787: The committee submits the draft, written primarily by Gouverneur Morris, to the Convention.

September 13-15, 1787: The Convention examines the draft clause by clause and makes a few changes.

September 17, 1787: All twelve state delegations vote approval of the document. Thirty-nine of the forty-two delegates present sign the engrossed copy, and a letter of transmittal to Congress is drafted. The Convention formally adjourns.

September 20, 1787: Congress receives the proposed Constitution.

September 26-27, 1787: Some representatives seek to have Congress censure the Convention for failing to abide by Congress' instruction only to revise the Articles of Confederation.

September 28, 1787: Congress resolves to submit the Constitution to special state ratifying conventions. Article VII of the document stipulates that it will become effective when ratified by nine states.

October 27, 1787: The first *Federalist* paper appears in New York City newspapers, one of 85 to argue in favor of the adoption of the new frame of government. Written by Alexander Hamilton, James Madison and John Jay, the essays attempt to counter the arguments of Antifederalists, who fear a strong centralized national government.

December 7, 1787: Delaware ratifies the Constitution, the first state to do so, by unanimous vote.

December 12, 1787: Pennsylvania ratifies the Constitution in the face of considerable opposition. The vote in convention is 46 to 23.

December 18, 1787: New Jersey ratifies unanimously.

January 2, 1788: Georgia ratifies unanimously.

January 9, 1788: Connecticut ratifies by a vote of 128 to 40.

February 6, 1788: The Massachusetts convention ratifies by a close vote of 187 to 168, after vigorous debate. Many Antifederalists, including Sam Adams, change sides after Federalists propose nine amendments, including one which would reserve to the states all powers not "expressly delegated" to the national government by the Constitution.

March 24, 1788: Rhode Island, which had refused to send delegates to the Constitutional Convention, declines to call a state convention and holds a popular referendum instead. Federalists do not participate, and the voters reject the Constitution, 2708 to 237.

April 28, 1788: Maryland ratifies by a vote of 63 to 11.

May 23, 1788: South Carolina ratifies by a vote of 149 to 73.

June 21, 1788: New Hampshire becomes the ninth state to ratify, by a vote of 57 to 47. The convention proposes twelve amendments.

June 25, 1788: Despite strong opposition led by Patrick Henry, Virginia ratifies the Constitution by 89 to 79. James Madison leads the fight in favor. The convention recommends a bill of rights, composed of twenty articles, in addition to twenty further changes.

July 2, 1788: The President of Congress, Cyrus Griffin of Virginia, announces that the Constitution has been ratified by the requisite nine states. A committee is appointed to prepare for the change in government.

July 26, 1788: New York ratifies by vote of 30 to 27 after Alexander Hamilton delays action, hoping that news of ratification from New Hampshire and

WASHINGTON
PRESIDENT
1791

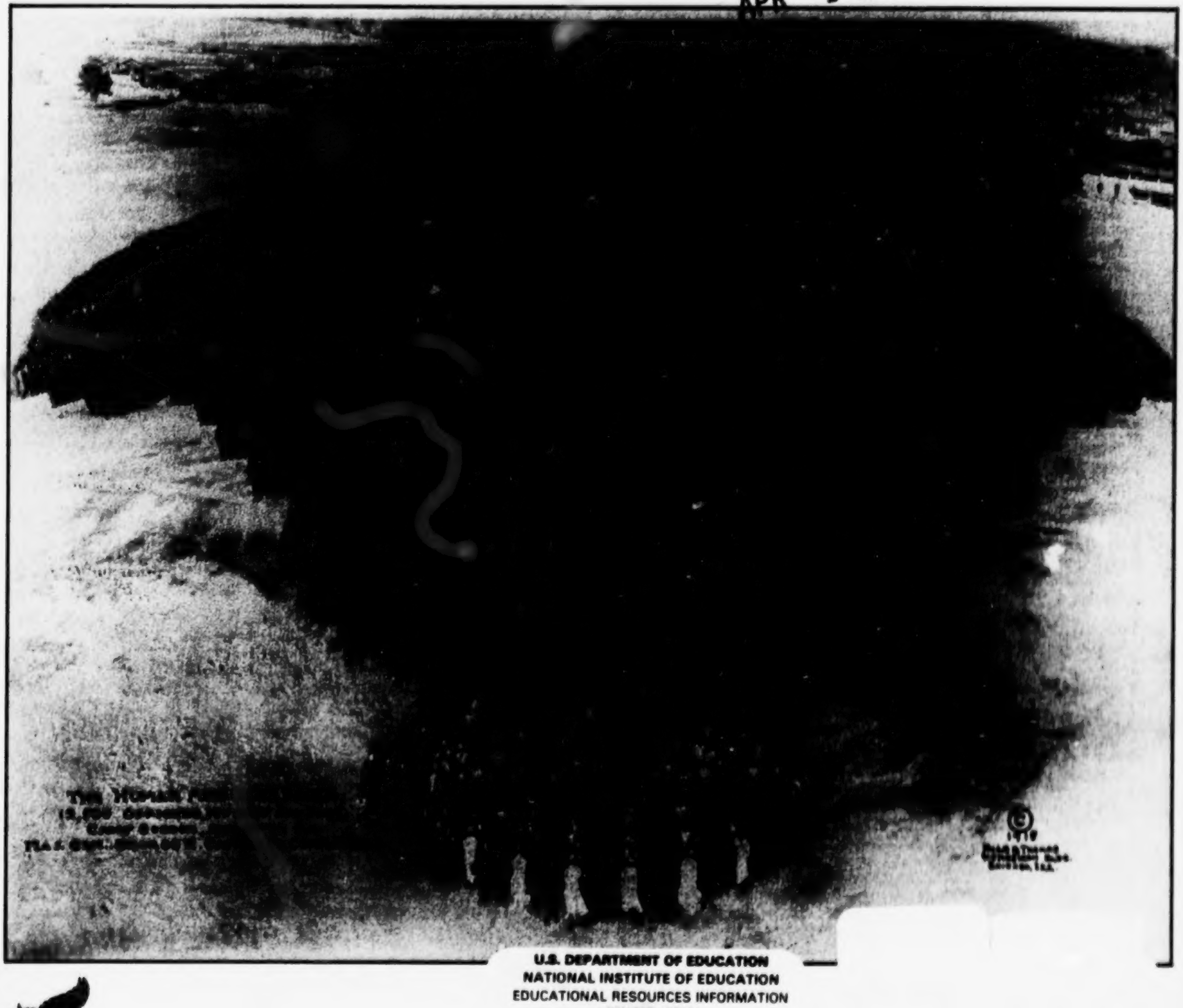
Virginia would influence Antifederalist sentiment.
August 2, 1788: North Carolina declines to ratify until the addition to the Constitution of a bill of rights.
September 13, 1788: Congress selects New York as the site of the new government and chooses dates for the appointment of and balloting by presidential electors, and for the meeting of the first Congress under the Constitution.
September 30, 1788: Pennsylvania chooses its two senators, Robert Morris and William Maclay, the first state to do so. Elections of senators and representatives continue through August 31, 1790, when Rhode Island concludes its elections.
October 10, 1788: The Congress of the Confederation transacts its last official business.
January 7, 1789: Presidential electors are chosen by ten of the states that have ratified the Constitution (all but New York).
February 4, 1789: Presidential electors vote; George Washington is chosen as president, and John Adams as vice-president.
March 4, 1789: The first Congress convenes in New York, with eight senators and thirteen representatives in attendance, and the remainder en route.
April 1, 1789: The House of Representatives, with 30 of its 59 members present, elects Frederick A. Muhlenberg of Pennsylvania to be its speaker.
April 6, 1789: The Senate, with 9 of 22 senators in attendance, chooses John Langdon of New Hampshire as temporary presiding officer.
April 30, 1789: George Washington is inaugurated as the nation's first president under the Constitution. The oath of office is administered by Robert R. Livingston, chancellor of the State of New York, on the balcony of Federal Hall, at the corner of Wall and Broad Streets in New York City.
July 27, 1789: Congress establishes the Department of Foreign Affairs (later changed to Department of State).
August 7, 1789: Congress establishes the War Department.
September 2, 1789: Congress establishes the Treasury Department.
September 22, 1789: Congress creates the office of Postmaster General.
September 24, 1789: Congress passes the Federal Judiciary Act, which provides for a chief justice and five associate justices of the Supreme Court and which establishes three circuit courts and thirteen district courts. It also creates the office of the Attorney General.
September 25, 1789: Congress submits to the states twelve amendments to the Constitution, in response to the five state ratifying conventions that had emphasized the need for immediate changes.
November 20, 1789: New Jersey ratifies ten of the twelve amendments, the Bill of Rights, the first state to do so.
November 21, 1789: As a result of congressional action to amend the Constitution, North Carolina ratifies the original document, by a vote of 194 to 77.
December 19, 1789: Maryland ratifies the Bill of Rights.
December 22, 1789: North Carolina ratifies the Bill of Rights.
January 25, 1790: New Hampshire ratifies the Bill of Rights.
January 28, 1790: Delaware ratifies the Bill of Rights.
February 24, 1790: New York ratifies the Bill of Rights.
March 10, 1790: Pennsylvania ratifies the Bill of Rights.
May 29, 1790: Rhode Island ratifies the Constitution, by a vote of 34 to 32.
June 7, 1790: Rhode Island ratifies the Bill of Rights.
July 16, 1790: George Washington signs legislation selecting the District of Columbia as the permanent national capital, to be occupied in 1800. Philadelphia will house the government in the intervening decade.
December 6, 1790: All three branches of government assemble in Philadelphia.
January 10, 1791: Vermont ratifies the Constitution.
March 4, 1791: Vermont is admitted to the Union as the fourteenth state.
November 3, 1791: Vermont ratifies the Bill of Rights.
December 15, 1791: Virginia ratifies the Bill of Rights, making it part of the United States Constitution.

Three of the original thirteen states did not ratify the Bill of Rights until the 150th anniversary of its submission to the states. Massachusetts ratified on March 2, 1939; Georgia on March 18, 1939; and Connecticut on April 19, 1939.

...do ordain and establish this Constitution for the United States of America.

A Bicentennial Chronicle Spring 1986, No.10

APR 1 1986



Project '87

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State and Municipal Bicentennial Commissions

The following list is based upon information solicited nationally and received by January 13, 1986. Many states are in the process of establishing official commissions for the Bicentennial, and we will continue to monitor and to report on the commissions in future issues. We welcome hearing from our readers who know of any other such groups. Information about Bicentennial programs is also available from state humanities councils, state historical societies and state and local bar associations.

**No commission; existing agency officially designated to oversee the state commemoration.*

†No commission; official state contact.

ALABAMA

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ARIZONA

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Chief Justice, The Supreme Court of Arizona
Commission on the Bicentennial of the United States Constitution
State Capitol Building
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Phoenix, AZ 85007
(602) 255-4534

CALIFORNIA

California Bicentennial Commission on the United States Constitution and the Bill of Rights
c/o Debra Beck
Governor's Office
State of California
Sacramento, CA 95814
(916) 445-4541

COLORADO

James C. Pierce, President
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...do ordain and establish this Constitution for the United States of America.

A Bicentennial Chronicle

No. 10 **Spring, 1986**

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Cover: *The Human American Eagle, Camp Gordon, Atlanta, GA, 1918. Library of Congress.*

***this Constitution* is published with the assistance of a grant from the National Endowment for the Humanities as part of its special initiative on the Bicentennial of the United States Constitution. Editorial offices are located at 1527 New Hampshire Avenue, N.W., Washington, D.C. 20036. All material in this publication may be photocopied if attributed as follows: "Reprinted from *this Constitution: A Bicentennial Chronicle*, Spring, 1986, published by Project '87 of the American Historical Association and the American Political Science Association." Project '87 would appreciate notification from those who photocopy material in this issue for use in presentations to other groups. © Copyright 1986 by the American Historical Association and the American Political Science Association**

this Constitution

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From the Editor:

The spring issue of ***this Constitution*** inaugurates our third year of publication as a quarterly magazine devoted to offering resources for the Bicentennial of the Constitution. In 1986, we will observe the Bicentennial of an important event leading up to the Constitutional Convention in 1787—the Annapolis Convention, held in September 1786, which proposed that a convocation of all the states meet the following year to reform the national government. Planning has begun for the commemoration and a brief report appears in the "Gazette" section of this issue; we will, of course, return to this subject in the other issues this year.

We are also including a number of features in response to readers' requests. One is a description by Michael Bouman, the associate director of the Vermont Council on the Humanities and Public Issues, of a successful series of book discussion groups. Program planners all over the country will find his step-by-step account most helpful. In addition, the "For the Classroom" section contains a survey of literature by John Kincaid to help study and teach the concept of federalism. And we offer another supplement to our Network of Scholars to assist program developers in locating nearby consultants for Bicentennial programs.

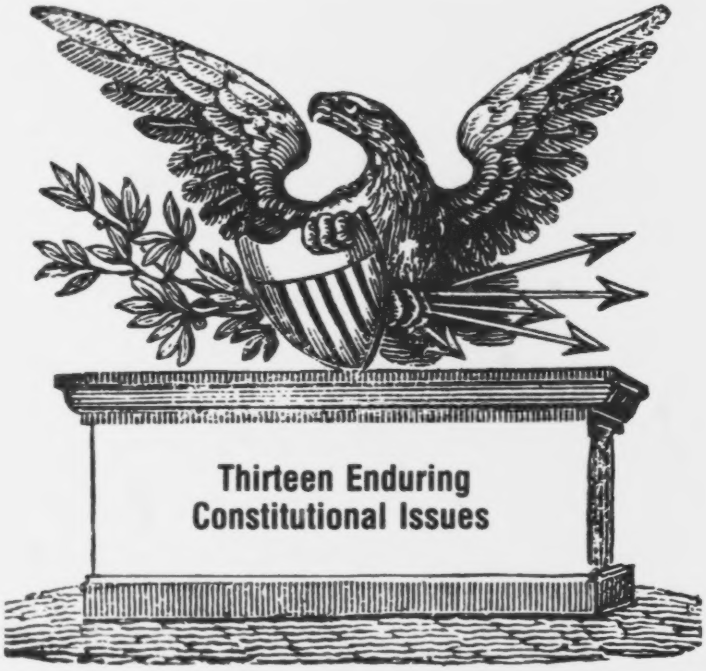
A resource for which we have received repeated inquiries appears on the inside covers—a directory of official state commissions, designated state agencies and official contacts for state Bicentennial commemorations. The recent appointment of these groups is an indicator that the approach of the Bicentennial era is indeed inspiring a burst of enthusiasm. We look forward to reports from our readers about state agencies not included here; we will update this list regularly.

Our first article in this issue, on the commerce clause, highlights the "Enduring Constitutional Issue" of property rights and economic policy. Charles A. Lofgren explores federal intervention in the economy throughout the course of American history. His essay discusses the Supreme Court's response to congressional action in this arena, as well as Congress' use of the commerce clause to achieve national goals not economic in character.

In the past two issues, pieces by W. Taylor Reveley, III, and Harold M. Hyman reviewed the evolution of the war power in the eighteenth and nineteenth centuries; an article by Michal R. Belknap completes our three-part series on this subject. "Vietnam and the Constitution" analyzes the development of the war power under presidents Lyndon Johnson and Richard Nixon, placing their execution of this highly controversial war in historical context.

Many articles have focused on aspects of the judiciary in the pages of ***this Constitution.*** Now, Kermit L. Hall examines the selection of federal judges, which, he points out, forms an integral part of the design of the judicial branch of the national government. The insulation of federal judges from public opinion differs, however, from the more responsive nature of state judge selection, as Hall describes.

Finally, Steven R. Boyd surveys a set of unusual constitutional records for our "Documents" section—five alternative constitutions proposed by reformers in the nineteenth and twentieth centuries. By their striking fidelity to the original, these proposals illuminate the compelling nature of the United States Constitution.



Thirteen Enduring Constitutional Issues

- National Power—Limits and Potential
- Federalism—the Balance between Nation and State
- The Judiciary—Interpreter of the Constitution or Shaper of Public Policy
- Civil Liberties—the Balance between Government and the Individual
- Criminal Penalties—Rights of the Accused and Protection of the Community
- Equality—its Definition as a Constitutional Value
- The Rights of Women Under the Constitution
- The Rights of Ethnic and Racial Groups Under the Constitution
- Presidential Power in Wartime and in Foreign Affairs
- The Separation of Powers and the Capacity to Govern
- Avenues of Representation
- **Property Rights and Economic Policy**
- Constitutional Change and Flexibility

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"To Regulate Commerce": Federal Power under the Constitution

by CHARLES A. LOFGREN

Today the commerce clause of the Constitution stands dramatically revealed as a fountain of vast federal power. Under its authority, for example, Congress has enacted civil rights legislation and may now dictate the wages of state employees. Yet the clause itself merely grants Congress the right "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." As with several key constitutional provisions, however, the clause's text provides only an inkling of its present meaning and potential. To understand the bold expansion of the commerce power, let us begin by briefly examining its sources.

Origins

Commercial problems under the Articles of Confederation helped fuel the drive for a new constitution in the 1780s. With the end of the Revolutionary War, Great Britain had limited trade between the newly-independent United States and the remaining parts of the Empire, closing altogether the previously important West Indies market to American shipping and most American goods, and putting sometimes prohibitive duties on goods imported into the British Isles. Because the Articles in effect guaranteed each state the right to regulate its own trade, Congress had no power to retaliate. (In actuality, however, smuggling operations helped soften the impact of the British restrictions.)

Another difficulty arose from import taxes that some states placed on goods from abroad. These provided revenues for the states imposing them, but they irritated the citizens of states lacking their own harbor facilities. (By one estimate, Connecticut residents supported a third of New York's public expenses through payment of New York's import duties.) Finally, interstate tariff wars loomed. In the spring of 1787, just before the Constitutional Convention met in Philadelphia, New York imposed fees on vessels running to and from Connecticut and New Jersey, and in response the latter state slapped a tax on a New York-owned lighthouse located on New Jersey soil. The Confederation Congress held no authority to intervene in either area.

To cope with these difficulties, the Constitution written during the spring and summer of 1787 not unexpectedly included the commerce clause among the provisions of Article I, section 8, defining the major powers of Congress. But what did the clause mean? It evoked almost no debate, emerging when a committee of the Constitutional Convention fleshed out the preliminary Virginia Plan. Drafted by James Madison who was then a strong nationalist, the Virginia Plan proposed for Congress "to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual [State] Legislation." Some argue that this origin shows the framers intended the clause as a broad grant. However, a comparable provision also appeared in the New Jersey Plan—the opposition proposal within the Convention—which envisioned fairly restricted central authority within a strengthened union. Indeed, had many people sensed that the clause threatened the internal authority of the states, the Antifederalists would likely have objected; but with only a few exceptions they did not. In the final analysis, probably all we can say with certainty is that Americans in 1787-1788 concluded the clause would at minimum prevent the sort of interstate commercial difficulties they had so recently experienced.

Early Interpretation

What history left murky, Chief Justice John Marshall set on the road to resolution in *Gibbons* v. *Ogden* (1824). The case arose when Aaron Ogden sought to prevent his former partner, Thomas Gibbons, from running a steamship between New York City and Elizabethtown, New Jersey, in defiance of the monopoly grant Ogden held from the New York legislature. After the New York courts upheld Ogden's claim, Gibbons appealed to the federal Supreme Court. The right to control commerce among the states belonged *exclusively* with Congress, he claimed; in any event, he was exempt from New York's regulations because his boat operated under a federal "coasting license" issued under the Coasting Act which Congress passed in 1793.

In his opinion, Marshall came close to accepting the argument for exclusive congressional power. "The court," he allowed, "is not satisfied it has been refuted." But he finally backed off and instead relied on the Supremacy Clause of Article VI, which makes federal law supreme over state law. Ogden's monopoly grant, Marshall held, was invalid because it conflicted with the Coasting Act.

As a result, Marshall did not directly answer the question of how far states might go in regulating or interfering with commerce in the *absence* of federal legislation. During most of the nineteenth century, this issue remained a lively one because Congress generally refrained from enacting domestic commercial regulations. (Before the Civil War, a major reason for this reluctance was the South's fear

John Marshall. ***Library of Congress.***

"Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior."
—Chief Justice John Marshall, 1824.

that passage of any federal commercial legislation might open the door to regulation of its "peculiar institution"—slavery.) Marshall's opinion in *Gibbons* nevertheless bristled with language that could be used to support extensive congressional authority at a later day.

To begin, Marshall explained the proper method of interpreting constitutional language. Although the Constitution contained an enumeration of powers, he argued that it nowhere stated those powers had to be construed strictly. He especially attacked narrow readings that "would cripple the government and render it unequal to the objects for which it is declared to be instituted."

He next applied this approach to the commerce clause, asserting that by common sense "commerce" encompassed a wide range of activities. Everyone admitted, moreover, that Congress could regulate all kinds of commercial intercourse with foreign nations, and therefore it held the same authority over commerce among the states, for within the same sentence identical words must have the same meaning. He showed similar acuity in examining the phrase "among the states," noting that "among" means "intermingled with." This reasoning led him to the conclusion absolutely necessary to the sweep the commerce clause has gained in our own day: "Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior."

Of course, the fact of enumeration implied *some* limits, but in reality Marshall's concession in this regard was itself a claim of broad power. Congress' authority did not extend "to those [concerns] which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government." But what if, for example, it became "necessary to interfere" with an *intra*state activity "for the purpose of executing some of the general powers of the government"? Avoiding a direct answer, Marshall observed: "the power over commerce with foreign nations, and among the several states, it vested in Congress as absolutely as it would be in a single government." As restraints, there remained only "the wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at election."

Congress Acts

Not until the emergence of large interstate railways and industries toward the end of the nineteenth century did Congress significantly begin to occupy the area Marshall had sketched in *Gibbons*. The first of two pioneering ventures, the Interstate Commerce Act of 1887, came after the Supreme Court struck down an Illinois law setting rates for the interstate operations of interstate railways operating within the state. Federal action now appeared the only viable approach to a problem that had been receiving increased state and national attention. Even some railway leaders saw benefits in limited national regulation, concluding it might ward off harsher legislation as well as soften the fierce competition that threatened to drive some lines into bankruptcy. Paradoxically contributing to the public outcry against the rail companies, this same competition had pushed the lines to make seemingly unfair rate discriminations between "long hauls," where competition was typically greatest and hence rates lowest, and "short hauls," where particular companies held monopolies and hence could charge higher rates per mile. (The situation resembled the picture confronting today's air traveler.) Also, to attract business, railroads sometimes rebated part of the charges paid by large shippers, putting smaller concerns at a disadvantage and drawing still more public criticism.

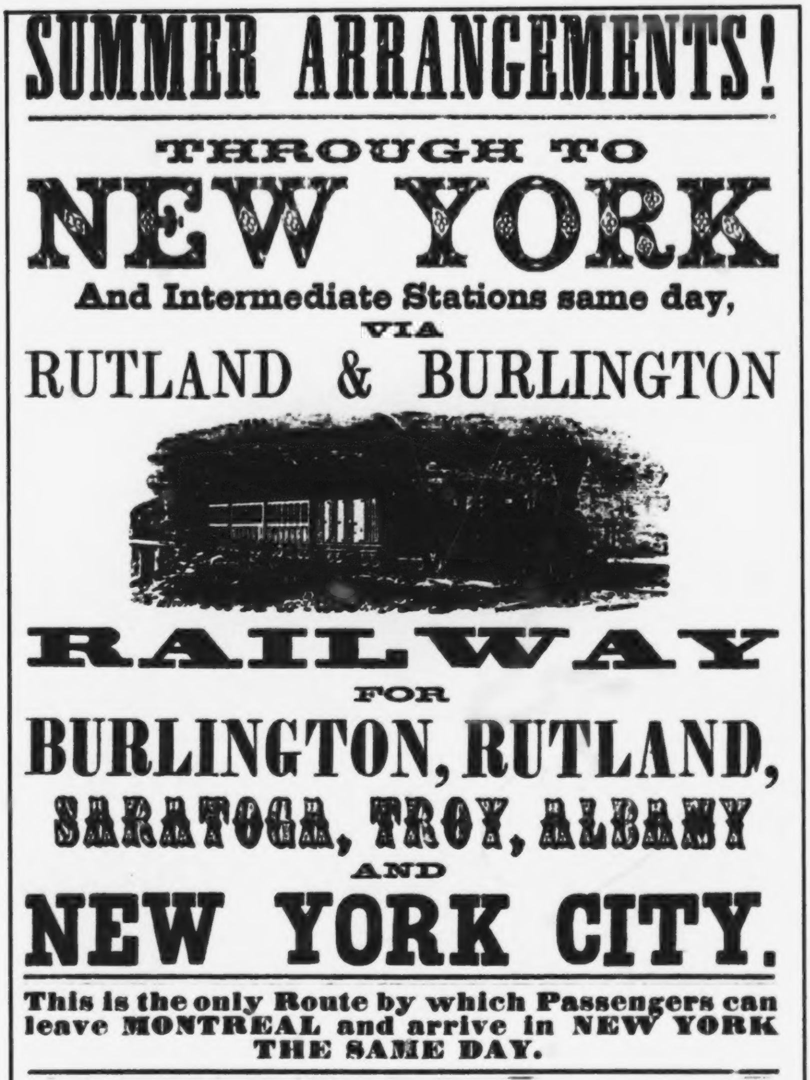
In response, Congress mandated that rail charges be "reasonable and just," outlawed rebates and "undue or reasonable preferences" to any person, company, or locality, and created the Interstate Commerce Commission to administer the new act. Indicating some appreciation of the ICC's importance, President Grover Cleveland appointed as its first chairman Thomas M. Cooley, a leading legal scholar of the period and a former member of the Michigan Supreme Court. Soon, however, the ICC found its powers narrowed through several court cases.

Yet the setbacks proved only temporary, for just after the turn of the century Congress rejuvenated the Commission by clarifying and expanding its role. In America of the Progressive Era, regulation found support at both state and national levels; cases were prosecuted more effectively than before; and now the courts cooperated in upholding Commission orders. Critics later contended that the ICC quickly became the champion of the carriers it was supposed to regulate, thereby tampering with normal competitive forces and creating serious long-term problems in American transportation. True or not, the ICC became a prototype for a growing number of independent regulatory commissions in the twentieth century. Hanging on the commerce clause as a constitutional "peg," such bodies as the Federal Trade Commission, the Federal

Communications Commission, the Securities and Exchange Commission, and the Consumer Products Safety Commission compose an integral part of America's actual framework of government. They also touch the lives of every American.

Congress' second pioneering measure struck off in a different direction. Although industrial expansion and consolidation, typified in the public mind by Standard Oil Company's growth in the 1880s, brought substantial benefits in product development and distribution, it threatened to overwhelm the American dream of individual entrepreneurship. In the 1888 presidential contest, not surprisingly, Republicans and Democrats both endorsed national legislation to control the "trusts," and bipartisan majorities soon passed the Sherman Anti-Trust Act of 1890. Whereas the Interstate Commerce Act aimed in part at slowing competition, the 1890 law sought to restore it by outlawing "every contract," combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, among the several States, or with foreign nations."

But the Supreme Court soon held that the Sherman Act did not outlaw all kinds of "bigness." Quite early, the Supreme Court in *Standard Oil Company* v. *United States* (1911) came close to endorsing Teddy Roosevelt's notion that there were good trusts and bad trusts. The act had to be interpreted in light of earlier English and American legal doctrines on restraint and monopoly of trade, wrote Chief Justice Edward White. These doctrines, and thus the Act, embodied the common-sense notion that not all the large business combinations were harmful to the public welfare and hence forbidden.



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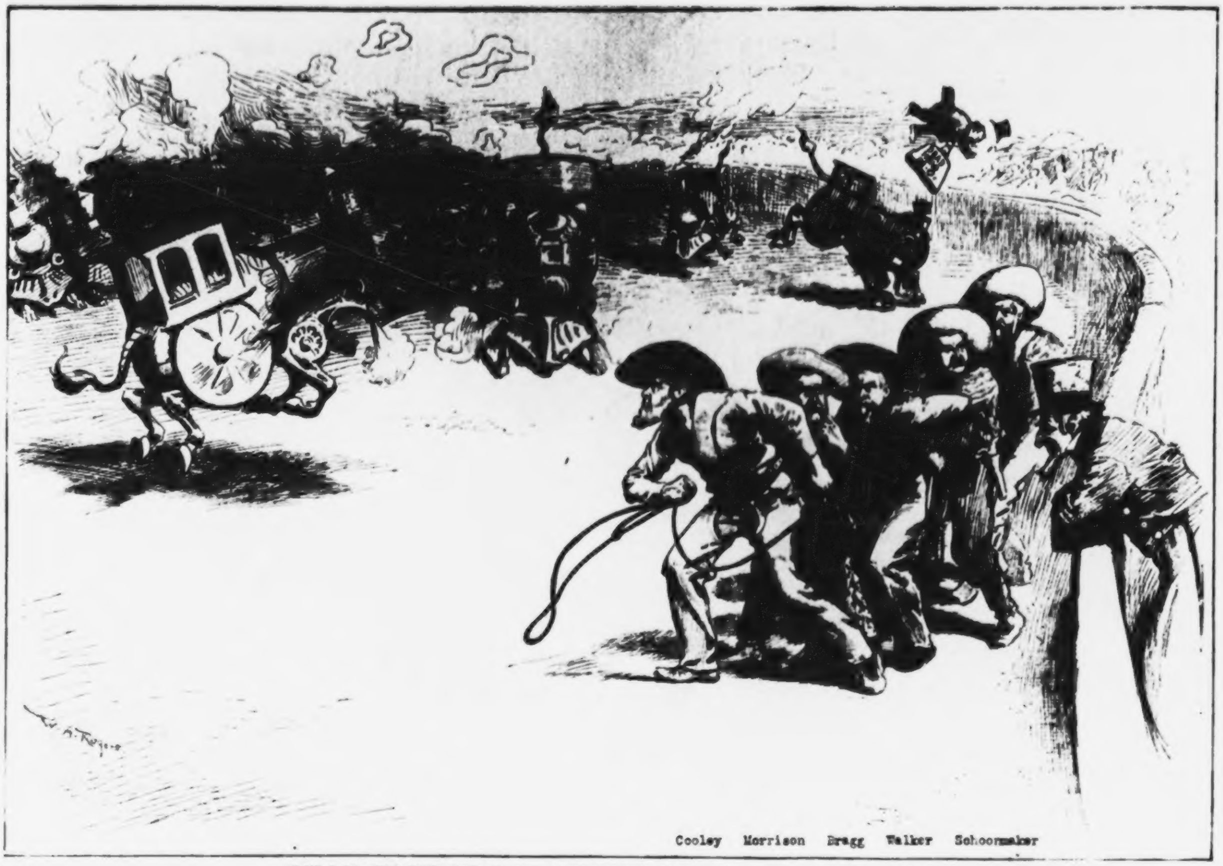


UNCLE SAM'S "WILD WEST" (EAST AND SOUTH) SHOW—THE INTER-STATE COMMISSIONERS MOVING ON THE ANIMALS

Harper's Weekly, *April 8, 1887. Library of Congress.*

Responding indignantly to White's "rule of reason," Justice John Marshall Harlan retorted that when Congress included "every contract" in the Act's coverage, it meant *every*. Although the Court had ordered the breakup of Standard Oil, Harlan parodied White as telling the big corporations: "You may *now* restrain such commerce, provided you are reasonable about it; only take care that the restraint is not undue." But if Harlan had the better of the argument from a literalist's point of view, White better captured the ambivalent American view of business concentration. And recent responses to the dismantling of the American Telephone and Telegraph Company again confirm the "love-hate" relationship of Americans toward the reach of the commerce clause in the form of anti-trust policy.

The Sherman Act led also to a more fundamental issue, one John Marshall had opened in *Gibbons*: As conferred by the Constitution, how far did Congress' commerce power extend? Put differently, what activities did the commerce clause authorize Congress to regulate? The question arose when the American Sugar Refining Company, which already produced nearly two-thirds of the sugar refined in the United States, bought the E. C. Knight Company and three other Pennsylvania-based refineries. Because the purchase gave American Sugar control of all but two percent of the industry's output, the Justice Department sought a judicial order under the Sherman Act to annul the contracts of purchase. In *United States* v. *E. C. Knight Company* (1895), the Supreme Court denied the government's request, upholding a lower court ruling.

Assuming Congress had meant the term "commerce" within the Sherman Act to convey the same meaning that it carried in the Constitution, Chief Justice Meville Weston Fuller asked if the constitutional meaning of "commerce" embraced "manufacturing." By his reading, it did not: "Commerce succeeds to manufacture, and is not part of it"—where manufacturing left off, commerce began; the two were neatly compartmentalized. Furthermore, to equate them would be fraught with danger, for it would take federal authority into every nook and cranny of American life and hence would destroy "the autonomy of the States" that was so necessary to "our dual form of government." By this reasoning, the commerce clause did not allow regulation of manufacturing, and accordingly the Sherman Act did not apply to the Knight purchase.

Over the next four decades, both in applying the Sherman Act and in testing other federal legislation, the Court admitted that the commerce power allowed *some* regulation of intrastate activities. One approach examined whether the object of regulation, although itself purely local in scope, formed part of a larger "stream of commerce." (Stockyards did and thus came within federal jurisdiction.) Another and more problem-laden test was whether the local activity had a direct or an indirect effect on interstate commerce. If direct (as in the instance

If the federal government could regulate a local activity merely because it had a generalized economic relationship to interstate commerce—and perhaps only a slight and even vague relationship—then no area of life would necessarily remain free from federal supervision.

of railway safety devices), regulation was permissible; if indirect (as with child labor), it was not. But the line between direct and indirect effects was obscure, to say the least. Its fuzziness gave considerable room to the policy choices of legislators and judges alike.

By the time of Franklin D. Roosevelt's New Deal, the Supreme Court had available a variety of precedents. Some pointed toward a strict interpretation of the commerce power; others offered more latitude. Because FDR's war with the "nine old men" on the Court is a story in itself, suffice it here to say that the justices initially took the narrow view, one that Roosevelt gloomily labeled "the horse-and-buggy definition of interstate commerce."

Reading the opinions in the early New Deal cases recalls to mind John Marshall's stricture in *Gibbons* against using metaphysical niceties to constrain federal power. As developed by Justice George Sutherland in *Carter* v. *Carter Coal Company* (1936), the direct-indirect effects test turned out *not* to involve the economic magnitude of a local activity's impact on interstate commerce. Discussing the relation of labor-management strife in coal mines to the nation's commerce, Sutherland explained that "the extent of the effect bears no logical relation to its character . . . . An increase in the greatness of the effect adds to its importance. It does not alter its [indirect] character." Yet *economic* magnitude is precisely the sort of consideration one might expect to enter crucially into a "test" relating to *commerce*. For Sutherland, however, the necessary requirement was practically a direct physical impact on commerce; an undeniable chain of cause-and-effect involving only broad market forces would not do.

Easy though it is to ridicule Sutherland's position, he conveyed a troubling message. His rejection of mere *economic* connections as sufficient to establish federal authority rested on a *political* concern. "The Constitution, in all its provisions," he reaffirmed, quoting from an earlier case, "looks to an indestructible Union, composed of indestructible States." He then added:

> Every journey to a forbidden end begins with the first step; and the danger of such a step by the federal government in the direction of taking over the powers of the states is that the end of the journey may find the states so despoiled of their powers, or—what may amount to the same thing—so relieved of the responsibilities which possession of the powers necessarily enjoins, as to reduce them to little more than geographical subdivisions of the national domain.

Stripped of its judgment about the undesirability of the outcome he foresaw, Sutherland's opinion offered a prediction: If the federal government could regulate a local activity merely because it had a generalized economic relationship to interstate commerce—and perhaps only a slight and even vague relationship—then no area of life would necessarily remain free from federal supervision.

Was Sutherland's prediction accurate?

In the spring of 1937 the Supreme Court reversed itself, upholding the National Labor Relations Act as a valid exercise of the commerce power even though it regulated labor relations in production or manufacturing. To be sure, in the major case, *National Labor Relations Board* v. *Jones and Laughlin Steel Corporation* (1937), Chief Justice Charles Evans Hughes emphasized the real and substantial interstate impact of labor strife in a large, far-flung steel company. But another decision applied the NLRA against a small clothing manufacturer, which employed about 800 of the 150,000 workers in the men's clothing industry. If the company were closed immediately, the dissent accurately protested, "the ultimate effect on commerce in clothing obviously would be negligible."

Such concerns now carried little weight, and the future became vividly outlined in *Wickard* v. *Filburn* (1942). Roscoe C. Filburn owned and operated a small farm near Dayton, Ohio; in 1941, he had grown 23 acres of winter wheat, totaling nearly 12 acres more than he was legally permitted by federal law. These production quotas, established under the New Deal's Agricultural Adjustment Act of 1938, sought to promote agricultural prosperity by limiting production and thus raising prices. Filburn, wishing to avoid a penalty, sued to prevent the Secretary of Agriculture from enforcing the measure. Filburn admitted that he generally sold some of his crop; but he also fed part to his poultry and livestock (some of which were sold), saved a portion for making flour for home consumption, and kept some for the next planting. In any event, counsel for the Secretary never alleged that the amount Filburn would directly market exceeded his quota.

No matter. The Supreme Court accepted the argument that even if farmers like Filburn consumed their wheat on the farm, they still affected commerce, for their home consumption depressed the agricultural economy by relieving them of the need to make purchases in the market. Moreover, although each farmer's share was minuscule, the total effect was great. With *Wickard*

With only the power to tax and spend as a near competitor, the commerce clause supports a list of federal activities that ranges about as far as the imagination.

v. *Filburn*, the line between *inter*state and *intra*state commerce all but evaporated.

The Commerce Clause and Civil Rights

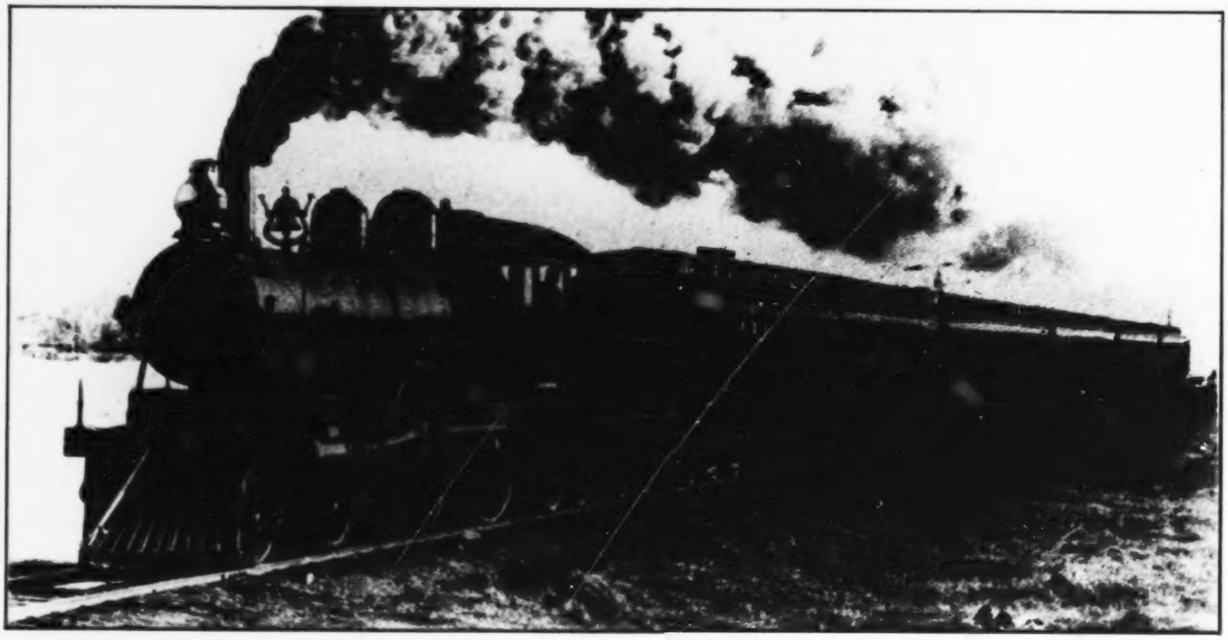
Intrastate commerce, although not specifically mentioned in the Constitution, is at least still commerce. In 1964, Congress, with the subsequent endorsement of the Supreme Court, used the commerce clause to support legislation on a subject that most of us think of as quite different—the protection of civil rights. This use of the clause is even more surprising because the Constitution offers other foundations for civil rights legislation. The Thirteenth Amendment, for example, both abolishes slavery and (as sometimes construed) bans practices that constitute "badges of servitude." The Fourteenth Amendment prohibits a state from denying equal protection of the laws. (Racial discrimination, the argument would assert, indicates state action in the form of failure to protect minority rights.)

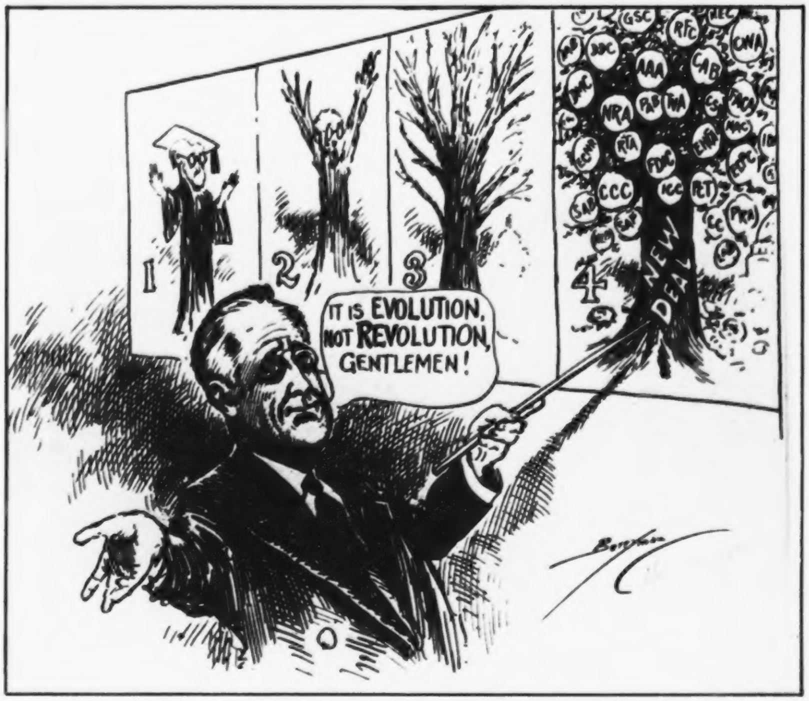
As early as 1883, however, in his classic dissent in the *Civil Rights Cases*, Justice John Marshall Harlan protested that the just-invalidated Civil Rights Act of 1875 could be justified as a regulation of commerce. Eighty-one years later, Congress accepted Harlan's suggestion when it passed the Civil Rights Act of 1964. Here the commerce power came to underpin legislation in which the economic concern was at best secondary, however laudable the legislation was in its own right.

Relying explicitly on the commerce clause, the public accommodations section of the 1964 act outlawed (among other practices) racial segregation in restaurants that served or offered to serve interstate travelers or obtained a "substantial portion" of their food from interstate sources. While the section also banned discrimination "supported by State action" and thus took a bow toward the Fourteenth Amendment, the Supreme Court nevertheless upheld its public accommodations provisions on commerce grounds.

One case arose when Ollie McClung and his son, Ollie, Jr., the operators of "Ollie's Barbecue" in Birmingham, Alabama, attempted to enjoin Attorney General Nicholas Katzenbach from enforcing the law against them. Their restaurant catered to local business and family groups, it did no advertising, and was situated about a mile from the nearest interstate highway and bus and train stations, and six to eight miles from the nearest airport. To the McClungs' knowledge, they

Empire State Express, 1894. Library of Congress.





Library of Congress.

served no interstate travelers, but because they purchased most of their meat from a supplier who obtained it from out-of-state, they clearly fell within the terms of the Act. And because they refused service to blacks, they were just as clearly violating the Act.

In *Katzenbach* v. *McClung* (1964), Justice Tom Clark briefly reviewed the congressional hearings preceding the Civil Rights Act and found they solidly established that segregated restaurants not only sold less food from interstate sources but hindered both interstate travel and new business opportunities. As in *Wickard* v. *Filburn*, he observed, the immediate impact of the business in question was nationally insignificant; but combined with the activities "of others similarly situated," it was "far from trivial."

Are There Limits?

As for possible limits to the commerce power, Clark returned to *Gibbons* v. *Ogden's* exclusion of activities "which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government." "This rule," Clark declared, "is as good today as it was when Chief Justice Marshall laid it down," but he wisely avoided suggesting any examples of activities that would fall within the rule. Nor did he mention that the Court had last invalidated a congressional commerce regulation in 1936.

Eventually, in *National League of Cities* v. *Usery* (1976), the Court did overturn an amendment to the federal Fair Labor Standards Act that regulated the wages and hours of state and local employees. Significantly, though, Justice William H. Rehnquist's opinion for the Court did not deny that these employees' wages and hours of work affected interstate commerce. Rather, Rehnquist contended the legislation interfered with the constitutionally essential operations of state governments. But the vote against the FLSA amendments was close—five to four—and in the ensuing years the Court declined to extend the *Usery* ruling. Finally, in *Garcia* v. *San Antonio Metropolitan Transit Authority* (1985), Justice Harry A. Blackmun changed sides and the Court explicitly overruled its 1976 decision, arguing that the political process adequately protected states from congressional regulation under the commerce clause. Again, however, the vote was five to four, and the dissenters promised that it would take only another one-vote switch to reinstate the judicially-enforced *Usery* limits on the commerce power. This area promises to be one of continuing controversy.

With only the power to tax and spend as a near competitor, the commerce clause supports a list of federal activities that ranges about as far as the imagination. From late nineteenth-century bans on transportation of lottery tickets and pornography, it has come to underpin federal attacks on prostitution, tainted food and dangerous or ineffective drugs, motor vehicle thefts, kidnapping, chaos in the radio spectrum, business "monopolies," labor racketeering, low wages and long hours, agricultural overproduction, racial discrimination, gas guzzling and polluting automobiles, dangerous toys, and improperly shaped toilet seats in the work place—among other economic and social ills.

When you next read that the FCC, say, is investigating the deceptive marketing of cordless telephones, or that the ICC is setting rates on the shipment of yak fat, think about John Marshall. Consider, too, today's complex economy and ask if there remain any limits to Congress's commerce authority.

Suggested additional reading:

Paul R. Benson, Jr., *The Supreme Court and the Commerce Clause, 1937-1970* (New York, 1970).

Felix Frankfurter, *The Commerce Clause under Marshall, Taney and Waite* (Chicago, 1964).

Alpheus T. Mason and Gerald Garvey, eds., *American Constitutional History: Essays by Edward S. Corwin* (New York, 1964), ch. 10 ("The Passing of Dual Federalism").

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Vietnam and the Constitution: the War Power Under Lyndon Johnson and Richard Nixon

by MICHAL R. BELKNAP

During the national agony known as the Vietnam War, Presidents Lyndon Johnson and Richard Nixon came under fire almost as intense as that directed at American military units in Southeast Asia. Among the charges leveled against them were allegations of unconstitutional conduct. In fact, Johnson and Nixon were guilty neither of massively misemploying their authority as commander in chief nor of abusing presidential war powers. Although often condemned for failing to obtain a congressional declaration of war, they had the support of twentieth century practice and opinion in contending that it was for the president to decide when and against whom the United States should commit its armed forces to battle. Furthermore, neither Johnson nor Nixon claimed, as had some of their predecessors, that the war powers of their office gave them the authority to subject large aspects of American domestic life to executive control. These much-villified presidents may deserve censure for fighting the wrong war in the wrong place at the wrong time, but they were not guilty of fighting that war unconstitutionally.

Precedent

It had never been quite clear what the framers of the Constitution meant when they provided in Article I, section 8, "The Congress shall have Power . . . to declare war . . . ." The declaration of war was a medieval custom associated with chivalry, which required one belligerent to notify another formally before commencing hostilities against it. By the time of the Constitutional Convention in 1787, this practice had fallen into disuse, and of the approximately 140 wars fought in the world between 1700 and 1907 (when the Hague Conference adopted a convention providing that hostilities might not be commenced without a formal warning), only a handful were declared. The draft of the Constitution prepared by the Committee on Detail gave Congress the power to "make" war, but the full Convention changed that word to "declare." It seems unlikely that the Convention intended thereby to restrict Congress only to giving formal notification of America's intention to fight or to initiating the minority of wars in which a declaration was employed. Probably, it made the change to allow the president to respond immediately if the nation were attacked. Unfortunately, debate on this issue was brief and opaque. By employing a word whose meaning was at best ambiguous, the Convention made it possible for presidents to argue later that it was constitutional for them to commence, on their own initiative, all wars which were not "declared."

In any event, by making the president the "Commander in Chief of the Army and Navy . . . ," the Convention conceded to the executive the real power to decide when and against whom the United States would fight whether or not the war is "declared." Congress declared war on Mexico in 1846, but only after being informed by President James K. Polk that Mexico already had initiated hostilities by attacking American troops. In fact, Polk, who was seeking a pretext for war, had provoked the Mexican attack by ordering the Army into disputed territory to which Mexico's claim was considerably stronger than that of the United States.

Other presidents have used their authority as commander in chief to deploy American military forces in ways which, although not causing a declared war, have resulted in fighting and even loss of life. In 1801, for example, Thomas Jefferson started a naval conflict with the Barbary pirates by spurning their demands for increased "protection money" and ordering the Navy and Marines to North Africa.

Presidential War-Making

Six decades later, the Supreme Court gave backhanded legal recognition to such presidentially-initiated "wars." In 1861, Abraham Lincoln launched the fighting between the North and South by dispatching a relief expedition to Fort Sumter. He made the resulting conflict a war under international law by ordering the Navy to blockade Southern ports. In upholding the legality of that action, the Supreme Court employed language useful to later champions of presidential warmaking. Whether a congressional declaration was necessary to make a non-civil war legal as a matter of domestic constitutional law was not really an issue in the *Prize Cases* (1863), which involved a dispute over international law. In its opinion, though, the Court proclaimed that a president was bound "to resist force by force," and to do so "without waiting for any special legislative authority." He could wage war without waiting "for Congress to baptize it with a name."

During the twentieth century, presidents advanced toward the sort of executive takeover of the war-initiating function that this language seemed to sanction. McKinley moved only a little way in that direction, and he did so with the explicit permission of Congress. On April 20, 1898, the House and Senate adopted a resolution recognizing the independence of the Spanish colony of Cuba and demanding that Spain relinquish its authority over that island and withdraw its

A search and destroy operation in Vietnam, June 1967. USAPA.

These much-villified presidents may deserve censure for fighting the wrong war in the wrong place at the wrong time, but they were not guilty of fighting that war unconstitutionally.

military and naval forces. At the same time, Congress directed the president to use the Army and Navy to carry its resolution into effect. In other words, Congress issued an ultimatum, then left it to the president to decide what action the United States should take if its demands were not met. Spain responded to the resolution by breaking diplomatic relations. On April 22, McKinley proclaimed a naval blockade of Cuba, and that same day an American warship fired across the bow of a Spanish steamer. On April 24, Spain declared war on the United States, and the following day Congress adopted a second resolution, which announced that a state of war had existed between the two countries since the twenty-first.

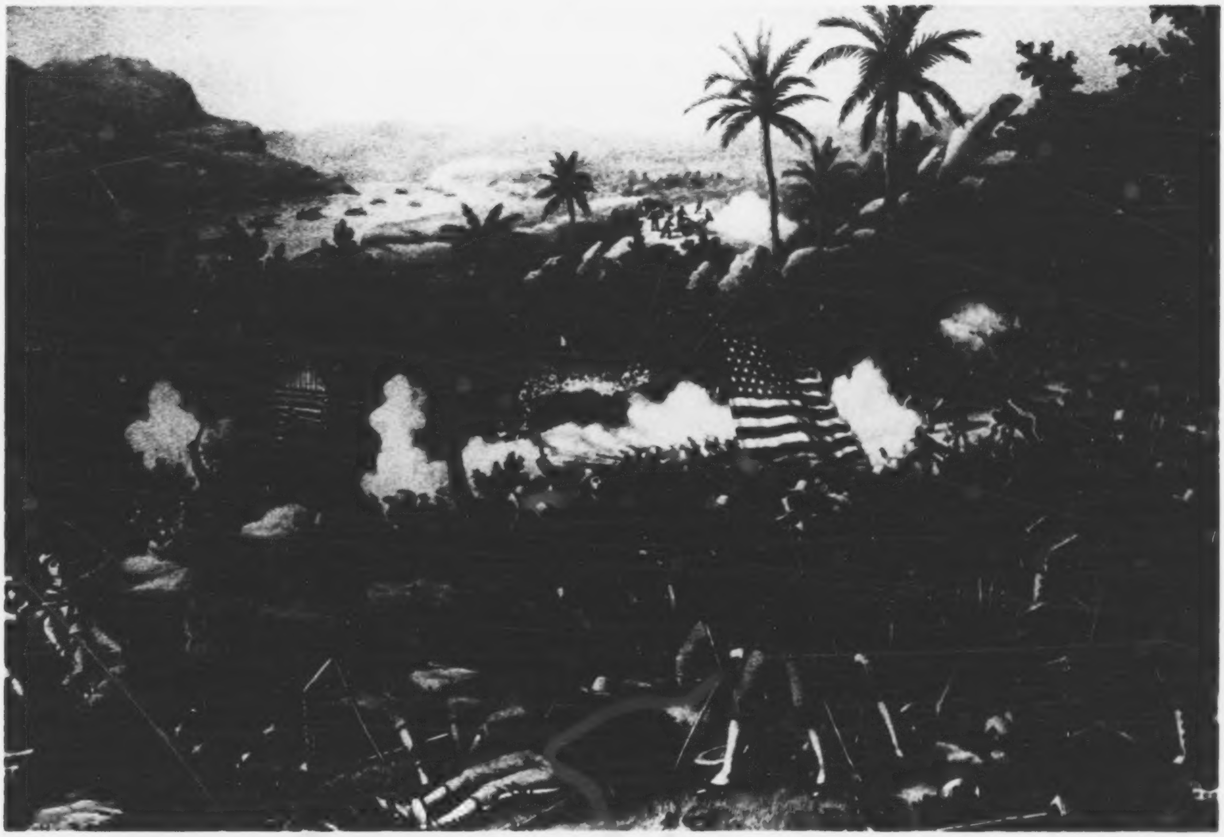
Like the Spanish-American War, World War I had explicit congressional sanction. In April 1917, Woodrow Wilson, an admirer of the British parliamentary system who believed a president should govern by leading Congress, asked for and obtained a declaration of war against Germany. Had the House and Senate refused his request, Americans might still have found themselves fighting Germans. Earlier, a Senate filibuster had prevented Wilson from obtaining congressional authorization to put guns, and Navy men to fire them, on merchant vessels. In March he took that step on his own. It was a move likely to result in American ships shooting it out with German submarines, whether or not Congress declared war.

During the period 1939–1941, Franklin Roosevelt went much further than Wilson had, reducing congressional declaration to little more than a formality. Congress voted for war against Japan only after the Japanese bombed Pearl Harbor on December 7, 1941 and for hostilities against Germany and Italy only after those countries announced they would join their Axis ally in its fight against the United States. Long before December 1941, however, this country had ceased to be neutral in the military conflicts already raging in Asia and Europe. Roosevelt had assisted China in its fight with Japan by subjecting the Japanese to escalating economic pressure and had made America into a virtual arsenal for Britain in her war against Nazi Germany. On his own authority, he transferred fifty destroyers to the British in exchange for some Western Hemisphere bases and with congressional authorization lent and leased American war materiel to Britain. Besides taking actions likely to provoke the Axis powers into attacking the United States, Roosevelt initiated combat against Germany. He ordered the Navy to convoy supplies bound for the British Isles and to fire on German submarines that tried to interfere. Several months before Pearl Harbor, the United States was already engaged in a shooting war with Germany in the North Atlantic. Of the two-year period which preceded December 7, 1941, political scientist Edward S. Corwin said in *Total War and the Constitution* (1947), "The initiative throughout was unremittingly with the President."

In June 1950, a president dispensed entirely with the declaration of war, leading the United States into a major military conflict without even consulting Congress. When North Korea attacked South Korea, Harry Truman simply ordered American air, naval, and ground forces into combat against the Communist aggressors. Explaining to legislative leaders why he had proceeded in this way, Truman declared, "I just had to act as Commander in Chief, and I did." When the tide of battle began to run strongly against the United States, Representative Frederic R. Coudert, Jr., introduced a resolution against sending additional military forces abroad without the prior approval of Congress. Conservative Republican Senator Robert Taft endorsed his position, but a host of other prominent senators from both parties, among them Paul Douglas, Arthur Vandenberg, Wayne Morse, and J. William Fulbright, defended Truman's right to send American forces anywhere he felt the security of the United States required.

By 1950 it was obvious to perceptive legislators that, whatever the members of the Constitutional Convention may have intended, the real power to determine whether or not this country went to war lay with the president. Lawyers and scholars had grasped this reality too. In 1941 University of California law professor Harry Willmer Jones observed: "Champions of the authority of Congress have long been aware that bold presidential exercise of the power of command over the armed forces may make somewhat unreal the constitutional power of Congress to declare war."

By the early 1960s, this state of affairs was widely regarded as a good thing. Victory in World War II had vindicated Roosevelt's pre-Pearl Harbor initiatives and discredited the isolationists who had criticized him for bypassing Congress. In the wake of that conflict, prominent international and constitutional lawyers took the position that the congressional power to declare war was really little more than the authority to announce to the rest of the world that the United States was engaged in hostilities. The development of atomic weapons, and of planes and rockets capable of delivering them from one continent to another, seemed to



The battle of Quasimas near Santiago, June 1898, *lithograph by Kurz & Allison, 1898. Library of Congress.*

make essential vesting war-making power in a single individual, who could act quickly and decisively to meet an enemy challenge. Historians, such as Arthur Schlesinger, Jr., and political scientists, such as Richard Neustadt, praised the emergence of the "strong" presidency. Meanwhile, international law authority Pittman B. Potter, unaware of how naive and even ridiculous his views would appear by the 1980s, observed in 1954 that while the president did have a large measure of discretion, it was after all "subject to the obligation to use a large measure of prudence . . . and not to involve us in another World War without more than ample justification."

It was in this climate of opinion that Lyndon Johnson went to Congress after the Tonkin Gulf incident in August 1964 seeking a resolution expressing congressional approval and support for "the determination of the President, as commander in chief to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression." Johnson did not believe the Constitution required him to obtain authorization from Congress before taking military action in Vietnam, but he thought such a resolution would be politically useful. It would show the Communists that America was united behind its commander in chief and enable him to avoid the sort of partisan criticism Truman had received for his unilateral action in Korea. Although Dwight Eisenhower had sought similar expressions of congressional support during the Formosa and Middle East crises of the 1950's, several prominent senators maintained that the president already had sufficient authority to use force in Vietnam. The commander in chief needed no legislative endorsement, they insisted. Among the proponents of this thesis was Senator Fulbright, by now chairman of the Foreign Relations Committee and later one of the sharpest critics of Johnson's Southeast Asian policies.

Such critics often faulted LBJ for failing to obtain a declaration of war from Congress before sending hundreds of thousands of troops to South Vietnam and launching a massive bombing campaign against North Vietnam, but this objection was seldom heard until after the futility of the war revealed itself late in the Johnson administration. As Professor Graham T. Allison has pointed out, had the War Powers Resolution, passed by Congress in 1973 to prevent "any more Vietnams," been in force a decade earlier, it would not have kept America from becoming militarily involved in Southeast Asia; Johnson's actions were initially popular, and he could easily have obtained the congressional authorization required for the troops he sent to Vietnam in 1965 to remain there. Furthermore, the president's conduct was in line with pre-1964 thinking and presidential practice.

So for the most part were the actions of Richard Nixon, which included expanding the war by invading neutral Cambodia in 1970.[1] In justifying the Cambodian incursion as an exercise of the powers of

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[1] Like thousands of college students of my generation, I participated in protests against the Cambodian incursion. I do not mean here to endorse it (or the Vietnam War as a whole) as either morally justified or politically wise.

By 1950 it was obvious to perceptive legislators that, whatever the members of the Constitutional Convention may have intended, the real power to determine whether or not this country went to war lay with the president.

the commander in chief, then-assistant Attorney General William Rehnquist took a position actually more restrained than Truman's. As Rehnquist argued, Nixon's invasion was, at least in part, a tactical move designed to protect American forces already fighting in Vietnam from attacks launched by the enemy out of sanctuaries across the border in Cambodia. Truman, on the other hand, had started a brand new war when he sent U.S. troops off to engage the North Koreans in 1950. Nixon did break new and dubious ground, but only when he continued to fight in Southeast Asia despite clear expressions of congressional opposition to the war, such as the 1971 repeal of the Tonkin Gulf Resolution.

Arthur Schlesinger, Jr. is hardly warranted in asserting in the *The Imperial Presidency* (1973): "Both Johnson and Nixon ... indulged in presidential warmaking beyond the wildest dreams of their predecessors." What bothers Schlesinger is the character of the conflict which one of these presidents escalated[2] and the other prolonged and expanded. He finds their conduct distinguishable from that of Lincoln, Roosevelt, and Truman primarily because, unlike Nixon and Johnson, those men involved the nation in just wars. That distinction may be a valid one, but it is not a constitutional one.

War Powers "At Home"

Although Johnson was a domineering individual and Nixon's efforts to enhance the prerogatives of the presidency sometimes suggested dictatorial ambitions, neither Vietnam president was as "imperial" in his use of presidential war power on the domestic front as predecessors who have fared far better at the hands of historians such as Schlesinger. Lincoln, for example, used the war power to justify spending money never appropriated by Congress, locking up disloyal civilians, and even freeing the slaves. Indeed, the domestic presidential "war power" was largely his creation. Lincoln manufactured it by linking the commander-in-chief clause, apparently intended by those who wrote the Constitution only to make the president the head of the Army and Navy, to the provision in Article II, section 3 directing the chief executive to "take care that the laws be faithfully executed." Together, Lincoln insisted, these clauses gave him sufficient authority not only to fight the Civil War but also to deal effectively with all of the domestic problems it created. In his hands, the commander-in-chief clause became a constitutional grant to the president of almost unlimited emergency powers.

Lincoln, was, of course, fighting a unique internal war in which the very survival of the nation was at stake. The extraordinary circumstances which he confronted justified the extraordinary measures which he took. By the end of the nineteenth century, though, commentators were pointing to his actions as examples of what any wartime president could do. They generalized Lincoln's conduct into a broad domestic presidential war power, available during foreign as well as civil wars.

This concept went largely untested during the Spanish-American War. That conflict, which ended victoriously only a few months after it began, was too brief and required too little in the way of economic and manpower mobilization to provide much occasion for assertions of presidential prerogative on the home front.

World War I was different. It was a cataclysmic world conflict in which several nations (although certainly not the United States) were battling for survival. Hence, it seemed to require extraordinary measures to ensure victory. Furthermore, national war efforts in an industrial age had become so heavily dependent on the economic base supporting them that a dozen workers had to labor at home to keep a single soldier fighting at the front. Under such circumstances, the use of unprecedented methods could not be restricted to the battlefield. Wilson responded to the challenge of World War I with a more sweeping domestic exercise of presidential power than anything seen since Lincoln's day. In a speech accepting the 1920 Republican nomination, Warren G. Harding complained that due to anxieties inspired by the war emergency, "every safeguard was swept away. In the name of democracy we established autocracy."

Harding's partisan recollections were not entirely fair to his Democratic predecessor. Rather than relying largely on the inherent powers of the commander in chief, as Lincoln had done, Wilson went to the legislative branch and got it to delegate sweeping authority to the chief executive. Congress gave him the power not only to draft men into the Army and Navy, but also to regulate food production, set fuel prices, license businesses, seize railroad, telegraph, and telephone lines, take over factories, censor the mails, and even imprison critics of the government and opponents of the war.

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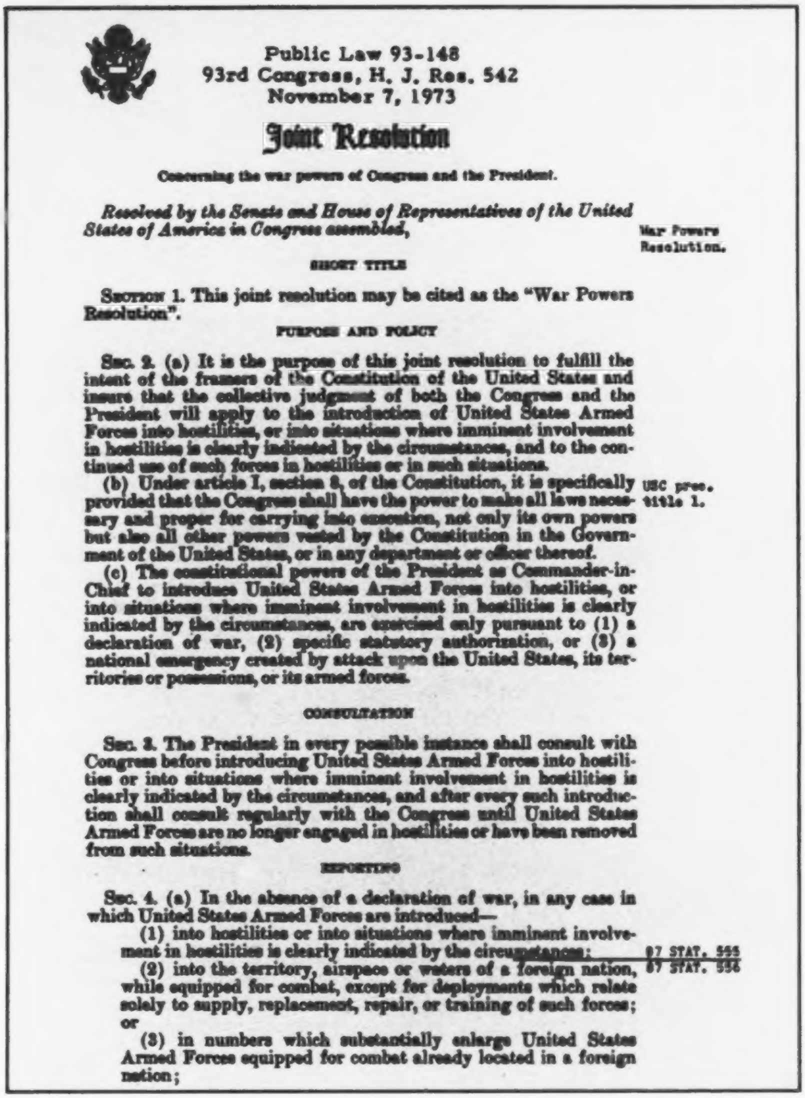
[2] President Truman sent the first American military personnel to Vietnam. The number of U.S. advisors in that country, which stood at less than 700 at the end of the Eisenhower administration, was raised to more than 16,000 by John F. Kennedy. Besides increasing the number of American men in Vietnam from that level to about 550,000, Johnson also changed the U.S. role there in two significant ways: he introduced American ground combat units into the fighting in the South and he initiated the bombing of the North.

Although the scope of the authority which Congress delegated to Wilson was breathtaking, he sometimes found it inadequate, or at least too slow in coming. Consequently, the president took a number of actions for which statutory authorization was lacking, justifying them as exercises of his own war powers. The most important of these was the establishment of the powerful War Industries Board, which extended a large measure of supervision over much of American business.

During World War II, Roosevelt relied even more than had Wilson on the war powers of the presidency itself. Congress was again generous in delegating authority to the executive, but FDR did many things, even during the period September 1939 to December 1941, for which he lacked statutory authority. These ranged from creating a host of new federal agencies to lengthening the work week to 48 hours. The president insisted he had the inherent power to seize defense plants in danger of being idled by strikes and took over several before Congress got around to enacting legislation clearly giving him the authority to do this. The Justice Department argued moreover that Roosevelt's war powers provided a legal basis for Army seizure of Montgomery Ward, de-

U.S. firefighting boats at burning battleship, USS West Virginia, bombed by the Japanese, December 7, 1941, Pearl Harbor. U.S. Navy.



Public Law 93-148
93rd Congress, H. J. Res. 542
November 7, 1973

Joint Resolution

Concerning the war powers of Congress and the President.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

War Powers Resolution.

SHORT TITLE

SECTION 1. This joint resolution may be cited as the "War Powers Resolution".

PURPOSE AND POLICY

SEC. 2. (a) It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

(b) Under article I, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.

USC prec. title 1.

(c) The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

CONSULTATION

SEC. 3. The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

REPORTING

SEC. 4. (a) In the absence of a declaration of war, in any case in which United States Armed Forces are introduced—

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;

87 STAT. 555
87 STAT. 556

(2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or

(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation;

The "War Powers Resolution," P.L. 93–148.

spite the tenuous connection between a consumer mail order house and the national military effort.

The war powers Roosevelt claimed were even greater than those he actually exercised. On September 7, 1942, he declared that if Congress did not repeal a statutory provision which was undermining the government's efforts to combat inflation, the "responsibilities of the president in war time to protect the nation" would justify him in refusing to carry out the offensive law. Corwin sharply criticized this message, lambasting Roosevelt for claiming he had the right to suspend the Constitution. Other commentators reacted differently, insisting that the nation's involvement in a "total war" justified, even required, such extreme examples of executive leadership. Neither Congress nor the judiciary, they believed, should sit in judgment of the commander in chief. The Supreme Court probably agreed, for it tended to treat many domestic actions of the President—like excluding Japanese-Americans from the West Coast and closing the civilian courts to captured enemy saboteurs—as part of his military conduct of the war, and consequently as matters in which judges should not interfere.

Like Roosevelt before him, Truman relied on extra-statutory authority to establish new agencies and give additional powers to old ones during the Korean conflict. In April 1952, when a nationwide strike threatened to shut down the steel industry and restrict the flow of war materiel to Korea, he ordered the Secretary of Commerce to seize the steel mills. In doing this, Truman relied upon what he insisted were the inherent powers of the president in a "defense emergency" (a rationale, however, with which the Supreme Court did not agree).

Johnson and Nixon managed the home front quite differently. In July 1967, when a railroad strike interfered with the movement of ammunition and military equipment to ports of embarkation to Vietnam, LBJ asked Congress for legislation to end the work stoppage and resolve the underlying labor-management dispute. When Nixon called out military reservists to deliver the mail during a 1970 postal strike, he cited as his authority for taking this action not the commander-in-chief clause but a statute. In imposing a ninety-day wage-price freeze the following year, he relied not on presidential war power but on stand-by authority which Congress had bestowed upon the president in 1970. It is true that when trying to justify some of the more dubious conduct of his administration, Nixon liked to refer frequently to the demands of "national security," but in managing the home front, neither he nor Johnson relied on the war power. As a matter of fact, the Vietnam presidents seldom even mentioned it in a domestic context.

There are probably three reasons for their failure to make greater use of the war power. One is the Supreme Court's decision in *Youngstown Sheet and Tube Co.* v. *Sawyer* (1952). In that case, the Court held that Truman lacked the authority to seize the steel mills. Since every member of the six-man majority wrote a separate opinion, it is difficult to say precisely why, but clearly only the three dissenters accepted Truman's contention that the inherent powers of the presidency

Neither Johnson nor Nixon had any real need to resort to special constitutional powers, arguably available only during a declared war. They could instead rely upon the vast and ill-defined statutory emergency power which Congress had bestowed upon the executive in bits and pieces.

provided sufficient support for his action. Two other justices might have agreed with them, had Congress not already provided a remedy for such strikes in the Taft-Hartley Act. They and two additional colleagues insisted, however, that a president had no right to ignore a statute. After 1952 the prudent course for a cautious chief executive was to cite statutory authority for any action likely to be challenged.

The growing unpopularity of the war in Vietnam also gave Johnson and Nixon plenty of reason for caution. In February 1968, LBJ chose to deal with the inflation which the war had ignited by setting up a cabinet committee to study the problem. His staff already had made a detailed analysis of the wage and price controls imposed by Truman during the Korean conflict, and many months earlier the White House Office of Emergency Preparedness had drafted the executive orders and legislation necessary to impose a variety of constraints on an overheating economy. Like the head of that agency, Johnson seems to have feared how the public might react to the idea of ecnomic controls. Consequently, he opted for another study of inflation rather than for meaningful action to halt it. Even Nixon had to be prodded toward wage and price controls by a Congress dominated by the Democratic opposition.

Although both the *Youngstown* decision and fear of negative public reaction help to explain why Nixon and Johnson seldom resorted to presidential war power, there is another more important reason for their failure to make it their main reliance: absence of any real need to do so. By the 1960s, the statute books contained hundreds of laws which delegated often quite broad powers to the executive during a national emergency. To lawyers and judges of the era prior to 1939, only a military emergency would have justified the redistribution of power for which these statutes provided. Roosevelt erased almost completely the "bright line" between war and peace fundamental to their constitutional thought. By the time Pearl Harbor was attacked, he already had proclaimed both a limited state of national emergency (in September 1939) and an unlimited one (in May 1941). The precise legal significance of either proclamation was never entirely clear. The states of emergency which they created did not end with the fighting in September 1945. It was years before the victorious Allies managed to sign a peace treaty with Japan, and they were never able to conclude one with a divided Germany. Rather than terminating decisively, World War II dissolved imperceptably into the developing Cold War between the United States and the Soviet Union. Neither psychologically nor legally did the country ever completely return to a state of peace. Roosevelt's proclamations remained in effect until 1952. By then Truman had declared a new state of emergency. That one did not end with the Korean conflict which had inspired it, but remained in effect at least until 1978.[3] By the time Johnson escalated the Vietnam War in 1965, emergency government had become for the United States, as Senators Frank Church and Charles McC. Mathias would note a few years later, the norm. Neither Johnson nor Nixon had any real need to resort to special constitutional powers, arguably available only during a declared war. They could instead rely upon the vast and ill-defined statutory emergency power which Congress had bestowed upon the executive in bits and pieces, which by 1974 (as the staff of a Senate committee headed by Church and Mathias discovered), numbered at least 470 separate laws.

Unlike Lincoln, the Vietnam presidents had no need to make the war power their main reliance on the home front. They did point to their constitutional authority as commander in chief to justify plunging the country into military engagement not previously authorized by Congress, but in doing so Johnson and Nixon were merely following in the footsteps of Lincoln, Roosevelt, and Truman. They were implementing concepts accepted, and even applauded, by most lawyers, scholars, and politicians before the Vietnam debacle itself called them into question. Thus, condemning Johnson and Nixon for unconstitutional conduct is scapegoating—it personalizes responsibility for a national mistake. Had Nixon and Johnson defeated Hitler or freed four million black slaves, few would charge them with abusing the war powers of the presidency. They behaved no more unconstitutionally than their predecessors. They were just less successful.

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[3] In the National Emergencies Act of 1976, Congress provided for the termination, two years after the enactment of that law, of all powers possessed by the President as a result of the existence of any declaration of emergency. This law does not purport, however, to withdraw or repeal such declarations themselves. Consequently, one can argue that the national emergency which Truman declared in 1950 is technically still in existence.

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Why We Don't Elect Federal Judges

by KERMIT L. HALL

In June 1957, Alabama legislators asked Congress to support an amendment to the Constitution calling for the election of federal judges for a definite term of office. A simple premise informed this action: the way in which federal judges gained and held office affected their courtroom behavior. No longer would judges be appointed by the President, with the consent of the Senate, to serve indefinitely, insulated from public opinion. The legislators simultaneously appealed to other states to join in what one member termed a "crusade to reform the federal courts" by "putting them back in touch with the people."

The Alabama legislators' demands represented the disdain for the federal courts shared by a vocal minority in the 1950s. Highway billboards urged Congress to "Impeach Chief Justice Earl Warren," while Rosalie M. Gordon's provocatively titled diatribe, *Nine Men Against America*, sought to weaken public confidence in the Court. Much of the attack on the federal judiciary stemmed from the Supreme Court's decision in *Brown* v. *Board of Education* (1954). White segregationists in the South—and the North as well—feared an end to the states' historic role of regulating social relations among the races. The Alabama legislators assumed that the best way to change the law was to change federal judges.

Their pleas fell on deaf ears. Yet Alabama's wish to subject federal judges to the pressure of local custom was hardly unique. Disaffected politicans have historically tinkered with the constitutional machinery of selection and tenure of judges and their proposals have invariably sought to make judges less independent of, and more accountable to, popular opinion.

The contradictory notions of accountability and independence compose the heart of the debate over the selection and tenure of federal judges, both for the Supreme Court and the lower courts. The former suggests that judges should be publicly responsible for their decisions and that they should also be answerable for their professional conduct to the lawyers who practice before them. Independence, on the other hand, holds that judges ought to remain impartial, above the political and popular fray, willing on occasion to do the unpopular thing.

The Constitution favors judicial independence over popular accountability. Article II, section 2, provides that the president can "with the advice and consent of the Senate" appoint "judges of the Supreme Court, and all other officers of the United States." Although there are a host of informal means (for example, public opinion, indirect pressure from the other branches of government, and evaluation of bar associations) through which federal judges are held accountable, Article II provides the only *formal* means by which political forces can directly shape the federal bench.

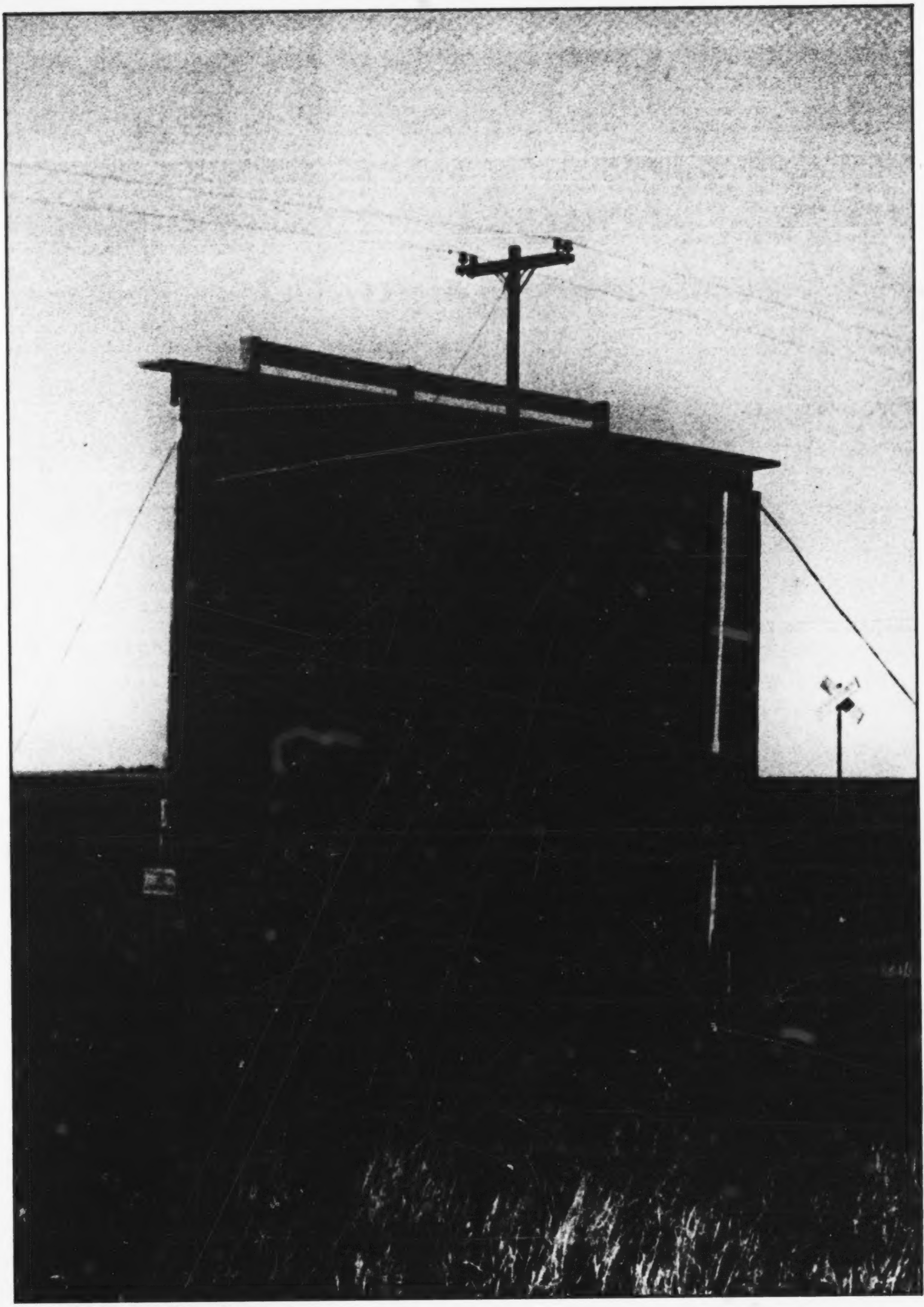
Once on the bench, federal judges have significant independence, for better or worse. Article III, section 1, specifies that "judges, both of the Supreme and inferior courts, shall hold their offices during good behavior." In a very few instances, federal judges may have abused this privilege. District Judge Willis W. Ritter, of Utah, in 1977 became the center of a storm of controversy because of his alleged prejudice against suits brought by the United States and his high-handed courtroom conduct. He frequently bullied attorneys, threatening them with "one of those 15 cent meals the sheriff serves up." Amidst efforts by Utah and federal officials to remove him, Judge Ritter predicted he would try cases until "they take me off the bench feet first." He died, several months later, still in office.

Only the impeachment clause of Article II holds judges accountable for their actions while on the bench. It provides that the House may bring charges and the Senate may try judges for "treason, bribery, or other high crimes and misdemeanors." But the unwieldy quality of the impeachment process has reinforced the importance of the constitutional provisions governing judicial selection and tenure.

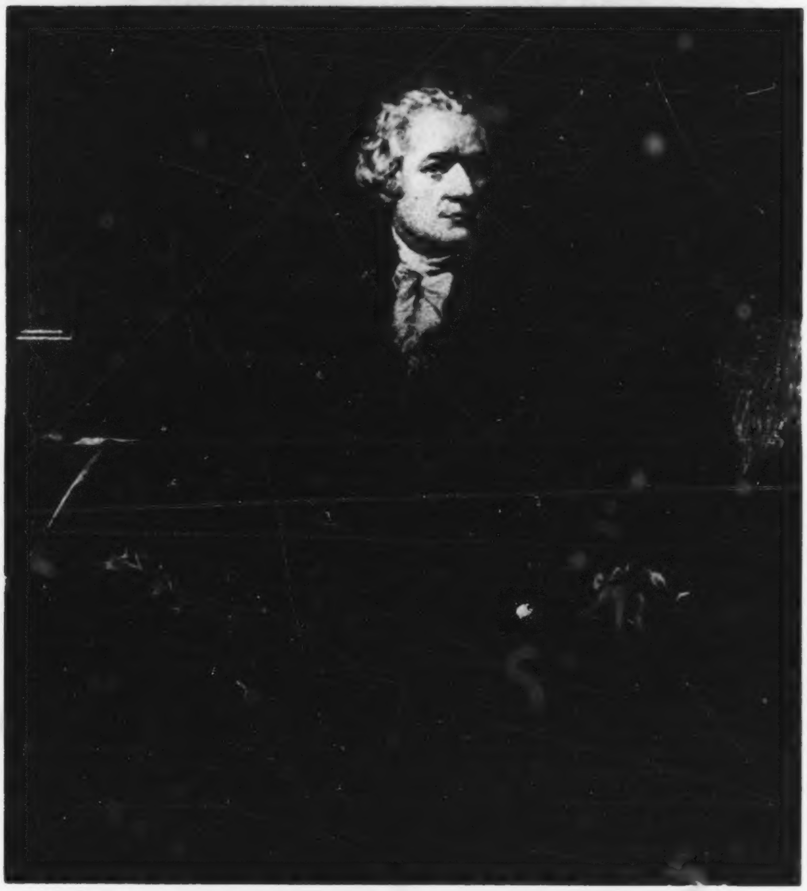
Accountability and independence are closely connected to the exercise of federal judicial power. No other nation on earth has relied so extensively on judges to implement its written constitution, and since 1789 the courts have steadily broadened their sphere of action. For example, the uproar since World War II over the federal judiciary reflected the courts' role in desegregating public facilities, ending prayer in public schools, sustaining the right to abortions, and upholding the rights of the accused.

Given the political sensitivity of the judges' constitutional pronouncements on these subjects, why not elect them for limited terms? In the past two hundred years, most states have embraced some form of popular election and almost all of them restrict their judges' terms. Why, at the same time, have federal constitutional provisions remained unchanged?

The answers have to do with the purposefully antimajoritarian cast of the Constitution and the responsibility of the national courts to protect individual rights within the federal system. Moreover, as the scope of judicial power has expanded, practical experience has added



Billboard in Colorado, 1957. Library of Congress.



Alexander Hamilton. ***Library of Congress.***

meaning to the brief provisions governing tenure and selection. Adaptation and continuity within the Constitution have gone hand in hand.

Judicial Power, Accountability, and Independence in the Philadelphia Convention

The Philadelphia Convention that framed the Constitution in 1787 devoted considerable energy to the issues of judicial independence and accountability. The framers were not "democrats" devoted to a simple notion of "majority rule." They were, instead, republicans committed to separation of governmental powers and checks and balances between branches of government. Popular will provided the sovereign basis for the new Constitution, but the delegates intended to prevent majority tyranny. They assigned to the judiciary the task of sustaining the immutable principles in the Constitution—the notions of fundamental law—against encroachment by the elected branches. Federal judges were to check and balance the other branches at the same time that the representatives of the people insured that the courts were limited to implementing the Constitution as law. Attitudes toward judicial accountability flowed from assumptions about the nature of judicial power.

The framers subscribed to an essentially defensive view of judicial power. The Constitution, while fundamental law, combined elements of a strictly legal nature, such as trial by jury, with matters of political significance, such as the operations of the legislative branch. The framers believed that the political branches had responsibility for politicial-constitutional controversies and the judicial branch for legal-juridical questions, of overseeing the rule of law. Alexander Hamilton astutely explained as much in *Federalist* 78. "Courts must declare the sense of the law," Hamilton observed, "and if they should be disposed to exercise WILL instead of JUDGMENT, the consequences would equally be the substitution of their pleasure to that of the legislative body." The judiciary, Hamilton concluded, because it had "neither FORCE nor WILL," would always be "the least dangerous to the political rights of the Constitution." Judges did not make nor execute public policy, but resolved legal questions and protected rights; to do so, they had always to act as courts—fair, impartial, and committed to the rule of law.

The delegates, therefore, approached accountability and independence from the perspective of a restricted judicial power. Since the federal courts were to address only legal issues, they did not need direct public accountability, but, for the same reasons, they did require freedom from overt political influence. Thus, the framers considered only two methods of judicial selection: appointment by the executive or appointment by Congress.

Federalists and Antifederalists clashed over the specific terms of the selection process. Federalists, who wanted an effective central government headed by a strong executive, sought to vest the appointment power solely in the president. James Wilson, of Pennsylvania, believed that only executive appointment could insure a truly independent judiciary, one capable of meting out national justice unfettered by parochial congressional interests. Wilson cautioned that alowing senators and congressmen to select judges would invite "intrigue, partiality, and concealment."

Antifederalists, who favored more power in state government, argued differently. Led by John Rutledge, of South Carolina, they conceived of accountability as sensitivity to local interests, not direct democracy. Rutledge argued, as well, that members of Congress, with close ties to state constituents, could better identify the most able

Senator Coe I.Crawford *(R., S.D.). Library of Congress.*

candidates. If the President alone made the appointment, Rutledge warned, "the people . . . [will] think we are leaning too much towards Monarchy."

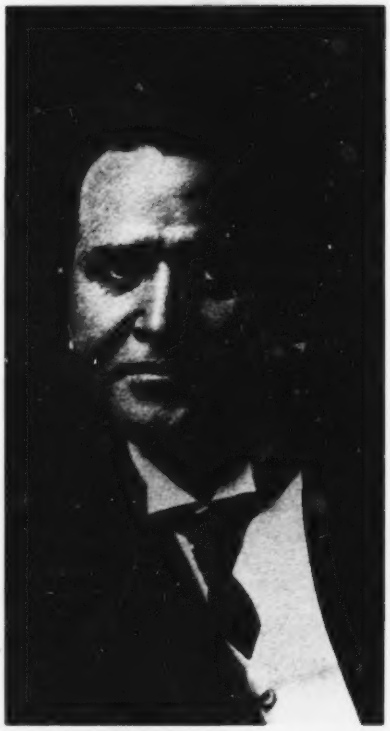
The two sides divided over whether or not the federal government should shape local interests through a national rule of law. The Federalists worried that the American conception of the law had become too diffuse, insufficiently obeyed, and often misunderstood. James Madison, of Virginia, insisted that a presidentially-directed method of selection would preserve a "consistency, conscienciousness, perspicuity and technical propriety in the law, qualities peculiarly necessary and yet shamefully wanting in our republican codes." By allowing the president to select judges, the federal bench would fulfill its nationalistic tasks with professional impartiality, even courage.

Madison initially proposed that the president nominate judges and, if the Senate did not object in a specified period of time by a two-thirds vote, the nomination would become an appointment. This scheme encountered stiff opposition. Antifederalists charged that it rendered the judiciary insufficiently accountable to the states. The convention resoundingly rejected Madison's plan, and it then immediately affirmed a competing resolution to allow the Senate alone to make judicial appointments.

The Antifederalists' plan might well have prevailed had not other changes occurred in the Constitution. The delegates last considered judicial selection in late August, near the end of the convention. By then they had designated the Senate a court to try impeachments brought against executive and judicial officers. Governeur Morris, of Pennsylvania, seized upon this alteration to argue successfully that it would be unseemly for the upper house to fill judicial vacancies created by its guilty verdicts, especially if it elevated one of its own members to the bench.

Madison offered a compromise that blended concerns about accountability and independence with the accepted notion that the judiciary had limited powers. The President would appoint the judges with the advice and consent of the Senate. As Elbridge Gerry, of Massachusetts, explained in endorsing Madison's compromise: "The appointment of the judges like every other part of the Constitution should be so molded as to give satisfaction to the people and the States." Given the limited—but important—role assigned the judiciary, the selection process quite properly emphasized independence rather than accountability.

Only during the ratification struggle did the delegates' grant to judges of tenure during good behavior arouse concern. Antifederalists claimed that good behavior tenure would encourage an undesireable expansion of federal judicial power. Hamilton, in *Federalist* 78, parried these complaints by reiterating that such an arrangement secured the bench in its legal functions from political meddling without granting judges any power to interfere in the political-constitutional duties of the other branches.



Robert M. La Follette. *Library of Congress.*

The Quest for Accountability

Hamilton's arguments proved better in theory than in practice. During the 1790s, the federal judiciary immediately became embroiled in political controversy, some of it by its own hand and much of it as a consequence of the emerging struggle between Federalists and Jeffersonian Republicans. Moreover, during the nineteenth century federal judges found themselves increasingly called upon to resolve controversies, such as the extension of slavery into new territories, that the political branches of government either would not or could not settle. The expansion of the judges' policy-making role stirred demands for a popularly accountable, elected federal bench. Antislavery political leaders in the 1840s and 1850s, for example, charged that the Constitution's provisions governing selection and tenure insulated the judiciary from public demands to abolish the "peculiar institution." After the Civil War, Republican Representative Amasa Cobb, of Wisconsin, engineered the first constitutional amendment to require election of federal judges. With the Union military in control of the South and Republican fortunes flowing strongly in the North, Cobb in 1867

Herbert Hoover. *Library of Congress.*

offered popular election a means of sweeping away Democratic judges appointed before the War. His amendment was never seriously considered.

Since then ten other amendments have been proposed and numerous non-binding resolutions and legislative bills, of dubious constitutionality, have been offered. Congress has also entertained thirteen separate resolutions to amend the Constitution to elect justices of the Supreme Court. All have been discarded.

Although different in format, these proposals have had much in common. Most of them have provided that the qualified voters of a state may elect judges of the district courts, whose boundaries are the same as the states they serve, and that voters in the multi-state circuits may select court of appeals judges. Proposals dealing with the Supreme Court have given the election of associate justices to the voters in the circuits to which the justices have been assigned. Some plans have called for a national election for chief justice; but at least two proposed amendments have required that the associate justices elect the chief justices. Only one of the constitutional amendments seeking popular election of the federal judges has ever received even full committee action, and that was negative.

The quest for judicial accountability increased as the notion that the courts should address only legalistic disputes withered. From the Civil War to the late 1930s the federal judiciary, responding to the broadened jurisdiction granted it by Congress, developed the view that the courts alone had final authority to settle constitutional disputes. The extended scope of judicial power relied heavily on new standards of constitutional interpretation rooted in values and sources of authority outside the Constitution itself. The judicial role, so it seemed, became more and more like that of a legislator.

Senator Coe I. Crawford (R., S.D.) in 1912 orchestrated the first serious effort to respond to these changes. He offered a constitutional amendment to restrict lower court judges to ten-year, renewable terms. Crawford argued that federal judges had increasingly penetrated areas previously the sole province of the elected branches and that they had treated laborers and farmers unfairly. "Federal judges," Crawford pleaded, "are too indifferent to the rights of the people and not sufficiently responsive to present-day needs and present-day conditions when passing upon issues between the people and the public interests." Crawford balked at electing judges, but he thought that once every decade they should stand presidential and senatorial review.

A dozen years later similar issues emerged in the Progressive presidential campaign of Robert LaFollette, of Wisconsin. LaFollette believed the federal courts had become the handmaidens of big business, and he urged a constitutional amendment not only to elect federal judges to limited terms in office but to allow for their popular recall. Congress, however, summarily rejected this and all other proposals.

The Adaptation of the Selection Process

The provisions forged in 1787 have persisted for a variety of reasons, not the least of which has been their inherent adaptability. The framers fostered this quality by leaving much to implication and informal understanding. Each generation, as a result, has contributed something to the selection process as we know it today, and, in so doing, they have created institutional prerogatives sufficiently strong that the possibility of achieving broad popular accountability is unlikely—and probably unnecessary.

The words "advice" and "consent," for example, assumed a meaning far different from that prophesied by Hamilton. Much as the Antifederalists had wanted, senators, with their local attachments, steadily gained the initiative in the selection of lower court judges. Aggressive political parties (something the framers sought to frustrate) aided this development. By the post-Civil War era, the practice of senatorial courtesy had become firmly established, allowing senators from a state where a judicial vacancy existed, and who were (usually) of the president's party, to have a veto power over any appointment. President Herbert Hoover, who came to office in 1929, observed: "At the time I began my term as president, the senators were practically choosing the federal judges.... The result was the standards for judges were far below the level which ... I could wish."

President Hoover properly complained that senatorial courtesy weakened the quality of the bench, but it also contributed an important element of accountability to the selection process. Senatorial courtesy insured that dominant local interests (often big business in the late nineteenth and early twentieth centuries) had some voice in the composition of the federal judiciary. The adoption in 1913 of the Seventeenth Amendment, which provided for direct election of senators, placed a veneer of popular support on the Senate's role. Indeed, ratification of the amendment contributed to the defeat of Senator Crawford's proposal to limit the term of lower federal court judges. The Senate's influence in the judicial selection process meant that Crawford and other reformers, who had to work through Congress to secure a constitutional amendment, faced senators unwilling to disturb their self-made prerogative.

Why We Do Elect State Judges

The history of judicial selection in the states has also responded to desires for both accountability and independence. The states initially provided for judicial selection by either the governor and/or the state legislature. Mississippi in 1832 was the first state to elect popularly all of its judges, and beginning with New York State's adoption of popular election in 1846 most states quickly followed suit. At century's end, more than 70 percent of all states elected their judges. Since it made no sense to elect judges for life, constitutional provisions limiting the tenure of judges accompanied popular election. Nineteenth-century proponents of popular election, most of whom were lawyers, sought to infuse democratic accountability into the bench at the same time that they sought to provide state judges with a base of popular support sufficient to curb legislative power.

The reformers' expectations exceeded their grasp. By the end of the nineteenth century, partisan domination of judicial elections and corruption on the bench fueled renewed concern about judicial independence. Progressive reformers attempted to have the best of both worlds by endorsing nonpartisan judicial elections and the recall of corrupt judges. But even this change proved inadequate for the American Bar Association. In 1937, it sponsored the "merit plan" or "Missouri Plan," so-called for the first state to adopt it. The Missouri Plan provides for appointment by the governor followed by a retention election in which a judge runs only against his or her record, not another candidate. As of July 1, 1985, this practice was followed in 8 states. Today, the tradition of popular election remains strong; almost 50 percent of all state judges are elected.

The state experience has been substantially different from that of the national government for two reasons. First, unlike the federal Constitution, state constitutions are frequently rewritten and amended through conventions. These conventions have provided proponents of popular election an opportunity to bring about change denied them on the federal level. (There has never been a second federal constitutional convention.) Second, the states, because of their more homogenous populations, have had to rely far less on antimajoritarian devices to protect minority rights than has the national government with its Madisonian emphasis on the clash of competing minorities protected in theory through federal judicial administration of the rule of law.

The executive branch's role also evolved in ways the framers had not anticipated. Presidents proved far more willing to pursue partisan ideological goals than the sweet reason of republican theory in 1787 contemplated. Even George Washington, for example, viewed judicial appointments as means to political (although not partisan) ends. Presidents Franklin Pierce and James Buchanan in the 1850s sought to counter antislavery advocates by loading the federal bench with proslavery judges. Pierce and Buchanan were also the first presidents to give the Attorney General responsibility for recruiting candidates, an administrative reform intended to keep the executive one step ahead of ambitious senators.

But not until President Hoover did the Department of Justice's influence reach anything like its current importance. Hoover systematically upgraded the role of the Attorney General, strengthened the administrative personnel in the Department, and fostered greater coherence in relations between the Attorney General, himself, and the Senate. As a consequence, the president, like the Senate, incurred a powerful vested interest in preserving the existing constitutional rules.

The emergence of professional bar organizations in the late nineteenth century created yet another constituency wedded to the existing selection system. The framers had anticipated that the judges would be lawyers, but they gave

The present scheme has secured an able judiciary indirectly accountable through political parties, senatorial courtesy, and the bar, yet sufficiently independent to remain above coercion by the public or the political branches.

scant attention to how to install particular legal talents on the bench. Benjamin Franklin predicted, with his usual wit, that appointment would proceed "from the lawyers" who would always select "the ablest of the profession in order to get rid of him, and share his practice among themselves." Throughout the nineteenth century the bar played an informal, invariably personal, and always ad hoc role in the selection of federal judges. But late in the century the new American Bar Association began to insinuate itself and its values of professionalism into the process.

The ABA's most important contribution did not come until 1946, when it established the Committee on Federal Judiciary. Its major responsibility was to evaluate the qualifications of prospective federal judicial appointees, without regard to a nominee's political views. Although presidential administrations, jealous of their own prerogatives, initially resisted this development, by the early 1960s the Committee and the executive branch recognized that together they could assert sufficient influence to lessen the Senate's grasp on the selection of lower court judges. The Committee contributed a component of professional accountability, but the selection process still remains highly political.

Adaptation within the selection process continues apace today, making popular election seem at best a remote alternative. Amid complaints that the lower federal courts were unrepresentative of major elements in the population, especially blacks and women, and that too frequently sordid partisan rather than professional considerations informed the choices of federal judges, President Jimmy Carter nourished the establishment of state judicial nominating commissions. The most important of these selection panels involved appointments to the Circuit Courts of Appeal. Composed on a bipartisan basis, these commissions, whose recommendations are strictly advisory, represent a continuing effort to blend local interests, the needs of diverse social constituencies, and professional values.

Finally, federal courts have displayed an uncanny ability to change direction just when the pressures of hostile social constituencies have seemed most acute. President Franklin D. Roosevelt's appointees to the Supreme Court in the late 1930s silenced complaints by liberal social interests, who had until then condemned the federal courts as reactionary. Indeed, these former critics of the federal bench rushed forward to pursue through constitutional litigation goals otherwise unattainable through the elective political process. On the other hand, social conservatives swallowed their former skeptical attitudes and urged democratic means of making federal judges accountable. The changing currents in the debate over judicial accountability and independence have flowed with the greater tide of our constitutional politics.

A Page of History and A Volume of Logic

Although the words of the Constitution have remained constant, their meaning has evolved in subtle ways since 1787. The involvement of the federal courts in the day-to-day lives of Americans, combined with the advent of political parties and interest group litigation, has given new meaning to the selection and tenure of federal judges. The policy-making role of federal judges raises questions about whether they ought to be elected. Perhaps they should be. But as Justice Oliver Wendell Holmes, Jr., once observed: "A page of history is worth a volume of logic." Practical experience has demonstrated the adaptability of the provisions governing judicial selection and tenure that make such change seem unnecessary—and unwise. Americans have come to appreciate the value of one branch of government exercising a clear anti-majoritarian function. The present scheme has secured an able judiciary indirectly accountable through political parties, senatorial courtesy, and the bar, yet sufficiently independent to remain above coercion by the public or the political branches. We do not elect our federal judges so much because the Constitution prohibits it, but because we have found, as Hamilton anticipated in 1787, that the federal branch has guarded "the rights of individuals ... from serious oppression."

Suggested additional reading:

Henry J. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court* (1974).

Harold W. Chase, *Federal Judges: The Appointing Process* (1972).

Philip L. Dubois, *From Ballot to Bench: Judicial Elections and the Quest for Accountability* (1980).

Joel B. Grossman, *Lawyers and Judges: The ABA and the Politics of Judicial Selection* (1965).

Kermit L. Hall, *The Politics of Justice: Lower Federal Judicial Selection and the Second Party System* (1979).

John R. Schmidhauser, *Judges and Justices: The Federal Appellate Judiciary* (1979).

Kermit L. Hall is professor of history and law at the University of Florida. He has held grants from the National Science Foundation and the National Endowment for the Humanities, and he is the author of *The Rule of Law in American History* (forthcoming from Oxford University Press). He is currently engaged in a study of the impact of popular election on state judicial decision-making.

DOCUMENTS

Five Alternative Constitutions for the United States

by STEVEN R. BOYD

One of the unique characteristics of the United States Constitution is its durability. In contrast to other written constitutions, both of nations and states, the United States Constitution endures. Even more astounding is the paucity of formal challengers to it. Indeed, so far as the evidence reveals, barring the Constitution of the Confederacy, only five times since the ratification of the Constitution has a complete alternative to it been proposed for the whole United States. Although few in number, to the extent that the alternative constitutions borrow from the existing constitution, they tell us what institutions, values and briefs we consider fundamental to any American constitution.

The first alternative constitution proposed for the United States was Victoria Woodhull's 1872 "Constitution for the United States of the World." Woodhull was a prominent social and political activist, a proponent of women's rights, and the first female stockbroker in America. She also edited a reform newspaper, *Woodhull and Claflin's Weekly*.

Woodhull was, in fact, among the vanguard of post-Civil War reformers who reacted to what has been described as a revolution in American life. The postwar mechanization of agriculture, the growth in rail transportation, the industrialization of the nation's manufacturing plant, and the consolidation of business triggered a host of calls for reform throughout the 1870s.

Some of those reformers—members of the Farmer's Alliance and the Populists who followed them—demanded that the federal government pursue inflationary economic policies, sponsor interest-free loans for farmers, and assume control of the railroads. Other reformers attempted to form a labor party as an alternative to the Democrats and Republicans while a vast array of visionaries saw the key to America's future in the overhaul of the land system, in the casting off of materialistic values or in the acceptance of socialism.

Woodhull embraced some of these ideas. She favored, for example, the abolition of the tariff and the issuance of federal paper money. She also called for a program of full employment, a national system of railroads, and a "new form of capitalism" in which the employer and employees would share equally in the profits of industry.

Nonetheless, her primary emphasis was on the rights of women. To further this end, she organized the Equal Rights Party and secured its nomination for the presidency of the United States. The "Constitution for the United States of the World" became her platform in that campaign.

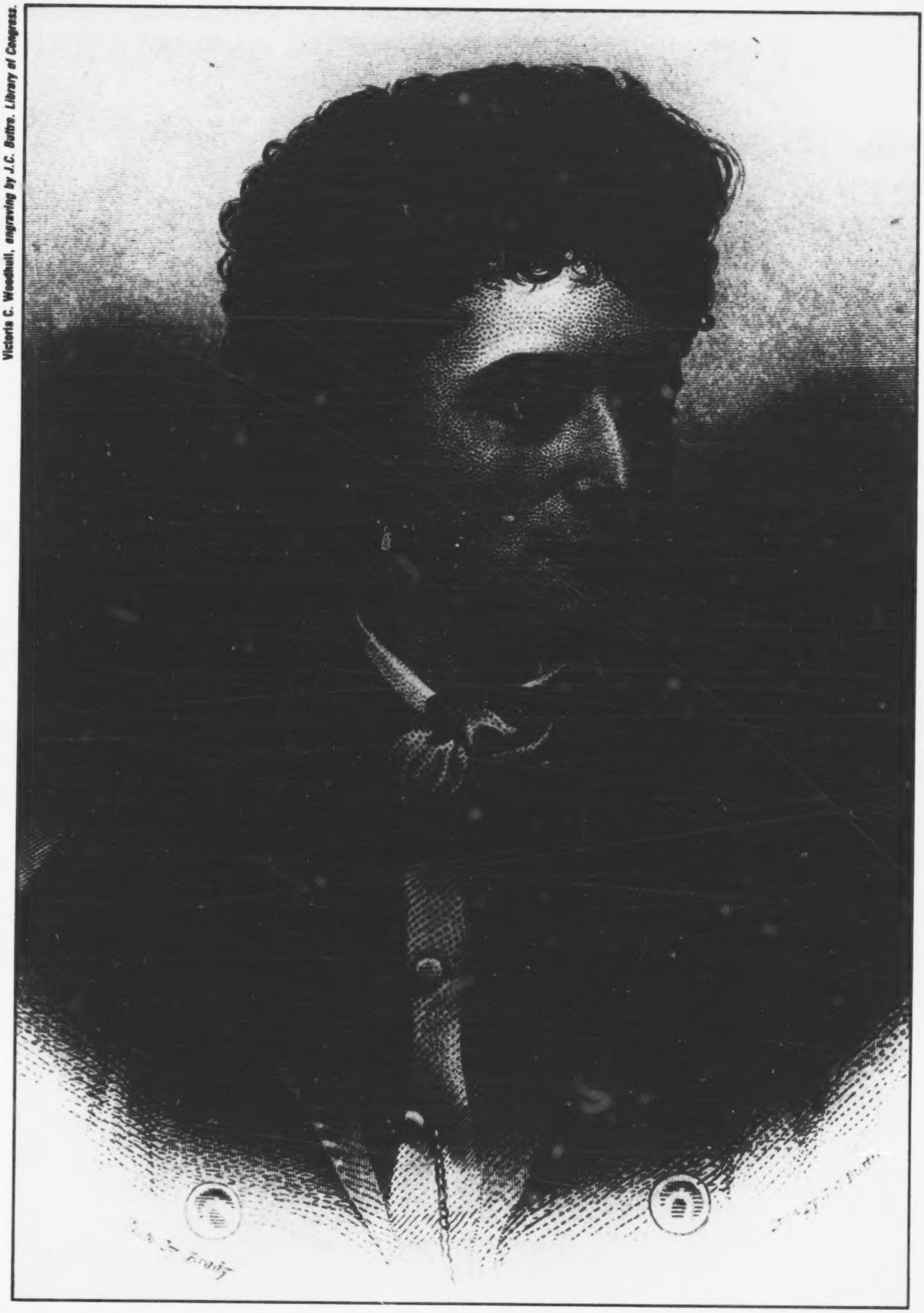
The preamble illustrates her commitment to social and political equality:

> *We, the people of the United States—a National Union—and of the several States as its component parts, proceeding upon the Natural Right inherent in humanity, and in order to secure a perfect and enduring Union; to establish equality as a birth-right; to administer common justice; to secure peace, tranquility and prosperity; to provide for the common defense; to promote the general welfare; to secure the blessings of freedom to ourselves and our posterity; and to erect a government which shall be the center around which the nations may aggregate, until ours shall become a Universal Republic, do ordain and establish this Constitution of the United States of the World; which shall be the Supreme Law wherever it shall have, or acquire, jurisdiction.*

Woodhull, like those who followed her, retained the basic form of government outlined in the United States Constitution, but altered it to achieve her different policy goals. Thus the Constitution for the United States of the World followed the preamble with a "Declaration:"

> *All persons are born free and equal, in a political sense (in every sense except heredity) and are entitled to the right to life, which is inalienable; and to the liberty and pursuit of happiness; and these rights shall be absolutely unabridged, except when limited in the individual for the security of the community against crime or other human diseases.*

This policy preference was supported by structural revisions in the United States Constitution designed to insure that the executive, legislative and judicial branches of government would be responsive to the popular will. Thus, she provided that senators could be recalled by majority vote of the state legislature which elected them. Furthermore, the entire senate could be eliminated as a branch of the legislature by a three-fifths majority popular vote of the nation because it was histori-



Victoria C. Woodhull, engraving by J.C. Buttre. Library of Congress.

cally an undemocratic body.

Members of the House of Representatives on the other hand would serve five-year terms. The House would originate all—not just money—bills. The House and Senate, whose members could be instructed by direct vote of the people, would override a presidential veto by a simple majority. Most important, all bills, whether approved by both houses and the president or the legislature only, would become law only after a majority of the people voted to approve them at an annual general election.

The Constitution would vest executive power in a president, vice-president, and ministerial cabinet which would consist of heads of sixteen different departments. In contrast to the existing system, the people would elect all of these officeholders indirectly through a electoral college to non-renewable, ten-year terms.

The Constitution would place judicial power in a system of courts similar to that of the Constitution of 1787 and vest those courts with comparable power. The men and women who served, however, would be elected by the people in order to make all branches of government more responsive to public opinion.

The most glaring departure from the institutional arrangements then existing involved the relationship between the nation and the states. Woodhull's Constitution required uniform state constitutions:

> *The Congress shall prescribe a form for a Constitution which shall be common to, and adopted by each state now constituting one of the United States: as well as adopted by every State that may hereafter be admitted into the Union.*

These constitutions, which were to be consistent "with the tenor and tone of this [Woodhull's] Constitution" eliminated the state autonomy characteristic of the federal system and insured equal opportunity to all persons without regard to race or gender.

Victoria Woodhull's constitution reflected her dissatisfaction with the social and racial inequalities dominating post-Civil War America. It was, however, like her abortive presidential campaign, anomolous to the American scene. Commented upon sporadically in the press, her Constitution for the United States of the World had no discernible impact on the American political process or the condition of women in American life.

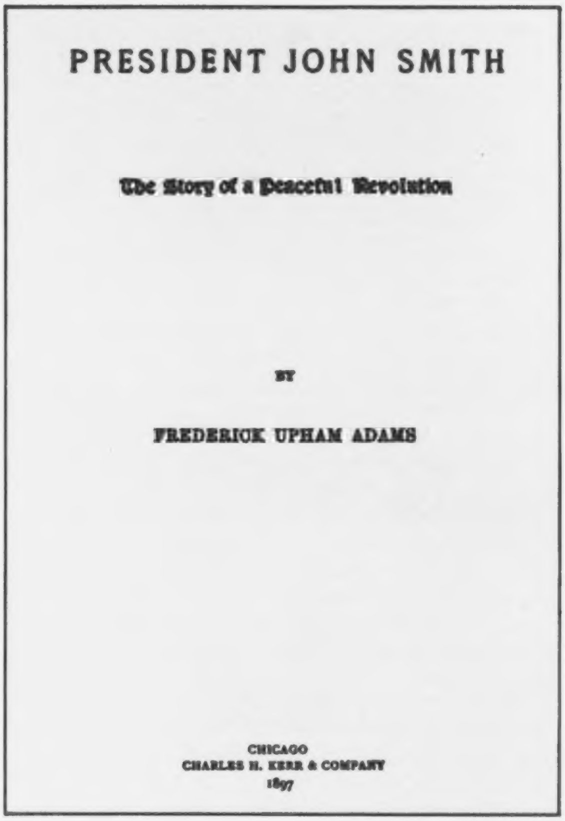
It seems improbable that Victoria Woodhull believed that the Constitution she proposed would be adopted; Frederick Upham Adams, a Chicago journalist and writer, may have been more optimistic. He proposed a new Constitution in 1897 in his novel, *President John Smith*, whose principal character is elected President of the United States on a majority rule platform, defeating Mark McKimbly of Ohio. In the preface to *President John Smith*, Adams declared that the "great issue of 1900 will be 'shall the majority rule?'" Adams then presented a constitution based upon the principle of majority rule that he believed should replace the document of 1787.

The preamble of Adams' Constitution succinctly expresses this principle:

> *We, the United people of America, in order to preserve to ourselves and our posterity the blessings of civilization, to maintain the republic, to establish justice, insure domestic tranquility, provide for the common defense, secure and guard the rights of the majority, and to guarantee to every citizen a fair opportunity for a livelihood, do hereby ordain and subscribe to this constitution of the United States of America.*

The meaning of that preamble is clear. Adams believed that the republic was threatened because of the economic dislocations caused by the panic of 1893. Strikes, lockouts, and "idleness" because of the downturn in the economy, Adams thought, denied "honest, faithful American citizens" the right to work and threatened the republic with destruction. The solution, he argued, was an overhauling of the institutions of government, first to allow the majority to rule, and second to allow them to rule in a manner that would insure a person the "opportunity to work, obtain wages, and support himself."

The principal of majority rule pervaded every part of Adams' Constitution. Thus the president, whose responsibilities and term were like those of the existing president, would be elected by direct vote of the people. The Adams' constitution eliminated the office of vice-president. Instead he provided for a cabinet popularly elected. Adams also proposed a unicameral legislature of two hundred members, elected annually by the voters. The legis-



PRESIDENT JOHN SMITH

The Story of a Peaceful Revolution

BY

FREDERICK UPHAM ADAMS

CHICAGO
CHARLES H. KERR & COMPANY
1897

lators were to consider, draft and prepare bills and upon the vote of fifty of their members submit them to the consideration of the people.

Likewise, the electorate would exercise considerable power over the supreme court. The president would appoint the members of the court, but the people would endorse them, and could retire them by majority vote. The judicial power would parallel that of the existing Supreme Court with one exception. While the Court could advise Congress on legislation to be submitted to the people, Congress would remain free to ignore that advice. There would be no judicial review of decisions of the people.

The constitution could be amended by majority vote of the people. It would be adopted when three-fourths of those voting approved it.

In Adams' case, majority rule was a means to create a republic of gainfully employed farmers and laborers. Toward that end, Adams' constitution mandated not only the structural changes outlined above, but the implementation of certain policies as well: the creation of federal paper money, the nationalization of the railroads as well as the natural resources of the nation—land, minerals, and forests; and the "supervision" of industry and the means of production. This broad exercise of power was to be used to insure the "prosperity of the nation."

As utopian as this may seem to the modern reader, Adams was sanguine that the adoption of his constitution would occur, perhaps as early as 1900. His expectations proved illfounded. The Democratic party, which Adams had supported in 1892, did not abandon its commitment to free silver in favor of majority rule and a new constitution (a winning issue in Adams' eyes). Adams nonetheless remained hopeful. In 1898, he published another treatise explaining the principles of majority rule as applied to the United States (*The Majority Rule League of the United States*) and in 1905 he produced a sequel to *President John Smith* titled *John Henry Smith*. Throughout, Adams remained an articulate, albeit ineffectual, spokesman for reform.

A similar fate faced another Chicago novelist, Henry O. Morris, who, like Adams, responded to the political and social turmoil of late ninteenth century Chicago with a call for a new constitution. Morris' fictional account of "the Revolution," *Waiting for the Signal*, appeared in 1898. Like Adams, Morris, despite the fictional format of his piece, made clear in the preface that "the Revolution is sure to come—it is on the way."

For a self-styled revolutionary, Morris nonetheless drafted a constitution remarkably similar to that of the United States. He hinted at this reliance in the preamble:

> *We, the people of the United States, in order to rectify apparent errors in the old Constitution, and to secure to all the people the beneficent results intended by that instrument, but which failed of its purpose by reason of gross misconstruction and perverted interpretation, do hereby make and declare the following Constitution.*

Morris then proposed a constitution that created a bicameral legislature which would consist of a house of representatives and a senate. Each house would be like its existing counterpart in large measure. The principle difference between Morris' and the United States' House of the 1890s would lie in the membership's control of the speaker, committees and officers. In the senate the principle difference would be the direct election of senators. Members of both houses would also be restricted to a maximum of twelve years in congress, after which they would be forever excluded from the legislature.

Morris' congress would possess considerable

Chicago's poor in 1893, photograph by Ray Stannard Baker. Library of Congress.

power. The two houses, together with the president, would make treaties, elect ambassadors, choose judges of the federal courts, and select the general officers for the army and navy. The legislature also could override a presidential veto by a simple majority. The people would select the president and vice-president directly for a single eight-year term. After serving in either office, an individual would be forever excluded from both offices.

Morris' constitution provided that Congress and the president would appoint federal judges, but only to limited terms. Courts had the same powers as under the Constitution with two exceptions. Morris would restrict the power of the courts to issue injunctions—orders requiring an individual to stop a particular act—and would require trial by jury for persons cited for contempt of court. Finally Morris proposed that this constitution could be amended only if changes recommended by the congress were approved by a majority of the voters, rather than the state legislators.

Morris, like Adams and Woodhull, had unbounded faith in "the people." He believed that the problems of his age could be solved if the people could regain control of the government currently in the hands of an "arrogant and vicious plutocracy." The structural changes that all three ninteenth-century constitution writers proposed rested upon that belief. But the people do not appear to have shared this view for none of the three proposals struck a responsive chord among the body politic. Woodhull, for example, was overwhelmingly rejected at the polls while Morris published no other work and remains a virtual unknown to American historians and to students of ninteenth-century American literature. Only Frederick Upham Adams made an enduring contribution, and then only in areas other than his constitutional proposal.

The dynamism of late ninteenth century, which generated three constitution proposals and a spate of other left wing political and economic reform plans, moderated in the decades after 1900 as Progressive reformers succeeded in adapting the Constitution to the changing reality of twentieth-century America through amendments and legislation. There were in the ensuring decades calls for a new constitution, by William MacDonald in 1921 and by Henry Hazlitt and William Kay Wallace, both in 1932. Following these, no further calls for a new constitution or formal proposals appeared until 1970. That year two events occurred. The Black Panthers unsuccessfully proposed a new constitutional convention and Rexford G. Tugwell, the former New Dealer and a Fellow at the Center for the Study of Democratic Institutions, published a new model constitution. Four years later he expounded on that document in *The Emerging Constitution* which also contained a "Constitution for the Newstates of America."

Tugwell had been a member of the "brain trust," a group of advisers to Franklin Delano Roosevelt in the 1930s. He was a firm advocate of a major restructuring of American economic and political life. He favored, for example, an "alliance" between business and government, with federal planners empowered to manage the economic life of the nation. Although the New Deal, as it evolved after 1932, fell far short of Tugwell's vision, he served first as the director of the Resettlement Administration, a rural reform agency, and later as Governor of Puerto Rico.

In the late 1960s, he also initiated the most complicated process designed to create a new constitution since the Constitutional Convention in 1787. Tugwell and other fellows at the Center drafted various papers and constitutional models which they debated, evaluated and revised. The end product of this process was "A Constitution for the Newstates of America."

Tugwell's premise was that the Constitution of the United States no longer reflected the reality of the constitutional order. He held that changes in practice but not in the document over the past two hundred years were so extensive as to render the written document irrelevant as well as inadequate to the needs of the nation.

These assumptions were reflected in the preamble to his constitution:

> *So that we may join in common endeavors, welcome the future in good order, and create an adequate and self-repairing government—we, the people, do establish the Newstates of America, herein provided to be ours, and do ordain this Constitution whose supreme law it shall be until the time prescribed for it shall have run.*

Tugwell proposed a constitution more innovative than those of his predecessors. Reflecting his firm belief in the need for extensive economic planning, Tugwell proposed a fourth branch of government, the Planning Branch:

> *to formulate and administer plans and to prepare budgets for the uses of expected income in pursuit of policies provided herein.*

Rexford Tugwell. *Library of Congress.*

The Planning Branch would be headed by a planning board of considerable power. The sponsors of any planned development that affected the public interest, if authorized by the planning board, could recoup any economic losses through a court of claims. Unauthorized developments were not so protected.

To further rationalize the economic life of the nation, Tugwell also proposed a fifth branch of government. This regulatory branch would consist of a National Regulatory Board headed by a National Regulator. The purpose of the Board would be to:

> *make and administer rules for the conduct of all economic enterprises. . . . Chartered enterprises in similar industries or occupations may formulate among themselves codes to ensure fair competition, meet external costs, set standards for quality and service, expand trade, increase production, eliminate waste, and assist in standardization.*

Tugwell's constitution reflected his commitment to economic planning. In other ways, it illustrated his belief that long-term civil servants like himself should have a greater role in the governmental process. Thus, while he proposed a bicameral legislature, with a house of representatives similar to the existing one, the second house was considerably transformed. Members could include former presidents and vice-presidents, select justices, heads of the electoral, planning and regulatory branches, governors, unsuccessful candidates for the presidency, and a number of federal executive officeholders.

The senate would possess considerable responsibility. It could approve or disapprove measures passed by the house of representatives, except the budget (such disapproval could be overridden by a majority plus one vote); advise the president if requested, by a two-thirds vote; declare emergencies and appoint a watchkeeper who would oversee and evaluate the performance of government agencies.

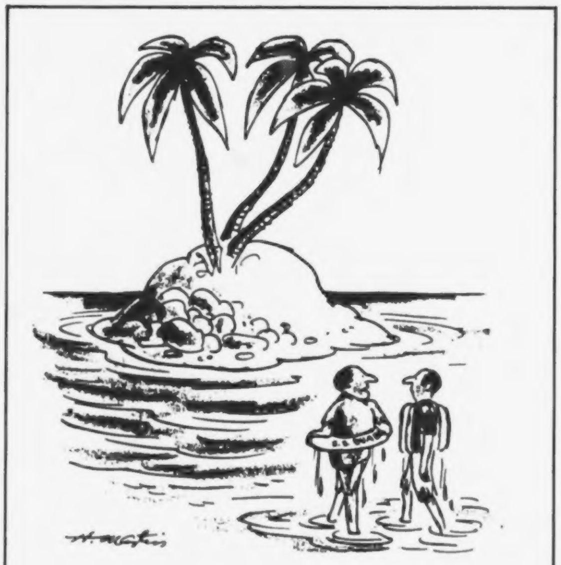
The president of the Newstates, although denied the power of initiating the budget, would be a powerful figure. Declared the "head of government, shaper of its commitments, expositor of its policies and supreme commander of its protective forces," he would serve a single nine-year term (subject only to recall by 60 per cent of the voters after three years). He would be assisted by two vice presidents elected with him: a vice-president for internal affairs and a vice-president for general affairs. The former would oversee domestic matters, the latter would oversee financial, legal and military matters.

Finally, Tugwell revamped the judiciary to allow its members a greater role in their own area of expertise. A principal justice would appoint all national court judges, preside over the system and be its chief administrator. The judicial council would study the operation of the courts, draw up codes of ethics, suggest constitutional amendments, and could revise as needed the civil and criminal codes. The judicial assembly in turn, made up of judges of the circuit court and of the High Court of the Newstates, could recommend changes in the civil and criminal code, meet periodically to consider the state of the judiciary, and nominate to the senate when necessary three candidates for the principal judgeship. The original and appellate jurisdictions of the courts were only slightly modified.

Tugwell proposed to offer his constitution to the public for adoption by national referendum. He also stipulated that after twenty-five years the people should again via a referendum either vote to retain the constitution or replace it with a new one. In this he departed from his predecessors who proposed constitutions for posterity.

Tugwell also differed from his nineteenth-century predecessors in that he more fully recognized the commitment of the American people to the existing document, originally crafted in the eighteenth century. He was therefore less optimistic than either Morris or Adams about the prospects for his constitution. He proposed a new constitution with substantive structural changes that he believed would energize government and reunite the theory of the American Constitution with the actuality of constitutional practice, but, in reality, he hoped that his proposals would at least trigger a national dialogue on the Constitution of 1787 and stimulate some needed changes in that document.

Even in this more modest goal, Tugwell was disappointed. His proposal did attract considerable attention—it is the one well-known constitution proposal. It did not, however, persuade people to relinquish their attachment to the Constitution, or stimulate a dialogue on the need for constitutional change.



"Now, you try to get a fire started while I draft a constitution."

Henry Martin. The Rotarian, June 1972.

Tugwell, nonetheless, did not stand alone in his call for serious reflection on the state of the Constitution of 1787. In 1974 Leland Baldwin, a retired history professor from the University of Pittsburgh, like Tugwell proposed a new Constitution. Baldwin believed that the erosion of the original institutions of government occurring in the 1960s could lead either to the subversion of the Constitution by a popular leader or to the total breakdown of the existing order. In an attempt to avoid both, and to stimulate a discussion of the changes needed in the constitutional order, Baldwin proposed a "parliamentary" reframing of the Constitution.

His purpose, in the context of his anxiety about the future of the republic, he articulated in the conventional language of the preamble:

> *We the people of the United States, acting as sources and final arbiters of the laws, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.*

Despite Baldwin's reliance on the language of the Constitution of 1787, his analysis of the operation of the government led him to revise its institutions in material ways. He did so first to provide the legislative and administrative arms of government with a greater ability to carry out their respective programs, and secondly to insure greater accountability on the part of the government to the people.

In order to achieve these ends, Baldwin proposed a unicameral legislature of two hundred elected to five-year terms "unless sooner dissolved." To these two hundred people, Baldwin would add congressmen "pro forma", key leaders of any political party with forty or more members in congress. These men and women could sit on committees and exercise all the privileges of members except voting on the floor of congress. Congress could also question the president, cabinet members, and their deputies on the floor and require executive documents be submitted to it. It would have to act upon all bills, motions, and resolutions within six months.

The president would serve as the presiding officer of the congress and act as its chief executive. He, like the members of congress, would serve a five-year term unless forced to resign by majority vote. As the leader of the party that secured a plurality in congress, he could call congress into session, and, with its consent, appoint from among the membership a presiding officer, secretaries of departments, and their deputies. From the general population, the president could appoint, with the consent of congress, certain administrative officials and judges.

Baldwin preserved the judicial power of the United States courts, although he remade the institutions. Specifically, a new-modelled senate would supervise the federal and state courts, impeach federal judges and constitute, from its "law" members, a court of last resort. The entire senate would judge issues of constitutional interpretation, could suspend any executive or legislative actions, could propose legislation and amendments, and in limited circumstances could dissolve congress.

The amendment process differed from that of the United States Constitution principally in that amendments would be ratified by three-fourths of the state legislatures, or by a majority vote of the people. The constitution could be implemented by the existing congress or by the state legislatures. Ratification would be by vote of the people.

Baldwin believed that the existing system with its checks and balances, separation of powers, loosely-knit parties, and autonomous bureaucracies created a situation in which little positive good was accomplished. Like Tugwell, he hoped by proposing a reframing of the Constitution in a manner that would remedy these defects, not to secure their adoption, but to start discussion on the need for constitutional change. As he declared in the preface to his book, *Reframing the Constitution*, the debate "should begin."

The response to *Reframing the Constitution* proved predictable, if not what Baldwin envisioned. The book was reviewed in the professional journals, but it triggered little discussion among either academics or the body politic. Like Tugwell's proposal, it seems destined to remain on library shelves, read by few, and those not the politically powerful.

Despite the minimal impact of these constitution proposals, they are still significant in two ways. First, the alternative constitutions serve to identify the basic institutions, beliefs, and values that lie at the core of American constitutionalism. Each proposer of an alternative constitution retains in his or her proposal those features perceived as fundamental to any constitution for the United States. A written document, an institution labelled a congress, popular sovereignty and consent of the governed are component parts of each proposal. Presumably, they are necessary components of any American constitution.

Second, the alternative constitutions illustrate, by their limited number and their reliance on the Constitution of 1787, our continuing commitment to the existing Constitution. Although the reasons for this commitment are beyond the scope of this essay, it is clear that the American people continue to believe the Constitution of 1787 serves us better than any alternative yet proposed.

The complete text of each alternative constitution is published. Victoria Woodhull's is in Madeleine B. Stern, ed., *The Victoria Woodhull Reader* (1974); Frederick Upham Adams' is in *President John Smith* (reprinted 1971); Henry O. Morris' is in *Waiting for the Signal: A Novel* (1897); Rexford G. Tugwell's is in *The Emerging Constitution* (1974); and Leland D. Baldwin's is in *Reframing the Constitution: An Imperative for Modern America* (1972).

Steven R. Boyd, associate professor of history at the University of Texas at San Antonio, is the editor of *The Whiskey Rebellion: Past and Present Perspectives* (forthcoming) and is engaged in a study of the alternative constitutions proposed for the United States.

RESOURCES ON FEDERALISM FOR CURRICULUM DEVELOPMENT

by JOHN KINCAID

This selection is reprinted from Teaching About American Federal Democracy, *edited by Stephen L. Schecter and published by the Center for the Study of Federalism. The Center was established in 1967 as an interdisciplinary research and educational institute dedicated to advancing the study of federal principles, institutions, and process. It is located in Temple University's College of Liberal Arts and is associated with the Department of Political Science.* Teaching About American Federal Democracy *is part of a project, "Utilizing Federalist Principles in Civic Education," supported by a grant from the National Institute of Education, U.S. Department of Education. For additional information, write: Ellis Katz, Center for the Study of Federalism, Gladfelter Hall-10th floor, Temple University, Philadelphia, PA 19122.*

The literature on American federalism is voluminous. However, much of that literature is in the form of journal articles and specialized studies, which are of limited utility for secondary school teachers and general readers. Rather than overwhelm the individual who wishes to learn more about American federalism in order to enrich his or her teaching or general knowledge, this essay highlights a few key resources that are well worth reading. Those who would like to extend their studies beyond the books cited here may consult the bibliographic resources contained in the other essays in this collection.

Foundings and Principles

Any study of American federalism must include *The Federalist* papers. These eighty-five essays—written by Alexander Hamilton, James Madison, and John Jay—were published in New York City newspapers under the pen name Publius in 1787–1788. *The Federalist* papers were written to convince readers of the merits of ratifying the new constitution proposed by the Constitutional Convention of 1787. In the process, the essays provide detailed explanations of the provisions of the United States Constitution and of the ideas the framers seem to have had in mind when they drafted the various portions of the Constitution. There is some bias of course because the authors seek to defend the Constitution; however, unlike many newspaper columns of today, *The Federalist* papers are rich in thoughtful analyses and penetrating insights, so much so that they are regarded by many people as the single best expression of American political thought.

The Federalist papers are available in a handy paperback edition assembled by Clinton Rossiter (New York: Mentor Books, 1961). Rossiter's edition contains a useful introduction, an annotated table of contents, and a substantial index. Another excellent edition, assembled directly from the newspaper columns of 1787–1788, is that of Jacob E. Cooke, ed., *The Federalist* (Middletown, Conn.: Wesleyan University Press, 1961). This edition contains useful notes, cross references, and index citations. It is also available in paperback (New York: Bantam Books, 1982).

Those wishing to zero in immediately on federalism can begin by reading numbers 9, 37, 39, and 45. Number 9 discusses the founders' invention of modern federalism for the new United States, explains why federal union is important, contrasts modern federalism with older federal or confederal theories and practices, and provides an initial definition of the federalism embodied in the U.S. Constitution. Number 37 comments on certain problems associated with federalism, which were encountered in the Constitutional Convention, and discusses both the need and difficulty of drawing lines between the federal and state governments. Number 39 elaborates on basic principles of the founders' federalism. Number 45 addresses the issue of states' rights in connection with republican liberty, considers threats to the authority of the states from the national government, and concludes that the states might very well maintain the upper hand in the union. After these four essays, one may wish to read numbers 10 and 51, which contain James Madison's famous theory of the "extended republic" and his conclusion about the need for "a proper federal system" to preserve liberty in a large and diverse civil society, such as that to be created by the proposed union of the thirteen states.

For a further analysis of *The Federalist* papers, one can turn to Vincent Ostrom's *The Political Theory of a Compound Republic* (Blacksburg: Center for the Study of Public Choice, Virginia Polytechnic Institute and State University, 1971). In this book, Ostrom seeks to elucidate the basic idea of the federal principal developed in *The Federalist*'s view of the proposed union as being a "compound republic," namely, partly national and partly confederal. Ostrom argues that *The Federalist* makes a major contribution to modern political theory by leading us away from thinking about political life in unitary and hierarchic terms. Instead, political life can be thought of in terms of complexity, multiple centers of power, and "concurrent regimes" (e.g., the states and the nation).

Those wishing to delve even more deeply into the formation of the federal union by examining other primary sources can consult Max Farrand, ed., *The Records of the Federal Convention of 1787*, 4 vols. (New Haven: Yale University Press, 1966). These records consist of James Madison's notes on the proceedings of the convention.

For a broader picture of public sentiment in 1787–1788, one can look at Jonathan Elliott, ed., *The Debates in the Several State Conventions on the Federal Constitution*, 5 vols. (Philadelphia: J.B. Lippincott, 1901; reprint, Charlottesville, Va.: The Michie Company, n.d.). Elliott's collection, however, is not comprehensive. Selective omissions give a misleading impression of the actual range of views expressed during the ratification campaign.

A nearly comprehensive collection of documents is now being published under the general title of *The Documentary History of the Ratification of the Constitution* (Madison: State Historical Society of Wisconsin). The first three volumes were edited by Merrill Jensen and are entitled *Constitutional Documents and Records, 1776–1787* (published in 1976), *Ratification of the Constitution by the States: Pennsylvania (1976), and Ratification of the Constitution by the States: Delaware, New Jersey, Georgia, Connecticut* (1978). To date, one other volume farther ahead in the series, Vol. 13, has been published. This one, edited by John P. Kaminski and Gaspare J. Saladino, is entitled *Commentaries on the Constitution (1): Public and Private, 21 February–November 1787* (1981).

No study of the founding period would be complete without a look at the Antifederalists, whose ideas about face-to-face democracy, moral conscience, civic virtue, and the public good have often been downgraded too easily by historians and political scientists. Now for the first time, a large body of their writings is available in seven volumes entitled *The Complete Anti-Federalist*, edited by Herbert J. Storing, with the assistance of Murray Dry (Chicago: University of Chicago Press, 1981). The introductory essay by Storing, available separately as a paperback, provides an excellent overview of the Antifederalists and their ideas.

A pithy and insightful introduction to basic principles of American constitutionalism is Andrew C. McLaughlin's *Foundations of American Constitutionalism* (New York: Fawcett Publications, 1961; reprint, Magnolia, Mass.: Peter Smith, 1972). McLaughlin devotes a chapter to the foundations of American federalism. Read in conjunction with the rest of the book, McLaughlin helps one to locate the idea of federalism in the context of the overall design and background of the United States Constitution. McLaughlin also examines indigenous sources of American constitutionalism stretching back to Puritan ideas of covenant. The historic links between covenant and federalism are suggested linguistically by the fact that the word *federal* comes from the Latin *foedus*, meaning *covenant*.

A rather thorough discussion of principles in relation to the entire system of American government is *The Democratic Republic: An Introduction to American National Government*, by Martin Diamond, Winston Mills Fisk, and Herbert Garfinkel (2nd ed.; Chicago: Rand McNally, 1972). Diamond's contributions are now available in paperback under the title *The Founding of the Democratic Republic* (Itasca, Ill.: F.E. Peacock, 1982), making this a most useful teaching resource as well as a reader for intelligent students.

For a broad-ranging discussion of the principles of American federalism, one can read Daniel J. Elazar, ed., *The Federal Polity*, a special issue of *PUBLIUS: The Journal of Federalism* 3 (Fall 1973). The nine essays by contemporary scholars in this volume provide a variety of perspectives on federal principles and their operation in contemporary America.

Another book worth reading is Donald S. Lutz, *Popular Consent and Popular Control: Whig Political Theory in the Early State Constitutions* (Baton Rouge: Louisiana State University Press, 1980). This book is important for two reasons. First, the author demonstrates the many indigenous sources of American constitutionalism. Quite a number of textbooks on American government emphasize the influences of John Locke, William Blackstone, and English political traditions on the drafting of the United States Constitution as though the framers had few ideas or traditions of their own. Lutz, however, shows that by 1787 Americans already had a long and rich history of state and local constitutionalism that differed in many respects from English ideas and traditions. Second, Lutz shows how Americans developed their constitutional ideas from 1620 to 1787 and how the Federalists emerged in the 1780s to formulate still newer ideas suitable for the achievement of the federal union.

Finally, one can round out one's reading on foundings and principles by consulting an important nineteenth-century commentator on American life and government, the French observer, Alexis de Tocqueville, whose *Democracy in America*, ed. J.P. Mayer (Garden City, N.Y.. Doubleday, 1969) remains a classic. The United States Constitution "is the most perfect federal constitution that ever existed," according to Tocqueville. Although he doubted whether the American federal union would be able to stand up to the strong centralized powers of Europe of the 1830s, Tocqueville admired the way in which federalism protected local liberties in America, fostered meaningful local attachments and participation, accommodated the diversity of peoples and town in the United States, and combined the advantages of small and large republics.

There are, of course, a great many other books on the founding era and on the drafting and ratification of the United States Constitution, but those cited above will provide a solid foundation in the historic principles and bases of American federalism. Together, these books suggest that modern federalism is a significant and original American contribution to political life and thought, and that federalism is not merely a static structure of government. More fundamentally, it is a principle and a process of governance intimately linked to liberty and to other ends sought by Americans in the Revolution and in the formation of the federal union.

Federalism in American History

Ratification of the United States Constitution set in place the federal framework of the new union, but it did not settle all questions of how federalism could or should work in practice. These issues were worked out over the course of time and, indeed, are still being debated today, as reflected in the public discussions of President Ronald Reagan's New Federalism proposals.

The first half of the nineteenth century was marked by several sharp controversies over the nature of the federal union, including the Eleventh Amendment (1795), the Kentucky and Virginia Resolutions (1798–1799), the Hartford Convention (1814–1815), the U.S. Supreme Court's *McCulloch v. Maryland* decision (1819), attempted nullifications of federal laws by state governments, and John C. Calhoun's theory of concurrent majorities. Disputes culminated in mid-century with the Civil War which, in the words of U.S. Chief Justice Salmon P. Chase, settled the nature of the federal union as "an indestructible Union, composed of indestructible States" (*Texas* v. *White*, 74 U.S., 7 Wall. 700, 725, 1869). After the Civil War, the U.S. Supreme Court developed the idea of "dual federalism" in many of its decisions. Dual federalism was the view that the states and the national government occupy separate and distinct spheres of operation.

At the same time, however, even while the states and the nation contested over certain matters and the U.S. Supreme Court tended to define issues in terms of dual federalism after the Civil War, the actual operations of the federal system generally unfolded in what has been called a more "cooperative" direction. This trend in American federalism is most fully examined in Daniel J. Elazar, *The American Partnership: Intergovernmental Co-operation in the Nineteenth-Century United States* (Chicago: University of Chicago Press, 1962). This book shows that patterns of cooperation in governance, mutual aid, and the provision of public services characterized relations between the states and the nation from the very beginning. The book discusses the operations of cooperative federalism in such areas as banking, internal improvements (e.g., roads and canals), schools and education, and welfare services.

Elazar argues that there have been three periods of cooperative federalism in the United States. The first period extended from about 1775 to 1840 when the "major vehicles of intergovernmental co-operation were the joint-stock company for long-term co-operative projects and the co-operative survey carried out with the widespread use of federal technicians by the states as a means of providing federal services-in-aid to the latter. . . . Co-operation in the field of banking was the most uniformly structured throughout the Union. . . . Federal aid to education was vital but generally consisted of 'backdoor financing' " (p. 313). The second period extended from about 1848 to 1913, during which "land-grant programs became the predominant form of intergovernmental co-operation." Other forms of mutual aid and public service cooperation intensified during this period as well. The third period has extended from about 1913 to the present. Cash grants-in-aid have become the predominant form of intergovernmental cooperation, coupled with an overall intensification of intergovernmental relations, such that virtually all public services provided to the American people involve shared responsibilities on the part of the federal government and state and local governments.

Not everyone is in agreement on this "cooperative" view of the history of American federalism. Harry N. Scheiber, in his *Condition of American Federalism: An Historian's View*, argues that cooperative federalism was a late development occurring after 1940. He sees three prior periods of American federalism: the first, from 1790 to 1860, being one of "rivalistic state mercantilism" and dual federalism; the second, from 1860 to 1933, being one of "centralizing federalism"; and the third, from 1933 to 1941, being one of the "New Deal and new federalism." Scheiber's essay is available in Mavis Mann Reeves and Parris N. Glendening, eds., *Controversies of State and Local Political Systems* (Boston: Allyn and Bacon, 1972).

Further elaboration of the development of American federalism and intergovernmental relations in the early years of the republic can be found in Leonard D. White's studies, *The Federalists: A Study in Administrative History* (1948), *The Jeffersonians: A Study in Administrative History, 1801–1829* (1951), and *The Jacksonians: A Study in Administrative History, 1829–1861* (1954)—all published by the Macmillan Company in New York. Another useful study is Lynton K. Caldwell's *The Administrative Theories of Hamilton and Jefferson: Their Contribution to Thought on Public Administration* (Chicago: University of Chicago Press, 1944). The book includes extensive discussions of the views and policies of Alexander Hamilton and Thomas Jefferson regarding the federal union and the roles of the states. For an overview of activities in the states during the founding era, one can consult Allan Nevins, *The American States During and After the Revolution, 1775–1789* (1924; reprint, New York: Augustus M. Kelley, 1969).

An excellent discussion of the period between Reconstruction and World War I can be found in Loren P. Beth, *The Development of the American Constitution, 1877–1917* (New York: Harper Torchbooks, 1971). This is not a legalistic study of the Constitution, but an elaboration of its political and social development during the urban-industrial revolution. Among other things, in analyzing the federal system, Beth examines five types of cooperation: (1) informal cooperation; (2) intergovernmental agreements and contracts; (3) joint or cooperative uses of federal, state, and local personnel; (4) interdependent law and administration; and (5) financial aid flowing between governments.

Given that the New Deal of the 1930s has generally been regarded as a watershed in the development of contemporary American federalism, one may wish to consult James T. Patterson, *The New Deal and the States: Federalism in Transition* (Princeton, N.J.: Princeton University Press, 1969). It has often been said that the New Deal resulted in a significant centralization of power in the hands of the national government and, thereby, distortion of American federalism. Patterson, however, reveals that the New Deal era was much more complex. The administration of Franklin D. Roosevelt generally cooperated with state officials and frequently looked to the states for legislative and policy ideas ultimately adopted as New Deal programs. Some states resisted the New Deal, many adapted to it, and still others pioneered and spearheaded New Deal ideas, occasionally going even beyond the scope of national thrusts. While the federal government did expand its sphere of activity, so did most of the states by the end of that era. What resulted was a more dense and complex intergovernmental system characterized by numerous cooperative endeavors.

One of the first detailed examinations of contemporary cooperative federalism is William Anderson, *The Nation and the States: Rivals or Partners?* (Minneapolis: University of Minnesota Press, 1955). This book is the author's minority report for the (Kestnbaum) Commission on Intergovernmental Relations, which was appointed by President Dwight D. Eisenhower to study the federal system and make recommendations for improvement. In this book, Anderson sets forth his views on the legitimacy and strength of cooperative federalism.

Another early and detailed examination of contemporary cooperative federalism can be found in Morton Grodzins, *The American System: A New View of Government in the United States,* ed. Daniel J. Elazar (Chicago: Rand McNally, 1966). Among other things, Grodzins is well known for his metaphoric conception of the American system as a marble cake; that is,

> the American system of government as it operates is not a layer cake . . . It is not three layers of government, separated by a sticky substance or anything else. Operationally, it is a marble cake . . . No important activity of government in the United States is the exclusive province of one of the levels, not even what may be regarded as the most national of national functions, such as foreign relations; not even the most local of local functions, such as police protection and park maintenance (p. 8).

Grodzins' book provides an overall view and a great many examples of the workings of this dynamic, cooperative system.

Federalism Today

An excellent introduction to contemporary American federalism is a widely used text by Daniel J. Elazar entitled *American Federalism: A View from the States* (3rd ed.; New York: Harper and Row, 1984). The author defines federalism "as the mode of political organization that unites separate polities within an overarching political system by distributing power among general and constituent governments in a manner designed to protect the existence and authority of both" (p. 2).

There are several distinctive features of this book. One is a focus on political processes in the federal system: namely, bargaining, negotiation, and cooperation. Second, there is an emphasis on the states as "the keystones of the American governmental arch." Third, the book examines the roles of localities as "civil communities" in the federal system. Fourth, the book discusses three American political subcultures—which the author terms *individualistic, moralistic,* and *traditionalistic*—and shows how they shape political life in the various states and influence American federalism. This examination of political culture is one of the best known features of this book and has been found to be useful to teachers for helping students to understand the diversity that exists in the United States. A collection of specific studies of the effects and manifestations of American political culture is available in John Kincaid, ed., *Political Culture, Public Policy, and the American States* (Philadelphia: ISHI Press, 1982).

Another widely used text is *Pragmatic Federalism: An Intergovernmental View of American Government* by Parris N. Glendening and Mavis Mann Reeves (2nd ed.; Pacific Palisades, Cal.: Palisades Publishers, 1983). This book focuses on the nuts and bolts of American federalism and offers a thorough review of the actors, agencies, and interests involved in the daily operations of the federal system. In the process, the book provides considerable data on various aspects of the system.

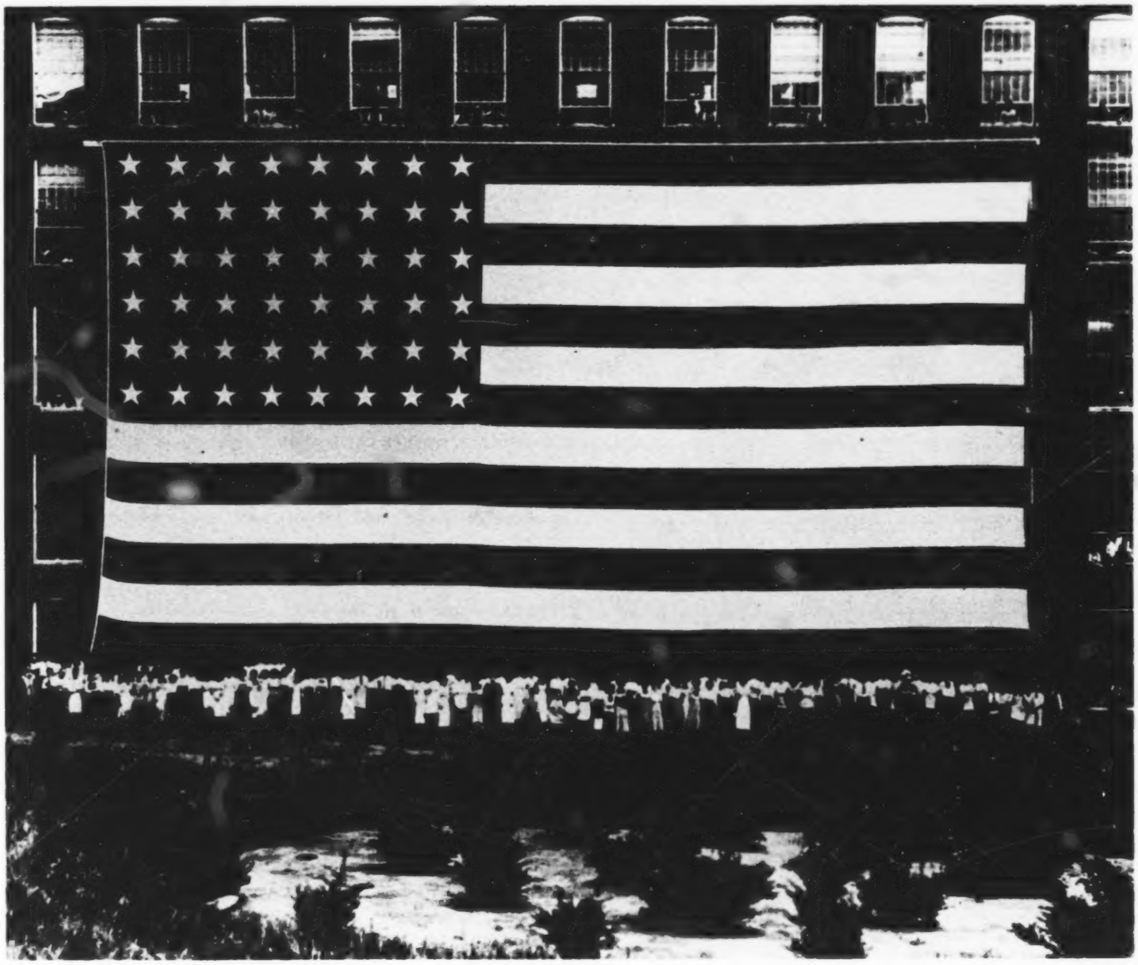
The leading text on intergovernmental relations is Deil S. Wright's *Understanding Intergovernmental Relations: Public Policy and Participants' Perspectives in Local, State, and National Governments* (2nd ed.; Monterey, Cal.: Brooks/Cole, 1982). This book is a thorough analysis of virtually all aspects of intergovernmental relations, including, of course, detailed information about fiscal federalism and grants-in-aid. Those interested in an older and even larger examination of intergovernmental relations, which Wright has called "the magnum opus of the field," can turn to W. Brooke Graves, *American Intergovernmental Relations: Their Origins, Historical Development, and Current Status* (New York: Scribner's Sons, 1964).

Various aspects of the American grant-in-aid system are discussed in *The Politics of Federal Grants* by George E. Hale and Marian Lief Palley (Washington, D.C.: Congressional Quarterly Press, 1981). The importance and growth of this system of fiscal federalism is suggested, for example, by the fact that the federal government made some $12 million available to state and local governments in 1913, while by 1982, the amount of federal aid exceeded $82 billion. Two key issues in the politics of federal aid are the degree to which federal control follows federal dollars and the degree to which state and local governments may be too dependent on federal aid. To what degree does federal aid strengthen state and local governments, and to what degree does it strengthen the federal government's leverage over states and localities? Different aid programs have different effects, though overall, it appears that state and local governments have held their own fairly well as effective partners in the federal system.

A recent book that takes a critical view of developments in the federal system is David B. Walker, *Toward A Functioning Federalism* (Cambridge, Mass.: Winthrop Publishers, 1981). This book discusses historical developments in American federalism and argues that the federal system has become too complex and overloaded with intergovernmental relationships, regulations, and grants-in-aid to work properly and efficiently. Instead of a "division of labor" between the federal, state, and local governments, there is a confusion of roles according to the author. This view is not held by all observers of the federal system. Others argue that the system promotes choice and flexibility, among other things, and that the federal system is not designed for a neat division of labor.

There are several good compilations available that provide primary resources, such as excerpts from *The Federalist* papers and court opinions, as well as essays and studies about American federalism. A large, though older, collection is *Cooperation and Conflict: Readings in American Federalism* edited by Daniel J. Elazar, R. Bruce Carroll, E. Lester Levine, and Douglas St. Angelo (Itasca, Ill.: F.E. Peacock, 1969). The primary sources and articles in this collection provide broad coverage of the field.

One may also wish to consult four briefer collections. One is Aaron Wildavsky, ed., *American Federalism in*



America's largest flag, made in Manchester, N.H., 1914, by the Amoskeag Mfg. Co. Photograph by Harlan Marshall. Manchester (N.H.) Historic Association.

Perspective (Boston: Little, Brown, 1967). This book includes articles on ideas of federalism throughout the world, American federalism, and Australian, Canadian, and West German federalism. Another collection is Valerie Earle, ed., *Federalism: Infinite Variety in Theory and Practice* (Itasca, Ill.: F.E. Peacock, 1968). This book focuses mostly on historical and comparative federalism.

A third collection is Daniel J. Elazar, ed., *The Politics of American Federalism* (Lexington, Mass.: D.C. Heath, 1969). This book emphasizes the theoretical framework of American federalism, various aspects of federalism in action, and problems and prospects for American federalism. A fourth collection is Richard D. Feld and Carl Grafton, eds., *The Uneasy Partnership: The Dynamics of Federal, State, and Urban Relations* (Palo Alto, Cal.: National Press Books, 1973). The essays in this book focus more on structures and policies in the federal system.

For a convenient collection of rather classic essays, one can turn to Robert A. Goldwin, ed., *A Nation of States: Essays on the American Federal System* (2nd ed.; Chicago: Rand McNally, 1974). The seven essays in this volume are more philosophical and theoretical in nature, but not difficult to understand, and provide useful insights into basic and enduring features of American federalism. The essays examine the federal system as it operates and review the arguments about how it should operate. For an earlier collection of this type, one can consult George C.S. Benson, ed., *Essays in Federalism* (Claremont, Cal.: Institute for Studies in Federalism, 1961).

A more recent collection of essays entitled *American Federalism: A New Partnership for the Republic*, ed. Robert B. Hawkins, Jr. (San Francisco: Institute for Contemporary Studies, 1982) provides current assessments and reassessments of the federal system, especially in light of President Reagan's New Federalism proposals.

Finally, to keep up with developments in American federalism, one can consult *PUBLIUS: The Journal of Federalism* published quarterly by the Center for the Study of Federalism. Among its quarterly issues, *PUBLIUS* publishes an annual review of American federalism that focuses on very specific developments occurring each year.

The States and their Civil Communities Today

American federalism cannot be understood simply from a national viewpoint as is so often implied in American government textbooks. The states are the vital constituent polities of the federal union. Whatever may have been said about the weaknesses of the states in the past, whether accurate or not, can no longer be said for most of the states. Over the last generation and a half, the states have undergone a remarkable renaissance, with each state carving out a distinctive path for itself. Most of the states have either adopted new constitutions or substantially revised older ones. All of the states have acted to strengthen, upgrade, and modernize their governmental systems in various ways. Many more states now have healthier, more diversified economies that make them less dependent upon the fortunes of any single industry or agricultural product. In the case of some states, it can be said that their governmental systems operate better than that of the federal government.

For a useful introduction to politics in the states, state government institutions, and policymaking in the states, one can consult Virginia Gray, Herbert Jacob, and Kenneth N. Vines, eds., *Politics in the American States: A Comparative Analysis* (4th ed.; Boston: Little, Brown, 1983). This book contains a useful annotated bibliography at the end of each chapter that can direct one to other resources on particular topics.

An older but still useful book is Ira Sharkansky, *The Maligned States: Policy Accomplishments, Problems, and Opportunities* (New York: McGraw-Hill, 1972). This book is a defense of the importance of strong state governments in which the author argues that: "If any segment of government promises the resources to meet the most pressing of our social problems, it is the states" (p. 1). The book examines the strengths and diversity of the fifty states, their financial problems and reforms, higher education in the states, the states in the federal system, the states and urban problems, and future prospects for the states.

For a wealth of current information and data about the states, one can consult *The Book of the States*, an annual publication of The Council of State Governments in Lexington, Kentucky. On visiting Washington, D.C., especially with students, one should consider including the Hall of the States on one's itinerary.

Recent information about particular states is also available in a series of books written by Neal R. Peirce, a journalist, and published by W.W. Norton in New York. These are: *The Megastates of America: People, Politics, and Power in the Great States* (1972), *The Mountain States of America: People, Politics, and Power in the Eight Rocky Mountain States* (1972), *The Pacific States of America: People, Politics, and Power in the Five Pacific Basin States* (1972), *The Great Plains States of America: People, Politics, and Power in the Nine Great Plains States* (1973), and *The Deep South States: People, Politics, and Power in the Seven Deep South States* (1974). Each state chapter contains information about the historical and political development of the state, significant actors and interests in state politics, the cultural climate of the state, economic development, major cities, recent significant events, and other interesting tidbits of information.

For an update on developments in the states and an overview of all of them, one can read Neal R. Peirce and Jerry Hagstrom, *The Book of America: Inside the Fifty States Today* (New York: W.W. Norton, 1983).

Local governments are integral significant forces in the federal system as well and should not be overlooked in any study of American federalism. Local government is no longer a "lost world of political science" as one scholar described it in the 1950s. Home rule and other constitutional and legislative provisions for counties and cities in many states have increased the ability of local governments to serve their publics. Suburbanization and more dispersed migration throughout the nation have transformed local governments in virtually every state. At the same time, states have developed closer cooperative ties with their localities, and local governments have developed direct relations of their own with the federal government.

A useful early look at the development of these dynamics can be found in Roscoe C. Martin, *The Cities and the Federal System* (New York: Atherton, 1965). Another book that traces the federal government's involvement in urban affairs is Mark I. Gelfand, *A Nation of Cities: The Federal Government and Urban America, 1933–1965* (New York: Oxford University Press, 1975).

A way of understanding local governments in the context of the federal system is developed by Daniel J. Elazar in *Cities of the Prairie: The Metropolitan Frontier and American Politics* (New York: Basic Books, 1970). This author suggests that many localities can be regarded as civil communities. "A civil community consists of the sum of the governments and quasi-governments that function in a given locality and that are tied together in a single bundle of governmental activities and services. This bundle of governmental activities and services is manipulated in the locality to serve the local political value system" (p. 460). What are the roles of the civil community?

> As one focal point within the national civil society, the civil community serves in five major capacities: as an acquirer of outside aids—governmental and nongovernmental—for local needs; as an adapter of government actions and services to local values and conditions; as an experimenter with new functions and services (or readaptations of traditional ones); as an initiator of governmental programs of particular relevance locally that may or may not become widespread later; and as a means through which the local population may secure an effective voice in governmental decisions that affect them (pp. 415–416).

This book also contains a useful guide for studying the civil community.

Finally, for an example of the application of these ideas to a particular community, one can read Daniel J. Elazar, *The Politics of Belleville: A Profile of the Civil Community* (Philadelphia: Temple University Press, 1972).

Conclusion

There is a wealth of material available on American federalism. What we have discussed above is a sampling of many of the best books available as well as resource books able to provide one with primary materials and different points of view. These books can serve as guides for developing rich curriculum materials, and for teaching about American federalism in exciting and rewarding ways. Federalism is at the heart of the American system and is a distinctive American contribution to the art of free democratic governance in the modern world. As such, federalism deserves an important place in the education of young Americans.

John Kincaid is associate professor of political science at North Texas State University, Denton. He is associate editor of* Publius *and editor of* Political Culture, Public Policy, and the American States *(1982).

Bicentennial Gazette

Organizing Book Discussion Groups on the American Founding

by Michael Bouman, Associate Director, Vermont Council on the Humanities and Public Issues

Two years ago, the Vermont Council on the Humanities and Public Issues organized a statewide project called "Readings in the Constitutional Era" to find ways of interesting adults in studies of the American founding. In the course of the project, the Council sponsored 119 programs in 18 communities, with total attendance of 3,395 people. With special funding provided by an NEH "Exemplary Award," we directed the project from the Council's office and enlisted helpers all over the state to take care of details and share in the discoveries.

The Content of the Programs

In its final form, the project contained four different series of programs, each with its own reading list. In a series called "Biographies From American History," we adopted the strategy of surveying the founding period and placing the Constitution in the context of the lives of various individual leaders, some of whom took no part in drafting the document.

We called another series "The American Social Revolution" and selected topical books with relevance to the Constitution. The series raised constitutional issues that endure today, while providing a rich sense of social context.

We wanted also to see if people would read some of the "real stuff" such as Madison's notes of the Federal Convention, or essays from *The Federalist*, or other primary documents. These we assembled into a syllabus for "Establishing America: The Founding Years." We used a textbook in this series as a means of reinforcing the lectures and providing a sense of context. The text selected was *The Great Republic* (Volume I) by Bernard Bailyn and Gordon S. Wood, and it proved immensely popular.

Finally, after a season of experience with the three series above, we added a fourth series based on Vermont's controversial struggle for statehood (1777–1791). The readings included biographies of Ethan Allen and Matthew Lyon and a collection of Vermont state papers which we reprinted especially for this series. We named the collection, and the series, "Vermont and the New Nation." By setting the Vermont founding in the context of national issues, we were able to bring in the ideas of national government and the Constitution together with ideas of state sovereignty and the state constitution.

Diary of the Project's Development

April–May 1983: Compiled a mailing list of American historians, political scientists, and professors of constitutional law. Sent them all a memo describing the proposed project, asked for readings we might use with general audiences.

Began checking books out of the local college library. Crash course in the secondary sources. Skimmed dozens of books to get a sense of what might be available, what the possible combinations might be.

Scholar response was immediate and enthusiastic. Within two weeks we had an awesome list of suggestions for topics and readings.

Wrote the proposal for NEH funding of the project.

June: Compiled a list of the books that had survived the initial skimming. Through inter-library loan obtained a copy of most of the other books the scholars had recommended. Blasted through those and added readable ones to the working list.

Consulted *Books in Print*. Appalled to find so many good titles extinct. Compiled a list of publishers, addresses, and phone numbers for the books we thought we might want for the project.

Made contact with the sales department of each publisher to determine the discounts for bulk orders. Ordered five copies of each title still under consideration.

Arranged with Syracuse University Press for a special reprinting of Charles Jellison's *Ethan Allen: Frontier Rebel*, which we knew would be the chief attraction of each series we had in mind.

July: Organized a team of volunteer readers around the state. These included scholars, librarians, journalists, and others from diverse backgrounds. Sent each reader a couple of titles and asked him or her to spend an hour with each one and fill out a book rating sheet. If after that first hour the book had failed to excite interest, we dropped it from consideration. We discovered during this test that many of the titles generated polarized evaluations. When this happened we used the book if it fit our "lesson plans" and dropped it if it didn't. We consoled ourselves with the knowledge that you can't please everybody all the time, but it's great if you know in advance that at least half of your readers will finish their assignments.

August: Endless reading and evaluation of books.

September: Compiled the results of the summer book evaluations and noticed big gaps in the lists. Wrote a memo to all the scholars to tell them where the project stood. Requested additional suggestions for topics and titles. This second mailing triggered almost as much response as the first.

October: Assembled a small team of scholars to help plan the syllabus for each of the series we intended to develop. These scholars joined us in reading the additional titles that had been suggested.

Sent project descriptions to libraries and other organizations we hoped would serve as the local sponsors of the project in the coming winter.

November: Wrote to scholars as soon as the book list and syllabus were settled and asked them to indicate on a form which programs they would be prepared to cover beginning in late January. By Thanksgiving we had enough replies from sponsors and scholars to begin scheduling speakers for the winter programs.

Met with an artist and worked out poster designs for each series.

Met with a radio producer and worked out public service announcements for each series. The messages we wanted to get across were: "You don't have to be a history buff to like these programs," "These are for people who always wished they understood our national founding," and "free of charge."

Began placing book orders. Chagrined to find that some books that had been available during the summer were now out of print, out of stock, or out of sight (prices had danced their way upwards during the fall). Had to wheel and deal like mad for three solid weeks.

Arranged for photo-offset reprinting of some public domain primary documents (The Virginia and Kentucky Resolutions).

December: (Still reading books we had selected on faith.)

Wrote sample press releases for the local sponsors.

Began receiving book shipments from the publishers!! Some books got lost in transit; some were short of stock—there seemed no end to the variety of experience that lay ahead. When the boxes got ceiling high in the office, we repacked them and shipped them out to the eight local sponsors. Lead time became our most precious asset.

Organized a scholarly seminar to reorient some of the prospective speakers to the discourse of political theory. Recruited Professor Murray Dry to conduct the seminar on six Saturdays during the winter.

January–April 1984:

Attended programs hither and yon. Amazed at the variety of readers. Some like the primary documents and disdain the secondary treatments. Some think historical novels are the most satisfactory way to absorb "history." Some prefer biographies, others textbooks. They all like the variety of speakers and their teaching styles. Their tolerance for professorial mannerisms surprises us. They are not merely interested in these programs, they are *avid* about them. They attribute their learning to the particular teachers and the layout of the programs. No one forms the idea that their own readiness to learn has anything to do with it.

Murray Dry's seminar was a reawakening for the six of us who took it. Those who missed it asked us to offer it again next year.

May–June: Reviewed and analyzed several hundred multi-page audience evaluation forms. Regretted the length of the form and the number of choices offered for each question (we had people evaluate the readings, the teachers, the sequence, the content . . . just about every idea that came to mind the day we drafted the form.)

Approved funding for two experimental "shortened" biographies series during the summer. We used these experiments to try out some new books as well as some new teaching strategies. A three-program series proved disappointing in one vacation community where people had lots of time to read and more interest than three good programs could satisfy. A five-program sequence in another town was very successful.

July: Organized another team of scholar/advisors to review the analysis of the evaluations and redesign the syllabus. This was as fruitful a process as the original project development. During the course of six or more meetings, we replaced books that weren't effective, added a whole new series, tightened up the "course outlines", and decided to compile and reprint a selection of primary documents related to Vermont's founding and admission to the union in 1791.

Reprinted from public domain material the *McCulloch* v. *Maryland* decision together with some of Thomas Jefferson's correspondence on the Court's excesses.

August: Lined up program sponsors for the fall season and organized a schedule of over fifty programs in nine towns. Proofread the reprint material. Ordered more books. Commissioned a new poster.

September–December: Further on-site program evaluations. Revision of the audience evaluation form, cutting it to two pages from four(!).

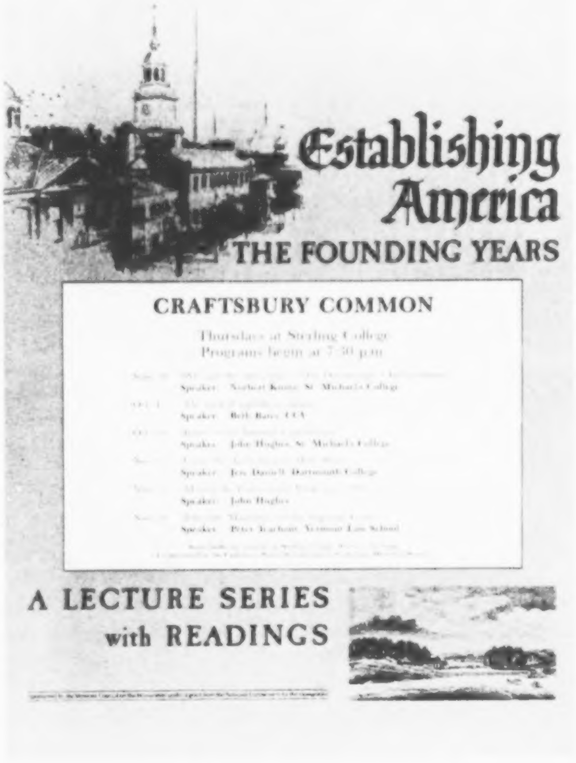
General Announcement to the Vermont Council on the Humanities' full network of program sponsors regarding the end of the testing phase and the beginning of general availability of the programs on the Constitution.

Epilogue

With the conclusion of a full year of testing syllabi, books, and speakers, "Readings in the Constitutional Era" closed as a special project and entered the mainstream of humanities programming in Vermont. Our office made book lists and scholar directories available to program sponsors, who took over the work of printing posters, scheduling speakers, and handling the details. Several of the sponsors who accepted one series scheduled a second Constitution series the following season. In several communities, the Constitution series led to the establishment of regular adult education programs in the humanities. No one realized the extent of the "market" for serious reading and discussion until our special project made it easy for local sponsors to take a risk with programs on the American Founding.

For Further Information

The syllabus for each series, as well as the final report on the "Readings in the Constitutional Era" project, is available free of charge from the Vermont Council on the Humanities and Public Issues, Box 58, Hyde Park, Vermont 05655.



THE NATIONAL ENDOWMENT FOR THE HUMANITIES
Special Initiative for the Bicentennial of the United States Constitution

IN UNION
IS STRENGTH.

Regrants by State Humanities Councils (by state)

For further information on these grants, contact the appropriate state council.

ALABAMA
A BICENTENNIAL SALUTE TO AMERICA'S CONSTITUTION (1984)
(Scholarly consultation)
Prichard, AL
$802

ALASKA
RADIO SERIES ON THE CONSTITUTION (1983)
Alaska Institute of Research and Public Policy
$15,000

COLORADO
CONSTITUTIONAL DEBATES OF 1787 (1984)
(Dramatizations)
University of Colorado
$10,872

THE DENVER DIALOGUES: "OUR LIVING HERITAGE: THE AMERICAN CONSTITUTION" (1984)
(Conference)
Unitarian Universalist Metro Denver Urban College
$14,394

CONNECTICUT
CONNECTICUT'S CONSTITUTIONAL HERITAGE (1983)
(Humanities institute)
Edwin O. Smith School
$500

DELAWARE
BICENTENNIAL PLANNING FORUM (1983)
Delaware Heritage Commission
$2,662

DISTRICT OF COLUMBIA
NOONTIME LECTURES (1983)
National Archives Constitution Study Group, Washington, D.C.
$14,610

NOONTIME LECTURES, SYMPOSIUM (1984)
National Archives Constitution Study Group, Washington, D.C.
$24,500

GEORGIA
RELIGION, EDUCATION AND THE CONSTITUTION (1980)
(Forum)
American Civil Liberties Union, Georgia
$1,025

ILLINOIS
CONSTITUTIONAL PRINCIPLES IN THE MARKET PLACE OF IDEAS (1983)
(Public lecture)
Bloomington-Normal Humanities
$8,099

ILLINOIS JEFFERSON MEETING ON THE CONSTITUTION (1984)
The Jefferson Foundation
$21,830

THE LIVING CONSTITUTION (1984)
(Radio series on current issues)
Constitutional Rights Foundation (IL)
$12,892

INDIANA
INDIANA AND THE U.S. CONSTITUTION (1984)
(Lecture series)
Indiana Association of Historians
$4,864

KANSAS
THE CONSTITUTION AND CONSTITUTIONAL GOVERNMENT (1983)
(Public lectures)
Southeast Kansas Committee for the Humanities
$4,280

AFRO-AMERICAN FREEDOM AND THE U.S. CONSTITUTION (1983)
(Public lectures)
Colmery O'Neil VA Medical Center
$2,487

KENTUCKY
TEACHING THE CONSTITUTION IN SECONDARY SCHOOLS (1983)
(Workshop)
Somerset (KY) Community College
$1,004

MARYLAND
BICENTENNIAL SYMPOSIUM (1984)
National Archives Constitution Study Group, Washington, D.C.
$1,200

MARYLAND AND THE MAKING OF THE FEDERAL CONSTITUTION (1984)
(Two-day seminar)
Anne Arundel County (MD) Schools
$500

MISSISSIPPI
VALUES UNDERLYING THE U.S. CONSTITUTION (1984)
(Teacher workshops)
University of Southern Mississippi
$9,674

INTERPRETING U.S. CONSTITUTION AND AMERICAN FREEDOM (1984)
(Conference)
Mississippi State Bar Association
$7,500

WOMEN AND THE CONSTITUTION (1984)
(Forum)
Alcorn State University, Mississippi
$5,000

MISSOURI
VALUE SYSTEM OF THE CONSTITUTION AND DECLARATION OF INDEPENDENCE (1982)
(Public lecture)
Clinton Civitan
$862

MONTANA
YOUR CONSTITUTION (1984)
(Three ninety-minute classes)
Montana Extension Homemakers Council
$450

PLANNING CONFERENCE (1984)
Montana Committee on the U.S. Constitutional System
$950

NEBRASKA
AMERICAN CONSTITUTIONAL DEMOCRACY CONFERENCE
(Planning grant)
University of Nebraska-Lincoln
$2,000

THE CONSTITUTION: THAT DELICATE BALANCE (1984)
(Discussion of the television series)
Creighton University
$4,990

NEVADA
THE CONSTITUTION: THAT DELICATE BALANCE (1984)
(Grant in support of local broadcast)
Channel 5, Public Broadcasting, Nevada
$1,000

NEW MEXICO
MULTI-CULTURAL PERCEPTIONS OF THE CONSTITUTION (1983)
(Conference)
University of New Mexico
$950

OHIO
THE CONSTITUTION: THAT DELICATE BALANCE (1984)
(Grant in support of local broadcast)
Ohio University Telecommunications
$970

THE CONSTITUTION: THAT DELICATE BALANCE (1984)
(Community forum in conjunction with broadcast)
University of Akron (OH)
$1,000

OKLAHOMA
SUMMER INSTITUTE FOR TEACHERS ON THE CONSTITUTION (1983)
College of Liberal Studies, University of Oklahoma
$9,509

OKLAHOMA AND THE U.S. CONSTITUTION (1984)
(Reading and discussion groups)
Arts and Humanities Council of Tulsa
$350

PENNSYLVANIA
STATESMANSHIP AND THE CONSTITUTION (1983)
(Two-day symposium)
Center for the Study of the Constitution, PA
$1,000

PUERTO RICO
A HISTORICAL-POLITICAL VIEW OF PUERTO RICAN AND U.S. CONSTITUTION (1984)
(Forum)
UIA Alumni Association
$1,500

U.S. CONSTITUTION'S BICENTENNIAL (1984)
(Lecture series)
Catholic University of Puerto Rico
$5,000

SOUTH DAKOTA
RELIGION, PUBLIC SCHOOLS AND THE CONSTITUTION (1981)
(Public lectures)
Association of Christian Churches, SD
$1,997

UTAH
TEACHING THE CONSTITUTION/MOCK CONSTITUTIONAL CONVENTION (1984)
(Planning grant for social studies teachers' program)
Utah Council for the Social Studies
$995

VIRGINIA
CONSTITUTION BICENTENNIAL PLANNING GRANT (1982)
Institute of Government, University of Virginia
$1,500

VIRGINIA JEFFERSON MEETING ON THE CONSTITUTION (1983)
The Jefferson Foundation
$8,500

CONFERENCE ON THE JUDICIARY AND THE CONSTITUTION (1984)
(Planning grant)
Hampden-Sydney College, VA
$1,500

WASHINGTON
THE CONSTITUTION AND YOU (1982)
(Seminars, workshops, debates)
Metrocenter YMCA, Seattle, WA
$19,000

CONSTITUTIONS, ANCIENT AND MODERN (1983)
(Public lecture by David Madsen)
Shorewood High School, WA
$305

CONSTITUTIONS, ANCIENT AND MODERN (1984)
(Public lecture by David Madsen)
American Association for University Women
$65

WISCONSIN
IF MEN WERE ANGELS (1984)
(Two-week teacher institute)
Alverno College, WI
$7561.18

Network of Scholars: Supplement

The initial list of scholars interested in Bicentennial programs appeared in the Fall, 1984 issue of ***this Constitution****; supplements to it have appeared in subsequent issues. Planners should get in touch directly with those whom they would like to have participate in their programs.*

CALIFORNIA
David Sadofsky, Ph.D., J.D.
Department of Politics
Chapman College
Orange, CA 92666
Modern American government and society; public administration

HAWAII
Stuart Gerry Brown, Ph.D.
Department of American Studies
University of Hawaii at Manoa
Honolulu, HI 96822
Political and constitutional history; presidency

Herbert F. Margulies, Ph.D.
Department of History
University of Hawaii at Manoa
Honolulu, HI 96822
Political and constitutional history

Deane Neubauer, Ph.D.
Faculty of Social Sciences
University of Hawaii at Manoa
Honolulu, HI 96822
American polity; democratic principles and process

OHIO
Howard Tolley, Jr., Ph.D., J.D.
Department of Political Science
University of Cincinnati
Cincinnati, OH 45221-0375
Civil rights and liberties; separation of powers; federalism

TENNESSEE
James E. Mock, Ph.D.
Department of Political Science
Austin Peay State University
Clarksville, TN 37044
Public administration; minority politics

TEXAS
Lino Graglia, LL.B.
School of Law
University of Texas at Austin
Austin, TX 78705
Constitutional law

MARYLAND
Robert W. McHenry, Ph.M.
Department of History and Political Science
Montgomery College
Rockville, MD 20850
Montesquieu; foreign affairs

Address change:
OKLAHOMA
Eldon Eisenach, Ph.D.
Department of Political Science
University of Tulsa
Tulsa, OK 74104
Colonial constitutions; religion and constitutional ideas

Summer Seminars for Secondary School Teachers

The following seminars related to the Constitution will be offered in 1986:

The Making of the Constitution
Richard R. Beeman
Summer Sessions Office
University of Pennsylvania
Philadelphia, PA 19104

The Creation of the American Constitution
Paul Finkelman
History Department
SUNY, Binghamton
Binghamton, NY 13901

Natural Law, Natural Rights, and the American Constitutional Order
Timothy Fuller
Political Science Department
Colorado College
Colorado Springs, CO 80903

The Texts of Toleration: Locke, Montesquieu, Voltaire, Mill
Alan C. Kors
Summer Sessions Office
University of Pennsylvania
Philadelphia, PA 19104

Alexis de Tocqueville, *Democracy in America*: Religion in a Democratic Society
Walter H. Capps
Department of Religious Studies
University of California
Santa Barbara, CA 93106

PUBLICATIONS

JOURNAL OF AMERICAN HISTORY, SIGNS, PLAN SPECIAL BICENTENNIAL ISSUES

The *Journal of American History* will devote its December 1987 issue to articles that will illuminate the theme of the Constitution and constitutionalism in American history. A special advisory board will assist in preparing the issue, which will also include review essays, polls, reminiscences and other features. The deadline for receipt of articles is December 1, 1986. For further information, write: David Thelan, Editor, *Journal of American History*, Ballantine Hall, Room 702, Indiana University, Bloomington, IN 47405.

Signs: A Journal of Women in Culture and Society will publish a special issue in 1987 that will explore the relationship between women and the formation, political impact and subsequent evolution of the Constitution. Papers are invited that consider the influence of the Constitution on women of all races and classes. The issue will include articles, documents, and other features. Papers should be sent by June 30, 1986, to *Signs* Special Issues, 207 East Duke Building, Duke University, Durham, NC 27708.

THE ESSENTIAL ANTIFEDERALIST

Edited by W. B. Allen of Harvey Mudd College and Gordon Lloyd of the University of Redlands, with Margie Lloyd as associate editor, *The Essential Antifederalist* has been published by the Center for the Study of the Constitution, Carlisle, PA., and the University Press of America. It has been designed specifically for classroom use and provides a broad selection of some of the principal themes of the Antifederalists. For more information, write to the University Press of America, 4700 Boston Way, Lanham, MD 20706. [*This entry corrects an item published originally in the Fall 1985 issue of* ***this Constitution.*** *— ed.*]

ORGANIZATIONS AND INSTITUTIONS

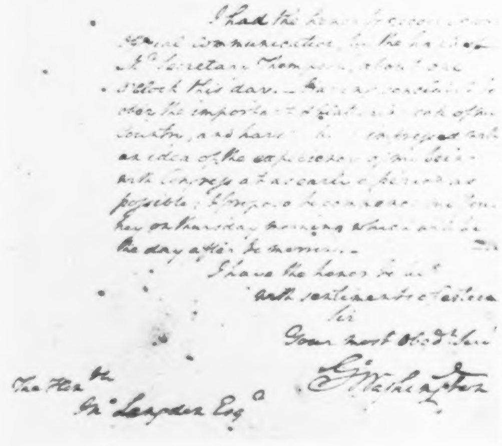
Cooperative Exhibition in Six States

In 1976 the Lilly Library at Indiana University mounted an exhibition of manuscripts and contemporary publications to celebrate the Bicentennial of the Declaration of Independence. This exhibit was the result of five years of acquisitions and planning made possible by annual grants from the Ball Brothers Foundation of Muncie, Indiana. The Library and the Foundation decided to continue their collaboration in preparation for the Bicentennial of the U.S. Constitution. The purchase of one of the six surviving copies of the first draft of the Constitution for members of the Constitutional Convention was the first acquisition, and over the intervening nine years, significant materials, for research as well as for exhibition, concerning the Constitution during the period of ratification by the original thirteen states have been added.

Consultation between the directors of the Lilly Library, the Ohio Historical Society, the Newberry Library in Chicago, the Clements Library at the University of Michigan, the State Historical Society of Wisconsin and the James Ford Bell Library at the University of Minnesota resulted in a decision to plan a cooperative exhibition, drawing on their combined resources to celebrate both the Bicentennial of the Constitution and the Northwest Ordinance. The alumni associations and the history departments of eight universities within the six states within the old Northwest Territory have already begun working together on a program of lectures and publications to acquaint the public with the significance of the Ordinance of 1787.

Application has been made to the National Endowment for the Humanities for a grant which will allow the exhibition to be seen in each of the six states, beginning in Ohio, the first state admitted to the Union under the Ordinance of 1787, in July 1987. It would move to Indiana in September, to Illinois in November, to Michigan in January 1988, to Wisconsin in March, and to Minnesota in May where it will conclude in June 1988, on the Bicentennial of the ratification by New Hampshire, the ninth state, which made the Constitution law.

Included will be the manuscript of the resolution of Congress convening the Constitutional Convention, signed by secretary Charles Thomson; the first printed draft of the Constitution; the manuscript of the fifth *Federalist* paper and Thomas Jefferson's copy of *The Federalist*; James Madison's letter to George Washington giving an account of the vote for ratification of the Constitution in the Virginia House of Burgesses; George Washington's letter written from Mount Vernon, 14 April 1789, accepting the Presidency of the United States; and Thomas Jefferson's copy of the *Acts Passed at a Congress of the United States of America* (New York, 1789) containing the first printing of the Bill of Rights. An illustrated catalogue with historical commentary by Dr. Cecil K. Byrd will accompany the exhibition. For more information, contact William R. Cagle, Lilly Library, Indiana University, Bloomington, IN 47405-3301.



George Washington accepts the office of president, April 14, 1789. Manuscripts Department, Lilly Library, Indiana University, Bloomington, Indiana.

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Pi Sigma Alpha Offers Awards for Bicentennial Projects

Pi Sigma Alpha, the national high school political science honor society, has announced that it will award two prizes of up to $1000 each in 1985 and 1986 for projects from its chapters relating to the Bicentennial of the Constitution. Projects may include speakers, paper contests, conferences or other programs. For further information, write: Pi Sigma Alpha, 4000 Albemarle Street, N.W., Washington, D.C. 20016. (202) 362-5342.

The Living Constitution Conference

The Bar Association of St. Louis and the American Civil Liberties Union of Eastern Missouri co-sponsored a conference in October 1985 for teachers of grades 9–12, the first in a series of scholarly workshops for integrating constitutional studies into the classrooms. Held in cooperation with the College of Arts and Sciences, University of Missouri-St. Louis, the conference was designed to explore the importance of teaching the U.S. Constitution and Bill of Rights in the secondary curriculum, to enhance the understanding of constitutional law, and to provide classroom teaching resources and strategies; its specific focus was religious liberty. Teachers were invited to bring effective teaching materials with which they were familiar. For further information, write: Bar Association of Metropolitan St. Louis, One Mercantile Center, Suite 3600, St. Louis, MO 63101.

National Center for Constitutional Studies

The National Center for Constitutional Studies is a private, non-profit educational foundation created to provide text materials and specialized courses in constitutional studies for schools, public officials and others. The Center seeks to promote a renewed appreciation for the constitutional system and fundamental principals of liberty. To do so, the Center has published a constitutional textbook, *The Making of America*; it also offers a monthly magazine called *The Constitution*. Its Bicentennial program includes a series of booklets with suggestions for celebrating the Bicentennial, legislative and leadership conferences, production of audio and video tapes for broadcast and use in schools, publication of a set of biographies about key figures in America's past, patriotic games, coloring books and story books, a speakers' bureau, and an educational game for teaching about the Constitution. For further information, write: NCCS, P.O. Box 37110, Washington, D.C. 20013; (202) 371-0008.

Convention II Announces Eleventh Annual Session

Convention II, the model Constitutional Convention for high school students, held its Eleventh Annual Session in Washington, DC, February 4th through 8th, 1986.

High school students serve as Delegates to Convention II, proposing and debating constitutional amendments in chambers of the United States Senate and House of Representatives.

The Delegates introduce their proposed amendments into Committees. The Committees, led by the Committee Chairmen who are chosen from among the Delegates, consider the text and the substance of the proposed amendments. If in the opinion of the Committee the proposed amendment is worthy of the consideration of the entire Convention, it is reported out for debate among all the Delegates.

Delegates to Convention II exchange ideas and develop friendships with their peers from across the country. They learn about the Constitution and about the process of amending it. They also learn about the process of politics, the art of compromise.

The National Association of Secondary School Principals has placed Convention II on its Advisory List of Contests and Activities for each of the past five years.

For further information or for applications, please contact Convention II, P.O. Box 44086, Washington, DC 20026.

The Jefferson Meeting on the Constitution—Guides for Teachers and Communities

The Jefferson Foundation—a non-profit, non-advocacy organization—has developed a program called The Jefferson Meeting on the Constitution which increases citizens' understanding of the Constitution by involving them in discussions of issues concerning constitutional change. Successful Jefferson Meetings have been organized at the state-wide, community, and school levels. To encourage local organization of Jefferson Meetings, the Jefferson Foundation has published two guides, "The Jefferson Meeting on the Constitution: The Constitution in the Classroom, A Guide for Teachers," and "The Jefferson Meeting on the Constitution: The Constitution in the Community, A Guide for Communities." Each guide provides an overview of the Jefferson Meeting, a step-by-step plan for organizing a Meeting, suggestions for use of the Meeting in various settings with various participants, and a listing of resources that will be useful in participants' preparation for the Meeting.

Jefferson Meetings foster discussion—first in issue committees and then in a general session—of up to six constitutional issues. These issues and the titles of Jefferson Foundation Discussion Guides about them are:

"To Make and Alter Their Constitutions of Government," about amending the Constitution.
"So Great a Power to Any Single Person," examining the desirability of changing the president's term of office to one six-year term.
"During Good Behavior," about setting terms of office for federal judges and/or altering the manner of their selection.
"To Control the Abuses of Government," a discussion of the item veto and the legislative veto.
"The Root of Republican Government," a discussion of extending and limiting the number of terms of Representatives.
"The Plain Simple Business of Election," a discussion about the popular election of the president.

These Discussion Guides, used in conjunction with the Teacher's or Community Guide, will allow schools and communities to organize and execute their own Jefferson Meetings on the Constitution.

A packet containing either the teacher's guide or the community guide and the six discussion guides is available from The Jefferson Foundation for $12. Discussion guides are available to persons or groups organizing a Jefferson Meeting for 75¢ each. Individuals and libraries may obtain the discussion guides for their use for $1 each.

To order materials for a Jefferson Meeting, contact: The Jefferson Foundation 1529 18th Street, N.W. Washington, D.C. 20036; (202) 234-3688.

Freedoms Foundation at Valley Forge

Freedoms Foundation is a national non-profit, non-partisan, non-sectarian organization founded in 1949. The Foundation's educational programs include Freedom and Leadership youth conferences for young people, and continuing education graduate credit seminars and American history workshops for teachers and other professionals.

Nearly 6,000 members of 42 Volunteer Chapters in 20 states work to support Freedoms Foundation in their local communities. They encourage awards nominations, honor local award recipients, sponsor participants to the educational programs and publicize these activities in the local media.

The Freedoms Foundation created the Center for Responsible Citizenship (CRC) to develop and communicate a deeper understanding of the rights and responsibilities of citizenship. CRC's primary objective is a balanced dialogue that examines the way our rights and responsibilities function in tandem to help preserve our free society. Toward this end, the Center distributes a "Bill of Responsibilities." (*See illustration.*)

As the first step in laying the intellectual foundation for future programs, CRC sponsored a two-day symposium in Washington, D.C. on December 13–14, 1984. On the evening of December 13, during a dinner and ceremony chaired by the Chief Justice of the United States Warren E. Burger, the Center was officially inaugurated. Dr. John Silber, president of Boston University, delivered the keynote address. Following opening ceremonies the next day in the beautiful and historic Old Senate Chamber, with Senator Strom Thurmond presiding, a distinguished panel of experts delved into historical and contemporary perspectives, along with constitutional issues and the responsibilities of the media. The symposium was attended by more than 250 people, including representatives of over 70 educational and service organizations.

The Center is now organizing a consortium of civic, service and educational organizations with significant grassroots outreach. Their active involvement will help us refine and improve the activities of CRC and will assist in achieving the widest possible distribution for the Bill of Responsibilities. In order to enhance its applicability for classroom use, educators and curriculum specialists will help develop teaching guides and related materials to accompany the Bill. Consortium members to date include: American Association of Retired Persons; American Association of School Administrators; American Bar Association; Citizen's Choice; Civitan International; Corporation for Public Broadcasting; Future Business Leaders of America; General Federation of Women's Clubs; Junior Achievement, Inc.; National Association of Elementary School Principals; National Federation of Independent Business; National 4-H Council; National School Boards Association; Optimist International; Pilot Club International and Veterans of Foreign Wars.

Bill of Responsibilities

Preamble. **Freedom and responsibility are mutual and inseparable; we can ensure enjoyment of the one only by exercising the other. Freedom for all of us depends on responsibility by each of us. To secure and expand our liberties, therefore, we accept these responsibilities as individual members of a free society:**

To be fully responsible for our own actions and for the consequences of those actions. **Freedom to choose carries with it the responsibility for our choices.**

To respect the rights and beliefs of others. **In a free society, diversity flourishes. Courtesy and consideration toward others are measures of a civilized society.**

To give sympathy, understanding and help to others. **As we hope others will help us when we are in need, we should help others when they are in need.**

To do our best to meet our own and our families' needs. **There is no personal freedom without economic freedom. By helping ourselves and those closest to us to become productive members of society, we contribute to the strength of the nation.**

To respect and obey the laws. **Laws are mutually accepted rules by which, together, we maintain a free society. Liberty itself is built on a foundation of law. That foundation provides an orderly process for changing laws. It also depends on our obeying laws once they have been freely adopted.**

To respect the property of others, both private and public. **No one has a right to what is not his or hers. The right to enjoy what is ours depends on our respecting the right of others to enjoy what is theirs.**

To share with others our appreciation of the benefits and obligations of freedom. **Freedom shared is freedom strengthened.**

To participate constructively in the nation's political life. **Democracy depends on an active citizenry. It depends equally on an informed citizenry.**

To help freedom survive by assuming personal responsibility for its defense. **Our nation cannot survive unless we defend it. Its security rests on the individual determination of each of us to help preserve it.**

To respect the rights and to meet the responsibilities on which our liberty rests and our democracy depends. **This is the essence of freedom. Maintaining it requires our common effort, all togeth and each individually.**

Developed and distributed by Freedoms Foundation at Valley Forge

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Constitutional History Conference for Secondary School Teachers at Creighton University

Creighton University will host a conference on June 17–19, 1986 for secondary school teachers. The topic will be the teaching of American constitutional history. Faculty for the conference have been drawn from Creighton's Department of History, Political Science, and Education, and School of Law as well as Omaha area secondary schools. The program has been developed in cooperation with the Nebraska Department of Education and the College Board.

The conference will follow a format established by the American Historical Association. It will include six sessions on topics related to the United States Constitution in which both content and instruction will be discussed. The topics will be: The Constitutional Convention: A Simulation; Nationalism and States' Rights; Judicial Review; Civil Rights and the Issue of Equality; The Imperial Presidency and the Power to Make War; and The Bill of Rights Today.

Scholarly presentations will be made at each session followed by the distribution and review of sample lesson plans. These lesson plans will serve as the focus of workshop activity in which teachers will be able to adapt the plans to their own individual needs or to outline collateral plans. Conference faculty will prepare the model lesson plans and assist participants in the workshop. A special presentation will be made at the conference by a representative of the College Board unveiling a new American government program for secondary schools.

The conference will be held on the campus of Creighton University, making use of university research and instructional facilities. Up to three graduate credits will be offered to participants who elect to fulfill additional requirements outlined by the Department of History. For further information, contact: Dr. Bryan Le Beau, Department of History, Creighton University, Omaha, Nebraska 68178.

American Bar Association launches "We the People: A Bicentennial Salute to the Constitution."

The American Bar Association, in conjunction with a wide range of national organizations, has launched a comprehensive Bicentennial project designed to educate the American public about the Constitution and its unique role in our nation's history.

The centerpiece of WE THE PEOPLE is a series of eight one-hour television programs to be broadcast in 1987 on the Public Broadcasting Service. The series, to be co-produced with KQED-TV in San Francisco, will analyze contemporary constitutional questions and trace the historic development of fundamental constitutional principles. A major mass-market book will be tied to the prime-time series.

Thirteen half-hour weekly radio programs, to be broadcast on National Public Radio, as well as 50 five-minute spots, will supplement the television programs. The project also includes a series of eight Sunday newspaper supplements to be distributed by the American Newspaper Publishers Association (ANPA) Foundation, a series of Bicentennial publications, and special events and conferences.

Community-based forums throughout the country will give adults the chance to examine the underlying values of the Constitution and their significance for contemporary society and the modern individual.

Through the ABA Special Committee on Youth Education for Citizenship, materials from the Bicentennial project will be made accessible to school children. Regional workshops programming guides, a magazine, and free newsletters are planned.

The following topics will provide the substantive and programmatic focus for the television series, community forums, radio and newspaper series, conferences and symposia, and all the youth components: *Why a Constitution?; Governing a Nation; Judicial Power; Expression and the Political Process; Self-Expression and Freedom of Religion; Equality Under the Constitution; Rights of the Accused; Autonomy and Economic Freedom.*

WE THE PEOPLE brings together the combined resources and expertise of the following organizations: • American Association of Adult and Continuing Education • American Association of Community and Junior Colleges • American Association of School Administrators • American Library Association • American Newspaper Publishers Association Foundation • American Society of Newspaper Editors • KQED, Inc. • National Association of Bar Executives • National Association of Broadcasters • National Association of Elementary School Principals • National Association of Secondary School Principals • National Community Education Association • National Council for the Social Studies • National School Boards Association • Office of Smithsonian Symposia and Seminars • Sigma Delta Chi, Society of Professional Journalists.

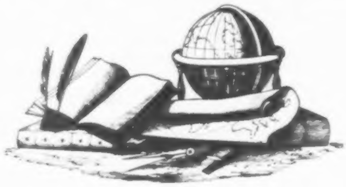
For more information, contact Robert S. Peck, ABA, 750 N. Lake Shore Drive, Chicago, IL 60611; (312) 988-5728.

National Society Daughters of the American Revolution

Every year, the more than three thousand DAR chapters plan activities for and promote Constitution week, September 17–23. Among these activities, chapters disseminate patriotic literature, spot announcements for radio, television, schools and newspapers, commemorative medals and pins, posters, and displays. Local observances have included essay, poster, and poetry contests, mural painting, and computer quiz disks. The DAR also distributes a manual for citizenship to those wishing to become American citizens, and during Constitution Week, DAR members make a special effort to attend naturalization courts to offer American flags and refreshments to the new citizens. For further information, write: Mrs. Walter Hughey King, President General, National Society Daughters of the American Revolution, 1776 D Street, N.W., Washington, D.C. 20006-5392; (202) 628-1776.

Schools Seek Essays from Students on Constitution

St. John's University and the College of Saint Benedict, in Collegeville, Minnesota, are sponsoring an essay contest for 1985–86 as part of an eight-year program to commemorate the Bicentennial of the Constitution. The theme of the 1985–86 celebration is "women and the Constitution"; essays may be submitted by any full-time student of SJU or CSB, exploring the historical background, significance and implications of one of the controversies that have arisen concerning the status of women and men under the Constitution. Winning students will receive cash prizes and a book on the Constitution.



Around the States

Humanities Foundation to Coordinate Bicentennial in Alabama

Governor George C. Wallace has designated the Alabama Humanities Foundation (AHF) to serve as the official agency to commemorate the Bicentennial of the Constitution in the state of Alabama. The AHF is now working closely with other state agencies to plan special activities for 1986–87 and serves as the contact with federal agencies and state national organizations. The Foundation is also devoting a major portion of its grant funds to the support of Bicentennial projects, including summer seminars for secondary school teachers, media, exhibit and general programs. A grant from the Aetna Life and Casualty Foundation will permit the establishment of a speakers' bureau in Birmingham in 1986. The Foundation also anticipates production of a state Bicentennial newsletter and a state conference in September, 1987. For more information, contact Walter L. Cox, Executive Director, Alabama Humanities Foundation, Box-A-40, Birmingham, AL 35254; (205) 324-1314.

New Jersey Historical Commission Sponsors Bicentennial Grants

In 1986, the New Jersey Historical Commission will sponsor grants to commemorate the Bicentennial of the U.S. Constitution (1987–89). The new program assists projects dealing with New Jersey's role in drafting and ratifying the Constitution, the history of the state's three constitutions, and constitutional issues in New Jersey history.

The following types of projects are eligible: research (maximum award, $2,000), public programs ($4,000), publication ($6,000), teaching projects ($1,000) and conservation of historical materials ($4,000).

In 1985, the Commission cosponsored a session on "Continuing Constitutional Controversies: 1780s–1980s" at the annual meeting of the New Jersey Council for the Social Studies, November 7 at the Hilton Marina Hotel in Atlantic City.

Richard Matthews of the Department of Political Science at Ursinus College discussed the debate among historians and political scientists over the intentions of the founders. Patricia Matuszewski, a teacher at Franklin High School in Somerset, discussed methods of teaching the Constitution and its political and social origins. For more information, contact the Commission office, 113 W. State St., CN305, Trenton, NJ 08625; (609) 292-6062.

Maryland Plans for Annapolis Bicentennial

The Annapolis Convention, September 11–14, 1786, was a crucial event in the development of the U.S. Constitution. It signaled the beginning of multi-state cooperation and discussion, which was an important departure from the bilateral discussions represented by the Mount Vernon Conference of March 1785. It also issued a report that broadened the framework of discussion from issues relating exclusively to trade and commerce to all matters necessary "to render the constitution of the federal government adequate to the exigencies of the union." And, of course, it was the Annapolis Convention that urged Congress to call another convention of all the states to meet in Philadelphia in 1787, where the Constitution was written.

To mark the Bicentennial of the Annapolis Convention, Maryland will host two days of activities in Annapolis on September 12–13, 1986. On Friday, the Ballet Theatre of Annapolis will present a special performance of their "Annapolis Yesteryear" ballet, and the St. Johns College public lecture will be devoted to the Constitution. On Saturday, the Maryland Humanities Council will sponsor a day-long conference for the public, with papers by scholars and a panel discussion in the morning, and outreach workshops in the afternoon. The Annapolis Mayor's Commemorative Committee is planning an Eighteenth-Century Fair for Saturday afternoon. There will be eighteenth-century lawn games, races, craftspeople in costume, militia units, and much more to give the public a sense of what life was like in Annapolis at the time of the Annapolis Convention. In addition, there will be six performances of a locally written and produced play that will tell the story of the Annapolis Convention. The hope of the planners is that everyone will enjoy the day, and that they will also come away from the fair with a better understanding about what the Annapolis Convention was and Maryland's role in the creation and adoption of the Constitution.

For further information, contact Greg Stiverson, Maryland State Archives, Box 828, Annapolis, MD 21404; (301) 269-3914.

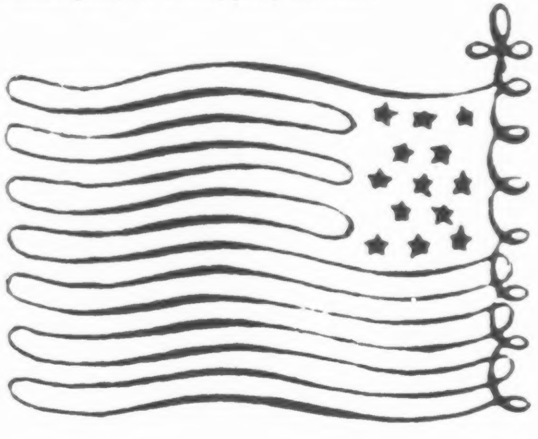
Philadelphia Plans for September 17, 1987

Grand Federal Procession and Closing Ceremonies - September 17, 1987 - will be the premiere events of the Bicentennial year. The We The People 200 committee will be the national coordinator of events scheduled on a proposed federal holiday - Constitution Day, September 17 - the day of the signing of the Constitution. The holiday will include several events here and in other communities.

A Grand Federal Procession will be created in Philadelphia in honor of the Constitution, and other communities will be encouraged to hold smaller ones. Originally held in 1788, Federal Processions with parades, floats and military units were organized by the delegates to the Constitutional Convention to demonstrate support for the Constitution, whose ratification was still uncertain, in every state and in scores of towns. It was, a Boston newspaper reported, "an exhibition to which America has never before witnessed an equal; and which has exceeded anything of the kind Europe can boast of." Such a Grand Federal Procession of the 50 States and U.S. territories, involving diverse groups of marchers and perhaps the best marching bands in the nation, will be staged here as the first part of the closing ceremony, to be reviewed by the President of the United States, Members of Congress, Supreme Court Justices, and heads of state or their representatives.

The parade will be followed by a signing ceremony symbolically affirming the nation's allegiance to the Constitution, followed by afternoon concerts and galas. In the evening, musical performances will be held throughout Philadelphia to be attended by the public and dignitaries. Similar ceremonies and shows will be encouraged in other cities, with at least several other cities participating in a national network.

Independence National Historical Park will play the central role in the events of Constitution Day. Major public ceremonies will be staged at Independence Hall and on Independence Mall. For further information, contact Fred Stein, We the People — 200, 313 Walnut Street, Philadelphia, PA 19106; (215) 597-1787.



Federal Bicentennial Agenda

Commission on the Bicentennial Presents Report

As required by PL 98-101, on September 17, 1985, the Commission on the Bicentennial of the United States Constitution presented its first report to the president, both Houses of Congress and the Judicial Conference of the United States. The report indicated that the Commission had established subcommittees on education, private organizations and media, and additional administrative committees.

The report also laid out a general framework of the commemoration, which would invite every community and family to participate. The celebration would have three phases: 1987 would be dedicated to the memory of the founders and the document drafted in Philadelphia, marked by both solemn and festive ceremonies on September 17, 1987, the anniversary of the Constitution's adoption by the Constitutional Convention. In 1988, events will focus on the ratification contest, including the publication of *The Federalist* essays. The establishment of the government will be commemorated in 1989, observing the beginnings of the legislative, executive and judicial branches and the inauguration of George Washington as the first president. The third phase will address the role of the federal government in securing freedom and prosperity under the Constitution.

The Commission is also urging the appointment of a Constitution Commemoration Commission in every state and territory; many have responded to this call. [*See list in this issue.*] The Commission expects to prepare a booklet to assist state commissions in planning their own observances. The Commission also encourages private organizations to plan for the Bicentennial, and especially to devote time at their national conventions in the Bicentennial period for speakers on the Constitution, as well as to include articles about the Constitution in their publications.

The Commission report included a provisional list of activities it expects to undertake. Among those mentioned were the establishment of a toll-free number for information about Bicentennial programs; a calendar showing a schedule of Bicentennial events; a speakers' bureau; contest activities (play-writing, essay, debate, newspaper articles, fine arts) for school groups; and planting of Constitution trees. The Commission is also investigating a number of projects in the media and in the arts.

The Commission also held meetings on November 24 & 25, 1985, and February 1 & 2, 1986. Additional meetings are scheduled for April 13 & 14 and June 27 & 28, 1986. Commission staff is headed by Mark W. Cannon, Staff Director, and Ronald Mann, Deputy Staff Director. For further information, write: Commission on the Bicentennial of the United States Constitution, 734 Jackson Place, N.W., Washington, D.C. 20503; (202) 872-1787.

Commission Seeks Staff

The Federal Bicentennial Commission is looking for staff knowledgeable about the founding period. Applicants should have imaginative, practical abilities to promote, develop and evaluate programs in coordination with public agencies and private organizations. Send form 171 or resume to Jeannie Reed at the Commission office, 734 Jackson Place, N.W., Washington, D.C. 20503.

USIA Establishes Bicentennial Office

The United States Information Agency (USIA) has established an International Coordinator's Office for the Bicentennial. Career Minister John L. Hedges heads the office, which is responsible for the overall direction and management of USIA's programs for the Bicentennial from 1985–88. During the Bicentennial period, USIA will give major attention in its overseas information and cultural programs to America's two hundred years of experience with democratic constitutional government. Activities of the Agency will emphasize the relevance of the U.S. Constitution and constitutional system in the world today.

USIA officers in its 214 overseas posts are planning Bicentennial projects with participation by local media, academic, government and professional leaders. American experts in constitutional law, history, government and the social sciences will soon begin to participate in Bicentennial-related speaking programs in 129 countries with USIA sponsorship. Its 135 libraries and reading rooms in 83 countries will conduct a series of Bicentennial exhibits and book projects; similar programs will be offered to 106 USIA-supported binational centers in 23 countries as well as to cooperating libraries elsewhere. USIA posts will facilitate special Bicentennial-related documentary reporting and news coverage on the U.S. by foreign media. Study of the U.S. constitutional system will be a major component in the Agency's English-language teaching and academic study programs. Overseas posts will distribute specially-prepared Bicentennial pamphlets and posters in local languages.

The Voice of America, USIA's international radio facility which reaches 120 million listeners in 42 languages each week, has begun reporting on Bicentennial news events and will carry special feature programs about the origins and development of the U.S. Constitution.

The Agency's Television and Film Service also will give high priority to communicating the message of the Bicentennial celebration overseas. It will acquire relevant videotape programs and films produced by American media and distribute them to foreign audiences. WORLDNET, the interactive TV network linking Washington via satellite to U.S. Embassies and USIA posts on six continents, will emphasize Bicentennial themes in its programming.

During the commemorative period, the USIA Press and Publications Service will focus on America's experience as a constitutional democracy via its radioteletype press network which regularly carries five regional transmissions in four world languages 5 days each week and its ten multi-lingual magazines.

USIA-administered programs of educational and cultural exchange have begun to implement Bicentennial projects, which will reach their zenith during the 1987–1989 period. For more information, call (202) 485-6797.

Roger Sherman

Roger Sherman, the introducer of the Connecticut Compromise, was the only man to sign the Continental Association (a British boycott pledge of 1774), the Declaration of Independence, the Articles of Confederation, and the Constitution.

MOVING???
Send your change of address along with a photocopy of the mailing label to: ***this Constitution***
1527 New Hampshire Ave., N.W.
Washington, D.C. 20036

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Commission on House Bicentenary Established

On August 1, 1985, the House adopted H. Res. 249 establishing the Commission on the United States House of Representatives Bicentenary. The Commission will oversee the planning and direction of the commemoration of the Bicentennial of the House through a program of publications, exhibits, symposia, and related activities designed to inform the nation of the role the House has played through two hundred years of growth, challenge, and change. It will be staffed by the Office for the Bicentennial and draw upon staff support of other employees of the House.

The bipartisan Commission is composed of eight members, six Members of the House (three from each party) and two former Members of the House (one from each party). Majority Leader Jim Wright (D-Tex.) and Minority Leader Robert Michel (R-Ill.) are ex-officio members. The Speaker of the House appointed Lindy Boggs (D-La.) as chairman. The other members of the Commission are: Newt Gingrich (R-Ga.), Paul Henry (R-Mich.), Peter Rodino (D-N.J.), Phil Sharp (D-Ind.), and Bud Shuster (R-Pa.). John Rhodes, former Republican congressman from Arizona and Minority Leader of the House from 1973 to 1980, and Richard Bolling, former Democratic congressman from Missouri from 1949 to 1983, have also been named to the Commission.

SUBSCRIPTION INFORMATION

The National Endowment for the Humanities is underwriting the publication of ***this Constitution*** as a quarterly magazine so that it may be distributed free to organizations planning programs for the Constitution's Bicentennial. The officer of the organization who is responsible for planning programs is invited to write us and ask to be placed on the free mailing list; requests should include a short statement about the program being planned. Free subscriptions begin with the next issue after receipt of the letter. Institutions wishing to receive more than one copy may do so by subscribing for additional copies at the rates below.

Individuals and organizations who are not planning Bicentennial programs but who wish to receive the magazine may subscribe as follows:

Individuals. . . . . $10.00 per year (4 issues)
Institutions . . . . $16.00 per year (4 issues)
(Individuals and institutions outside the United States please add $5.00 per subscription.)

Paid subscriptions received by November 1, 1986 will begin with issue no. 10 (Spring, 1986) and end with no. 13 (Winter, 1986).

Single copies (less than 10) of back issues can be purchased for $4.00 each. Each issue of the magazine will also be available for purchase at bulk rate. (Issue no. 1 is no longer available.)

Bulk rate (10 or more copies) . . . . $1.75 each
Shipping for bulk orders:
On orders of 25–75: zone 2–4, $3; zone 5–8, $5.
On orders of 75 or more: zone 2–4, $4.50; zone 5–8, $8.
On orders of 10–25: $2.50.
(Please write for bulk rate shipping charges for foreign orders.)

In order to subscribe, or to order in quantity, please fill out the form on this page and return it, with your check, to: **Project '87, 1527 New Hampshire Avenue, N.W., Washington, D.C. 20036.** We must request that **all orders be pre-paid.** If you have already received the magazine, please include a photocopy of the mailing label with orders or changes of address.

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State Commissions

continued from inside front cover

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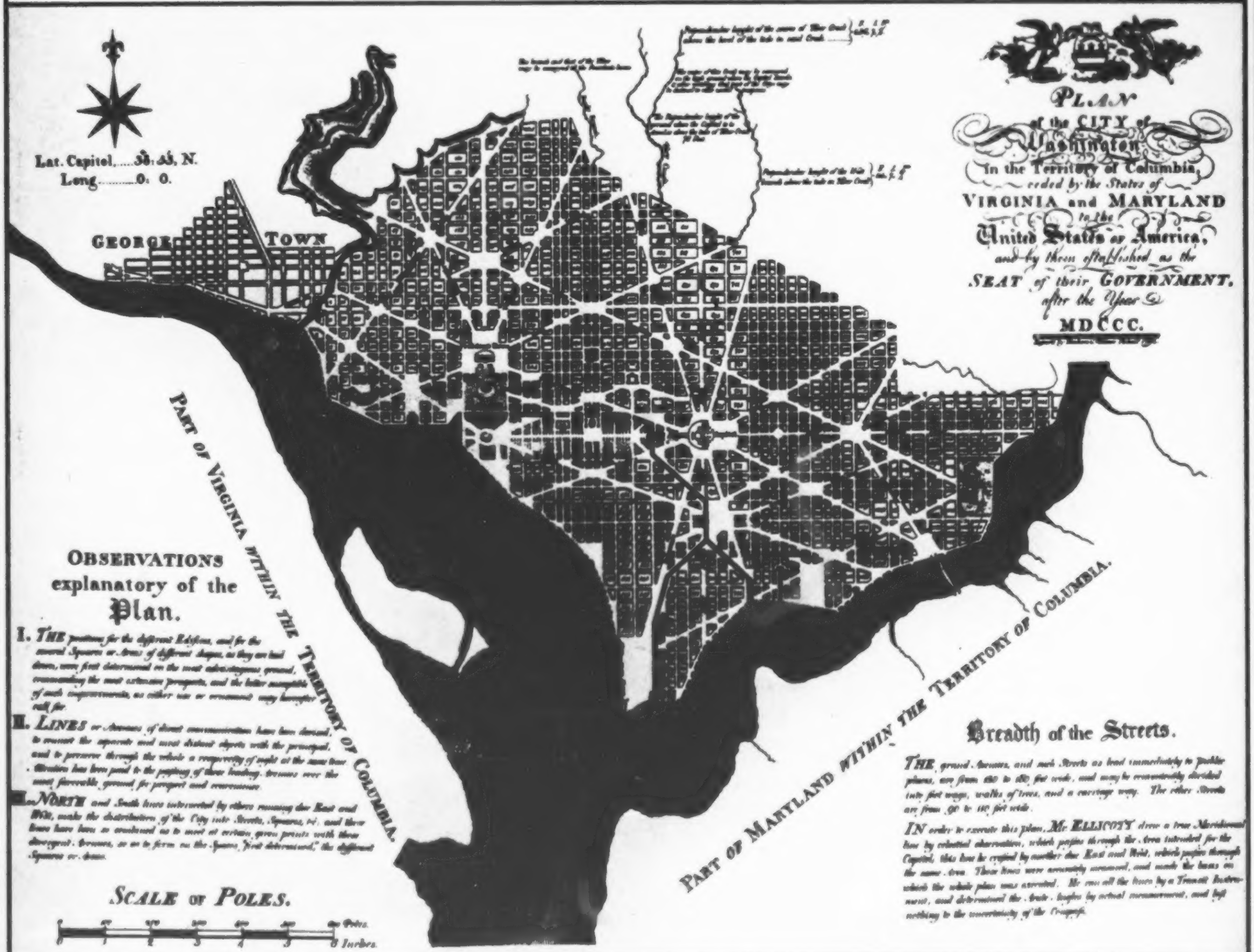
...do ordain and establish this Constitution for the United States of America.

A Bicentennial Chronicle Summer 1986. No.11

Project '87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PART OF MARYLAND WITHIN THE TERRITORY OF COLUMBIA.
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III. NORTH
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Educational Films on the United States Constitution

This list of films was compiled for Project '87 by John J. Patrick, School of Education, Indiana University, and Richard C. Remy, Mershon Center, Ohio State University. Many were reviewed by a panel of social studies educators in cooperation with the Agency for Instructional Technology, Bloomington, Indiana; others were chosen based upon the annotations found in the Educational Film Locator *and the* Index to 16mm Educational Films, *both of which also list film distributors. Unless otherwise noted, all the entries are 16mm color sound films. All have running times of half an hour or less, which permits in-class preparation and follow-up.*

ORIGINS AND PURPOSES OF THE CONSTITUTION

INVENTING A NATION

After the Revolutionary War in 1787, prominent colonists met in Philadelphia to develop a framework for governing the colonies. The film dramatizes the secret debates among Hamilton, Mason and Madison, and shows the contributions made by each to the final form and adoption of the Constitution. From AMERICA: A PERSONAL HISTORY OF THE UNITED STATES series, Time-Life Films, 1972, 30 minutes.

AMERICAN REVOLUTION—THE POSTWAR PERIOD

This film follows the major events leading to the formation of the United States and the development of the Constitution. From the AMERICAN REVOLUTION series, Coronet Instructional Films, 1975, 11 minutes.

TO FORM A MORE PERFECT UNION

Depicts the struggle waged by the Federalists and the Antifederalists over ratifying the Constitution. Highlights Samuel Adams' and John Hancock's roles in ensuring ratification by the Massachusetts Convention. From DECADES OF DECISION: THE AMERICAN REVOLUTION series, National Geographic Society, 1974, 30 minutes.

MAIN PRINCIPLES OF GOVERNMENT IN THE CONSTITUTION

CAPITAL PUNISHMENT

Presents a dramatization of the sentencing phase of a convicted murderer's trial, including the arguments for and against capital punishment. From BILL OF RIGHTS IN ACTION series, BFA Educational Media, 1976, 23 minutes.

DE FACTO SEGREGATION

Dramatizes events and cases involving issues surrounding the limits of freedom guaranteed by the Bill of Rights. From BILL OF RIGHTS IN ACTION series, BFA Educational Media (no date), 22 minutes.

DUE PROCESS OF LAW

A college student is suspended following a rock-throwing incident during a campus demonstration. The film presents opposing interpretations of the due process clause of the Fifth Amendment, and suggests that due process is time-consuming and often in conflict with the immediate need to avoid further violence. The result of the student's application for reinstatement is left open-ended. From BILL OF RIGHTS IN ACTION series, BFA Educational Media, 1971, 23 minutes.

FREEDOM OF RELIGION

The Bill of Rights guarantees freedom of religion, but what if laws are broken or life is endangered in the exercise of that freedom? The film uses a blood transfusion case to discuss constitutional issues and analyze when society's interest outweighs an individual's constitutional right to freedom of religion. From BILL OF RIGHTS IN ACTION series, BFA Educational Media, 1969, 21 minutes.

FREEDOM OF SPEECH

The film uses the case of a controversial speaker convicted of disturbing the peace to stress the importance and complexity of the issues involved in free speech. The lawyers argue the constitutional issues in an appeals court. From BILL OF RIGHTS IN ACTION series, BFA Educational Media, 1968, 21 minutes.

FREEDOM OF THE PRESS

A reporter refuses to cooperate in a criminal investigation, protecting the source of his news story. The film questions the meaning of the First Amendment's prohibition against laws that abridge freedom of the press. From BILL OF RIGHTS IN ACTION series, BFA Educational Media, 1973, 21 minutes.

THE STORY OF A TRIAL

Using a case involving two young men accused of a misdemeanor, the film provides an introduction to procedures that protect citizens' rights and the constitutional safeguards of the accused. From BILL OF RIGHTS IN ACTION series, BFA Educational Media, 1976, 21 minutes.

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...do ordain and establish

this Constitution

for the United States of America.

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Cover: Major Andrew Ellicott's drawing of Washington, D.C., 1792, based on the design by Pierre L'Enfant. The plan provided for three centers of government—the Congress, the President's House and the Federal Judiciary—reflecting the separation of powers established by the Constitution. U.S. Department of Commerce, National Oceanic and Atmospheric Administration.

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this Constitution is published with the assistance of a grant from the National Endowment for the Humanities as part of its special initiative on the Bicentennial of the United States Constitution. Editorial offices are located at 1527 New Hampshire Avenue, N.W., Washington, D.C. 20036. All material in this publication may be photocopied if attributed as follows: "Reprinted from *this Constitution: A Bicentennial Chronicle,* Summer, 1986, published by Project '87 of the American Historical Association and the American Political Science Association." Project '87 would appreciate notification from those who photocopy material in this issue for use in presentations to other groups. © Copyright 1986 by the American Historical Association and the American Political Science Association

this Constitution

published by Project '87 of the American Historical Association and the American Political Science Association

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From the Editor

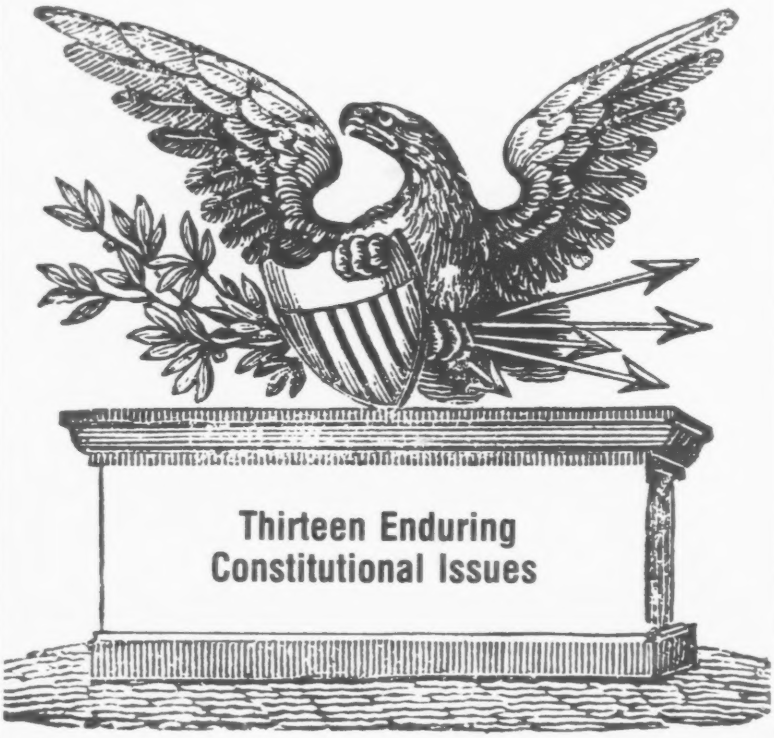
Two articles in the summer issue of ***this Constitution*** focus on the "Enduring Constitutional Issue" of the separation of powers and the capacity to govern. In "A Self-Correcting System: The Constitution of the United States," Martin Landau describes how the organization of government established by the Constitution ensures a reliable and stable government through the distribution of powers among different branches of government. Although not necessarily efficient, the government retains an adaptability that has allowed it to endure despite great strains. Gregg L. Lint and Richard Alan Ryerson, in the "Documents" section, explore the origins of the conception of "separation of powers" in an examination of the thinking of John Adams. Although Adams did not attend the Constitutional Convention, his ideas on this subject informed the discussion that took place in Philadelphia.

Tony Freyer takes up a related theme: the Constitution also divided power between national and state governments, an arrangement we label "federalism." His article, "Federal Authority and State Resistance: A Dilemma of American Federalism," analyzes the tension intrinsic to a federal system and reviews instances of outright conflict between states and the national government.

On yet a third "enduring constitutional issue," Kenneth Holland considers economic policy in "The Constitution and the Welfare State." Is there, he asks, a constitutional duty obligating the state to provide the material conditions for a dignified life? Are the intentions of the framers relevant to this question?

Along with the latest roundup of Bicentennial news, the "Gazette" features a summary of the interim regulations issued by the Federal Bicentennial Commission for groups seeking its recognition. A list of state and local commissions, which supplements the directory published in the last issue, also appears. The "For the Classroom" section presents discussions of the Constitution in high school textbooks of other nations, and, beginning on the inside front cover, we offer a list of films about the Constitution, a resource for educators and civic groups.

Finally, we want to take a moment to emphasize that we intend for our readers to reproduce the features and articles in ***this Constitution*** for use in their own Bicentennial programs. Each of the pieces in the magazine has been chosen with that purpose in mind; support from the National Endowment for the Humanities makes it possible for these resources to be widely disseminated. We do, however, request that you tell us when any materials are reproduced and that they carry the appropriate acknowledgment (see page 1).



Thirteen Enduring Constitutional Issues

- National Power—Limits and Potential
- Federalism—the Balance between Nation and State
- The Judiciary—Interpreter of the Constitution or Shaper of Public Policy
- Civil Liberties—the Balance between Government and the Individual
- Criminal Penalties—Rights of the Accused and Protection of the Community
- Equality—its Definition as a Constitutional Value
- The Rights of Women Under the Constitution
- The Rights of Ethnic and Racial Groups Under the Constitution
- Presidential Power in Wartime and in Foreign Affairs
- [redacted]
- Avenues of Representation
- Property Rights and Economic Policy
- Constitutional Change and Flexibility

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A Self-Correcting System: The Constitution of the United States

by MARTIN LANDAU

"That which is redundant is, to the extent that it is redundant, stable. It is therefore reliable."
W. S. McCulloch

The great English philosopher, Alfred North Whitehead, once remarked, "I know of only two occasions in history when the people in power did what needed to be done about as well as you can imagine its being possible. One was the framing of your American Constitution." (His other example was the reign of Augustus Ceasar.) The framers, Whitehead added, were able statesmen with good ideas which they incorporated "without trying to particularize too explicitly how they should be put into effect."

Years before he became president of the United States, Woodrow Wilson, in reflecting on the durability of the Constitution, also observed its generalized character. It did little more than lay down a foundation in principle, Wilson remarked; it was not a complete system; it took none but the first steps. The Constitution, he continued, provided with all possible brevity for the establishment of a government having three distinct branches: executive, legislative and judicial. It vested executive power in the presidency, for whose election and inauguration it made careful provision, and whose powers it defined with succinct clarity; it granted specifically enumerated powers to Congress, outlined the organization of its two houses, provided for the election of its members and regulated both their numbers and the manner of their election; it established a Supreme Court with ample authority to interpret the Constitution, and it prescribed the procedures to govern appointments and tenure.

At this point, Wilson noted, the organizational work of the Constitution ended and "the fact that it [did] nothing more [was] its chief strength." Had it gone beyond such elementary provisions, it would have lost elasticity and adaptability. Its ability to endure, to survive, was directly attributable to its simplicity.

There is strong ground for such belief. State constitutions, notoriously complicated, cluttered, and rigid, have come and gone—tossed away as outmoded, inelastic, and maladaptive instruments. Since 1789, there have been some two hundred state constitutional conventions, one, it seems, for every year of our history. This should not surprise us when we observe that the average size of our state constitutions is ten times that of the national, the movement toward simplification notwithstanding. But the national Constitution, framed for a simple society marked by doubtful unity and fearsome external threat, now orders a world that would appear as science fiction to its designers. Where states have had to scrap their constitutions five, seven, even ten times, the nation's remains intact.

Despite Wilson's admiration of the simple brevity of the Constitution, he wondered about the future of a governmental system in which "nothing is direct." "Authority," he stated, "is perplexingly subdivided and distributed, and responsibility has to be hunted down in out-of-the-way corners."

In this sentence we have the crux of an unending stream of criticism which remains vigorous to this date. One frequently hears that separation of powers has resulted in continuous struggle between president and Congress, too often leading to deadlock; that the decline of Congress and the rise of an "imperial presidency" is ample testimony to the failure of checks and balances—a failure further intensified by a Supreme Court which remains beyond the reach of Congress, president, and the public. So too has federalism failed. It has fractured and fragmented the nation, nurtured the parochialism of local interests, furthered the imbalances of society, and subverted efforts to mount coordinated national programs. In the decline of the states and the ascendancy of national power, little of the original design remains. And beyond this, the staggered electoral system has prevented the majority from controlling its government or ousting one it does not want.

Whatever their logical consistency, these are frequent and familiar criticisms that derive from a variety of sources. They give rise to all sorts of remedial proposals from a fixed single term for the presidency to a parliamentary system. They abound today, and their proponents are prominent public figures who delight in telling us that no other modern government on the European continent has used the American Constitution as its model. Because of distinctive ethnic and regional problems, some have employed the principle of federalism but none has been impressed with the cumbersome and conflict-prone separation of powers. The issue, publicized in the media, is the "ungovernability" of the system: separation of power breaks down into stalemate, delay, nonfeasance, even malfeasance. What captures critics is the apparent inefficiencies of our governing institutions.

But it would do us all well to remember Justice Brandeis' injunction that the Constitution was not a design for efficiency. Nor is it by any means as simple as Wilson thought. In the brevity of the seven articles which established the government, there is contained an or-

——————nubem pellente Matheſi
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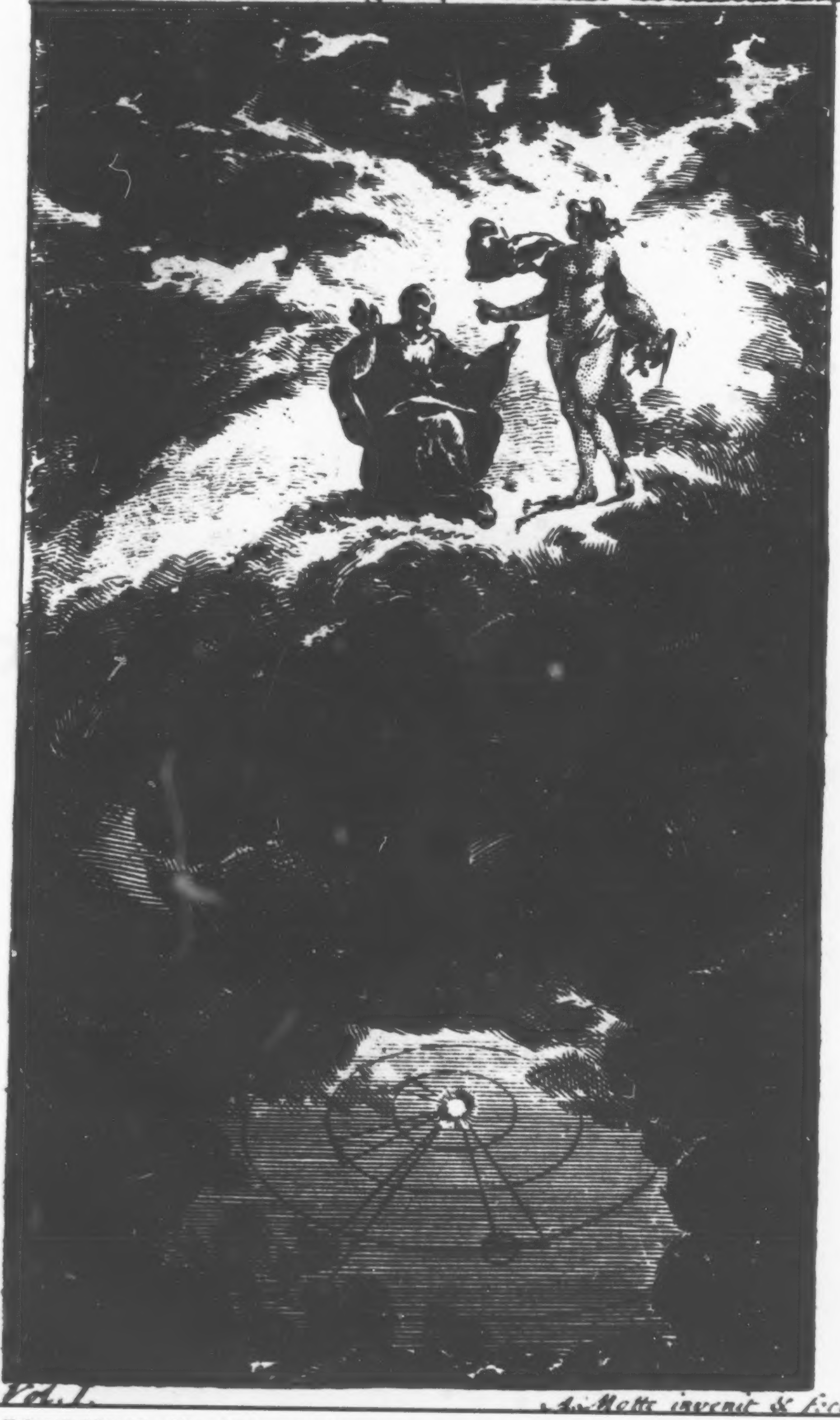
Jam ſuperûm penetrare domos, atq; ardua cœli
Scandere, ſublimis genij conceſſit acumen. *Dr. Halley.*



Vol. I. *A. Motte invenit & Fecit.*

Illustration for The Mathematical Principles of Natural Philosophy by Sir Isaac Newton, 1729. Library of Congress.

This was the ideal struck in Philadelphia—a government that by its natural properties minimized the risk of human error.

ganizational logic that we are only now beginning to fathom. Separation of powers and federalism as we understand these concepts, do not quite cover the organizational principles involved. But they are critical elements in all "self-regulating" and "high reliability" systems—which is what the Constitution established.

Self-Regulating Systems

Before turning directly to this concept, it is important to note that to the eighteenth century, the system of mechanics formulated by Isaac Newton was not simply a scientific theory. Indeed, it had become a cosmological formula so powerful as to constitute "an infallible world outlook." So it was that the English poet, Alexander Pope, could write, "Nature and nature's laws lay hid in night, God said, 'Let Newton be,' and all was light."

Whatever their political differences, those who wrote the Constitution were Newtonians. With few exceptions, they thought the governmental system they were designing was in accord with nature's way. And nature's way, so elegantly stated in Newton's Third Law, was action and reaction, thrust and counter-thrust, or what we call checks and balances. There are, John Adams had written, three branches in any government and "they have an unalterable foundation in nature": "to constitute a single body with all power, *without any counter-poise, balance, or equilibrium* is to violate the laws of nature" but "to hold powers in balance is a self-evident truth."

This was the ideal struck in Philadelphia—a government that by its natural properties minimized the risk of human error. The true principle of government, Hamilton declared, is "to give a *perfect proportion and balance to its parts*, and the power you give it will never affect your security." And to Madison, a "natural government" was such that "its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places," of regulating and controlling each other.

So too did this image comprehend federalism. A "natural" government, after all, was a transcript of nature and nature was a machine. Look at this world, David Hume wrote—"You will find it to be nothing but one great machine, subdivided into an infinite number of lesser machines . . . adjusted to each other with an accuracy which ravishes into admiration all men who have ever contemplated them." Look at these United States, Jefferson might have written, one great government subdivided into lesser governments, adjusted to each other with an accuracy . . . . What he did write was:

> In time all these [states] as well as the central government, like the planets revolving around their common sun, acting and acted upon according to their respective weights and distances, will produce that beautiful equilibrium on which our Constitution is founded, and which I believe it will exhibit to the world in a degree of perfection, unexampled but in the planetary system itself.

Balance, equilibrium, stability: these were the goals the framers of the Constitution sought. Once, in exasperation, Walter Lippmann asked: "Is there in all the world a more plain-spoken attempt to contrive an automatic governor, a machine that would not need to take human nature into account?" To Lippmann, a noted political analyst, government was not a problem in mechanics, and its solutions were not to be found in a balance of forces. Such a balance, he held, leads not to stability, but to paralysis. But a ship on the high seas and a jet in the sky are stable systems. They constantly change in velocity and vector, yet they remain in equilibrium.

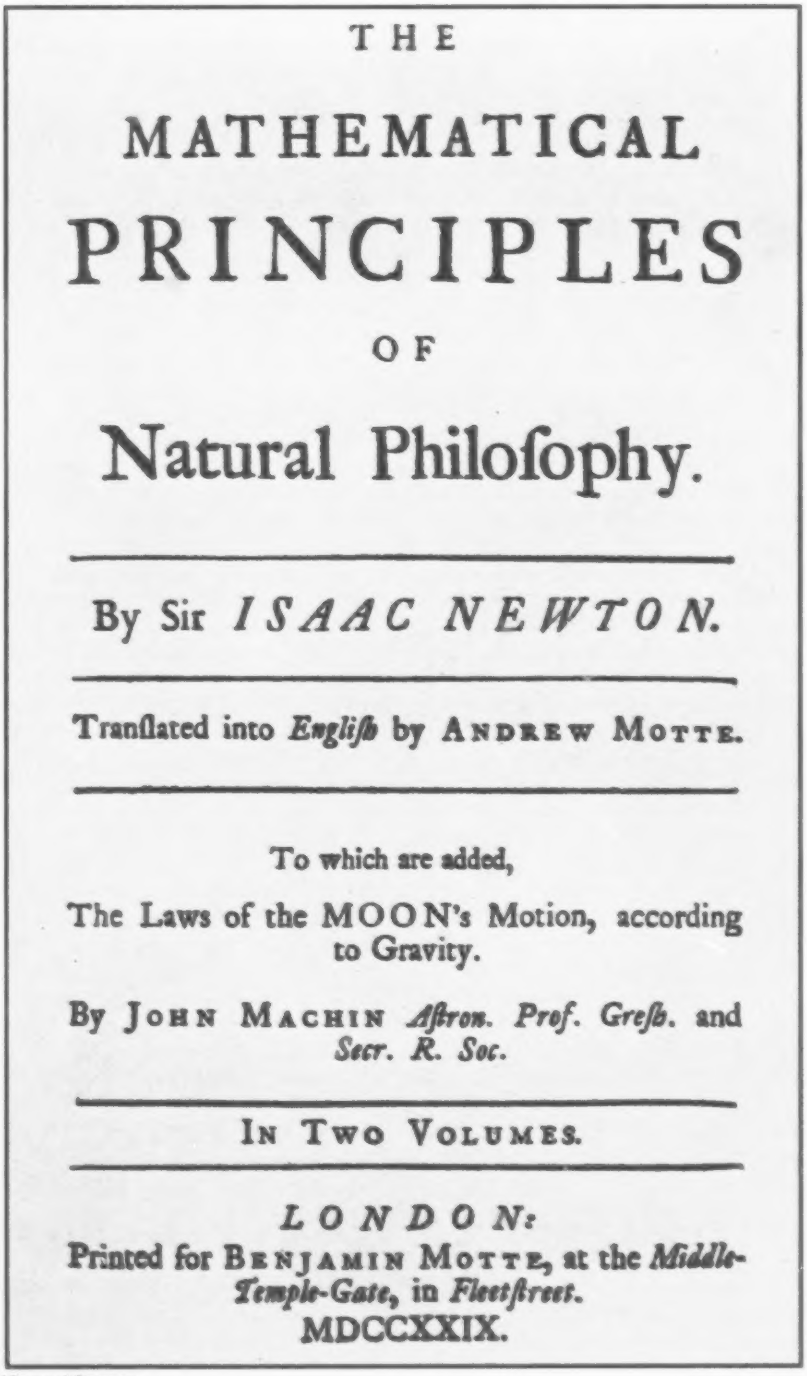
There are stable systems that are self-regulating. They can prevent error and they can correct error; some are able to repair themselves even as damage occurs. Generally addressed as "cybernetic," their governing principle is "feedback." By cycling back a portion of their output, they are able to avoid and suppress sharp pendulum-like swings. What is fed back regulates and stabilizes the system. This is often referred to as "feedback stabilization." That there is a striking resemblance between "checks and balances" and "feedback stabilization" was observed some years ago by the noted scientist, John R. Platt.

In a stabilization or self-regulating system, internal checks are introduced to prevent error, stress, or threat from so building that the system breaks down suddenly and dangerously. Protection is acquired, as Hamilton would phrase it, by proportioning the system so that its parts balance each other, so that they regulate each other. In modern parlance, we refer to "feedback loops" which enable parts to work against each other and even against the whole. Counter-forces of this type prevent discontinuities, wild oscillation, and rapid fluctuation. Wholesale breakdowns, due either to extreme mutability or rigidity, are thereby avoided. This is a type of self or internal regulation which permits stable operations even as the system changes.

In the constitutional design, Platt suggested, "the idea was to set up, at every critical point . . . , some kind of equilibrium between opposing interests . . . so as to have a steady pressure against either the excesses or defects of policy into which governments were likely to fall." Or, as James Madison put it, "to control itself," a government's "interior structure" must be so arranged that the relationship of the parts regulates the whole. This is the function of checks and balances or, in Platt's language, negative feedback.

In a self-regulating system, any number of devices are employed to maintain and insure stability of operation. Because a system constantly and inevitably faces unexpected and uncertain conditions which generate a wide variety of problems, its repertoire of response must be rather extensive. Accordingly, self-regulating systems are designed in terms of different time constants, different response levels, and brakes and accelerators—along with its multiple feedback linkages. There are problems that demand rapid action. There are others which require careful and deliberate consideration. Disturbances to a system are not all alike: they will vary in intensity, character, cost, and duration. Hence a range of time constants, of schedules and calendars, each having its own place in the system, is required.

There are also problems that directly effect the whole and must be dealt with at the systemic level. Others are, by their nature, best handled at intermediate levels. Still others, of lesser magnitude, engage only a part of the system. Decision and choice points, thus, must be located at places most appropriate to the problem. And there are times when it is necessary to slow action, or to speed action. For such circumstances, brakes and accelerators are necessary. The idea is to enable the system to act as a whole



THE

MATHEMATICAL

PRINCIPLES

OF

Natural Philoſophy.

By Sir *ISAAC NEWTON.*

Tranſlated into *Engliſh* by ANDREW MOTTE.

To which are added,

The Laws of the MOON's Motion, according
to Gravity.

By JOHN MACHIN *Aſtron. Prof. Greſh.* and
Secr. R. Soc.

IN TWO VOLUMES.

LONDON:
Printed for BENJAMIN MOTTE, at the *Middle-*
Temple-Gate, in *Fleetſtreet.*
MDCCXXIX.

Library of Congress.

Alfred North Whitehead. *Harvard University News Office.*

Woodrow Wilson. *Library of Congress.*

even as it distributes and differentiates authority to decide, and to produce a powerful capacity to respond to a multitude of different types of problems simultaneously.

Taken as a whole, an organization of this sort does appear to be "perplexingly subdivided and distributed" and it certainly looks messy. But a variety of time constants, differential response levels, brakes and accelerators, and multiple forms of feedback are precisely the elements that protect against dangerous fluctuations and permit a deliberate change process which insures stability.

These safeguards are all to be found in the Constitution. They were placed there by men who knew what they were doing, and explained what they were doing. One needs only to read *The Federalist* papers. There we find explanations of the different systems of recruitment, staggered tenure, separation and division of power, concurrent authorities, varieties of decision rules, multiplicity of choice points—all arranged in such a manner as to produce networks of internal control. These failed only once; in the years of the Civil War. The repair was costly but it was effected. And since then no threat to the system was ever allowed to amplify to the point where it threatened stability. It is a plain fact that neither war, nor depression, nor natural calamity, has ever been able to shatter its self-correcting arrangements.

It is also striking to observe the number of cybernetic theorists who see analogy in the American system of checks and balances. The anthropologist Gregory Bateson and the psychiatrist Jurgen Reusch, both concerned to avoid wild swings in the interest of stable development, saw the variety of "cross-overs" in the American system as constraints and accelerators which combine to regulate "the rate or direction" of over-all change. And C. R. Dechert, in *The Development of Cybernetics* tells us:

> The founding fathers of the United States wanted the legislature sensitive to public opinion, so they introduced a House of Representatives elected bi-annually on the basis of population. But they did not want the decision process too sensitive to public opinion, so they introduced a Senate elected on a different basis for a different term of office whose concurrence is necessary to legislation. In order to introduce further stability into the system they decoupled the legislative from the executive branch and introduced an independent control element in the form of a Supreme Court. The inherent stability of the system has been proved over the past 175 years.

We like to tell our students that the Constitution was designed to endure, to outlast human deficiencies: that it is a system which "by its own internal contrivances" regulates itself. There are times, to be sure, when its pace is maddeningly slow. But in the main, it has met traumatic assaults and threats without much loss of systemic stability. There are many ways to account for this but whatever the theory employed, it remains the fact, in Platt's words, that the constitutional designers understood the principles of a self-regulating system far better than our contemporary political philosophers. Nor were they oblivious to the problem of reliability.

Redundancy and Reliability

Theories of organization frequently involve reference to *peaked* and *flat* systems. Peaked systems are hierarchies. There is only one central decision point, one channel of authority, one official or legitimate communication system. Each component operates in lock-step dependence, part of a single chain. Policy is determined at the top and prescribes the behavior of each subordinate unit.

The Constitution provides for a flat organization. There are many decision points, many authority centers, and many communications channels—all mandated. The entire system is constructed on the basis of duplication and overlap, and each major component—the executive, legislative, and judicial—has independent authority. Policy is determined through negotiation and constitutes an agreement by parties of equal standing.

It is the flat character of the government that Woodrow Wilson despaired of. And this is the property of the system that has been subjected to unceasing criticism. We have already rehearsed the argument: it results in conflict, deadlock, lack of accountability, and robs us of a dynamic and vital decision center capable of quick and decisive action. For the last sixty years there have been countless reorganization proposals to "peak" the system, to locate more and more decision authority in the presidency—even beyond that which naturally accrued to the office as the United States became the United State. Until the advent of the "imperial presidency" and the excesses of Watergate, there were few voices in support of the flat system designed so long ago—a design that is also remarkable in its anticipation of the theory of redundancy.

Suppose there is a structure (or process or channel) which will fail one time in a hundred. What would the probability of simultaneous failure be for two such systems—each independent of the other? What would the probability of failure be for three systems; for four, etc.? For two, the chance of failure would be 1 in 10,000; for three, 1 in 1,000,000; for four, 1 in 100,000,000. This fact, the product rule of probability, lies at the foundation of the theory of redundancy, which is a theory of system reliability. Applied properly, it lessens the risk of failure and protects against the injurious effects of major errors and malfunctions. Its cardinal element is simple repetition or duplication.

And its basic assumptions are Madisonian—that mankind is fallible—not good, not bad—just prone to error. It agrees that "if men were angels" or "if angels governed men," no special safeguards or auxiliary precautions would be necessary. The theory of redundancy simply accepts the obvious limitations of any and all systems—political, economic, social, physical, natural, and artificial—by treating their parts, no matter how perfect, as *risky actors*. The theory focuses on the whole and asks one paramount question: is it possible to construct a system that is more reliable, more perfect, less prone to failure than even the most faithful of its components? When we set this question against that time-honored maxim—a chain is no stronger than its weakest link—its full import is made clear. The theory tells us that a chain can not only be made stronger than its weakest link, it can be made stronger than its strongest link.

It has generally escaped notice but this is the problem that much of *The Federalist* papers dealt with. "As long as the reason of man continues fallible," as long "as enlightened statesmen will not always be at the helm," how can we devise a government that will withstand gross malfunction as it continues to serve its purposes? The answer: by so organizing it that when some parts fail *they do not and can not automatically cause the failure of others*. The idea is to provide a system with multiple channels, independent of each other, at those points where failure can be disastrous. Where this type of redundancy is incorporated into a design, the odds against total breakdown rise by many times. The failure of one part cannot and does not irreparably damage the whole. There are alternative pathways, backups, which move the entity toward failsafe. In real machines, we have learned to insure reliability through the redundancy of simple duplication, as in a power-grid, a 747, and the dual braking system of our cars. And, intuitively, we follow the same principle when we seek a second opinion in a threatening medical situation.

The founders constructed what was, and still must be, the most redundant government in the world. They did more than introduce internal balances and controls: they "wired" the system in parallel at every crucial choice point. There is no unity of command and authority: there is no monopoly of power. The system is flat. And for each person there are, at the least, two governments—state and national, each separate and independent. There are two constitutions, two executives, two legislatures, two systems of law, two judiciaries. There are two bills of rights, two networks of checks and balances; two representation systems, and there is more. For apart from the redundancy of duplication, manifested in federalism, there is also the redundancy of checks and balances; i.e., of "overlapping jurisdictions."

In the event of damage, overlapping systems can expand their jurisdictions and "take over" when the functions of others have been lost

The constitutional system works as a "self-regulating" and "self-correcting" organization exhibiting a reliability, stability, and adaptability that has continually overcome its deepest strains.

or impaired. There are indeed limits which vary with the type of system, but an inherent protective potential is thereby established. In the case of the Constitution, our three basic branches are designed to overlap. They resist mutually exclusive jurisdictions. And they expand and contract. Scholars have for years spoken of the "cyclical" character of intragovernmental arrangements, of "pendulum" swings—frequently pointing to these as adaptive responses. The "uncertain content" (jurisdiction) of the three branches of government does not allow any one of them to sit still. If one weakens or fails, the other can affect a partial takeover. And the same holds for the national and state governments.

A system thus can sustain failure that, in the absence of overlapping jurisdictions, would destroy it. Once, on the floor of the Senate, Senator Mike Mansfield (now Ambassador to Japan) warned his colleagues that their refusal to act on a critical issue would not prevail: "It is clear that when one road to this end fails, others will unfold as indeed they have.... If the process is ignored in legislative channels, it will not be blocked in other channels—in the executive branch and the courts." This has been the pattern of much of our history.

It is a history that confirms Whitehead's judgment. The constitutional system works as a "self-regulating" and "self-correcting" organization exhibiting a reliability, stability, and adaptability that has continually overcome its deepest strains. We like to say that ours is the oldest written Constitution in the world—yet it remains a striking novelty. Marked by a redundancy of law, of channel and code, of command and authority, the whole has been stronger than any of its parts.

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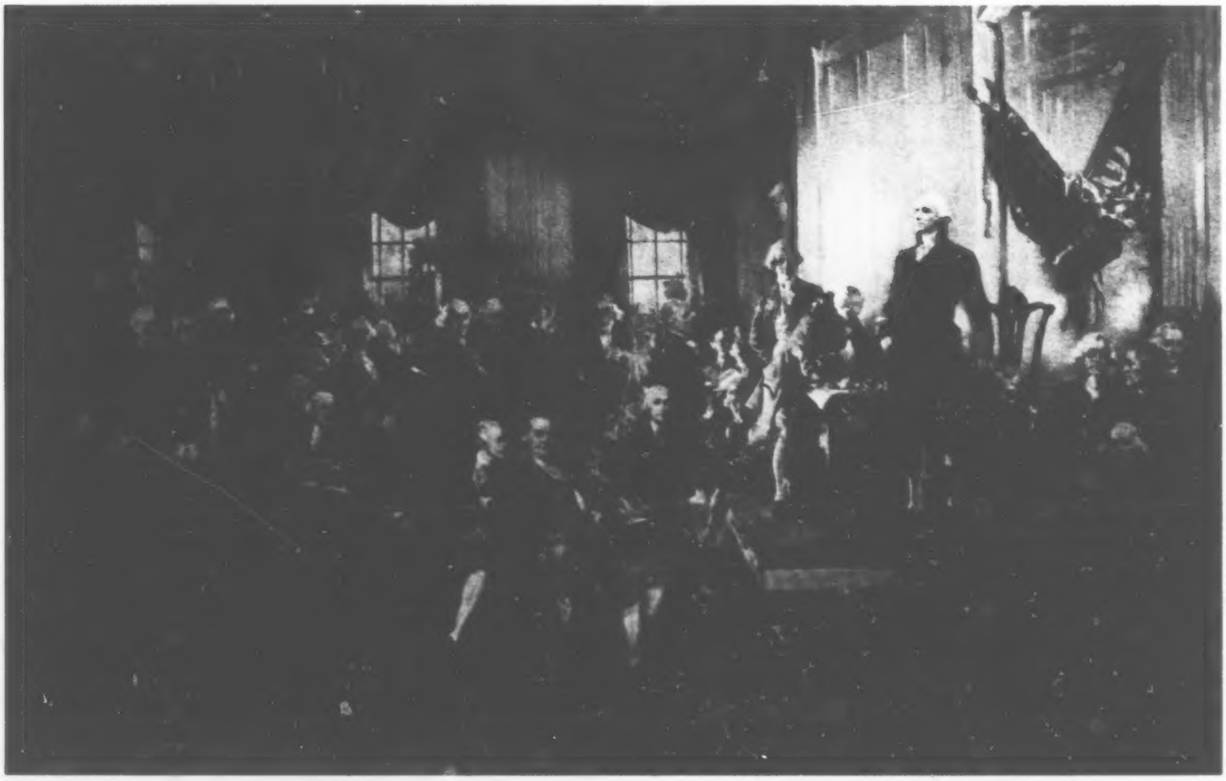
Signing of the Constitution of the United States ***by Howard Chandler Christy. Architect of the Capital Collection, Library of Congress.***



Federal Authority and State Resistance: A Dilemma of American Federalism

by TONY FREYER

When government threatened their liberty, Americans often resisted. At times private groups claiming a quasi-official status like the Sons of Liberty or the Ku Klux Klan opposed centralized governmental authority. But more significant forms of resistance involved defiance carried out by democractically chosen local representatives. The Nullification Crisis, the northern states' repudiation of slaveholders' property rights and the theory of secession, the Civil War and Reconstruction, and the southern states' massive assault upon desegregation during the 1950s and 1960s were instances of formal resistance to federal power that shaped the nation's history.

The nature of federalism encouraged this official resistance. The Constitution's division of power between state and national government gave the official representatives of diverse social and political groups a popular base of local support. Americans' long standing belief in states' rights and popular sovereignty reinforced this tradition of local democratic control. Not surprisingly, then, ever since the founding fathers created federalism in 1787, conflict has marked its history. Indeed, federalism made conflict inevitable. At different times these confrontations over local and national control involved the special interests of groups such as slave holders or the individual rights of black Americans; but in either case the struggles tested the limits of American constitutional ideals.

James Madison and State Resistance

For the framers a fundamental purpose of the Constitution was the protection of individual rights against state governments. James Madison, in *The Federalist*, No. 10, recited a number of "wicked projects" that had been undertaken by state legislatures, including religious discrimination, the issuing of worthless paper money, and interference in the collection of debts. Such measures arose in part because "factious leaders" could "kindle a flame within their particular states." The remedy was to remove certain powers from the state governments and to place some of them in an "extended republic," the national government. "Extend the sphere" in which the interests struggled, Madison urged, and as their diversity and number increased it was less likely that "a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison."

But to the extent that the national government impinged upon local control it invited resistance. In *The Federalist*, No. 46, Madison explored the ability of both state and federal authorities to "resist and frustrate the measures of each other." He argued that because the citizens' primary prejudices or "prepossessions" favored the states, state power posed a greater threat to federal authority than the other way around. Moreover, local interests determined the people's view of and response to national issues. Madison admitted that "measures will too often be decided according to their probable effect, not on the national prosperity and happiness, but on the prejudices, interests, and pursuits of the governments and people of the individual States." In addition, if national officials pursued policies that "inflamed the zeal" of local interests, it would bring about "disquietude" among the citizenry and "perhaps, refusal to co-operate with the officers of the Union," presenting "obstructions which the federal government would hardly be willing to encounter."

By checking the abuses of local control, however, federal authority could protect individual rights from governmental intrusion. "Justice is the end of government," Madison asserted in *The Federalist*, No. 51. But whenever the "stronger faction" was able to "unite and oppress the weaker," anarchy reigned. Through the division of power between state and national government which made up the federal system of this "compound republic," a "double security" was established for the "rights of the people." Federalism was in turn basic to that extension of the political sphere by which society was "broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from . . . the majority." Indeed, the Virginian concluded hopefully, the "extended republic" might even encourage "coalitions" of majorities based upon principles of "justice and the general good."

During the struggle for the ratification of the Constitution the Antifederalists challenged Madison's views regarding the best protection of individual rights. The opponents of national power believed that the closeness of state governments to the people made local authorities, not the federal government, better defenders of individual liberty. Moreover, the Antifederalists feared that unless specific guarantees of rights were imposed upon national authority there was too much room for abuse.

The remedy was a Bill of Rights, which became the main condition for the ratification of the Constitution. Madison and the Federalists

> *"If the legislatures of the several states may at will annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals."*
>
> *—John Marshall, 1807*

agreed to this demand, clearing the way for the adoption of the Constitution. As Madison explained to Thomas Jefferson, a Bill of Rights could serve two vital purposes: first, "the political truths declared in that solemn manner" would "acquire by degrees the character of fundamental maxims of free government"; second, the Bill of Rights could become during periods of attack upon liberty "a good ground for an appeal to the sense of community."

As a Virginia congressman in the First Congress in 1789, Madison led the struggle for the Bill of Rights. He proposed constitutional amendments that would restrict *both* the state and federal governments. States' rights supporters in the Senate, however, defeated this proposal; consequently the amendments that became the Bill of Rights applied only to the national government. From this political struggle emerged specific guarantees of individual rights, including the prohibition upon Congress against abridging freedom of religion, speech, the press, assembly, petition, or the right to bear arms, as well as restrictions on quartering troops, and on federal criminal prosecutions and punishments. Moreover, the right to trial by jury, due process of law, and other procedural guarantees were established.

At the same time, the effort was made to balance a broad affirmation of individual rights with the claims of state sovereignty. The Ninth Amendment stated that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Tenth Amendment proclaimed states' rights: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Although Article VI of the Constitution, the supremacy clause, counterbalanced the Tenth Amendment, the recognition in the Constitution of federalism, individual liberty, and states' rights nonetheless established a rationale for resistance.

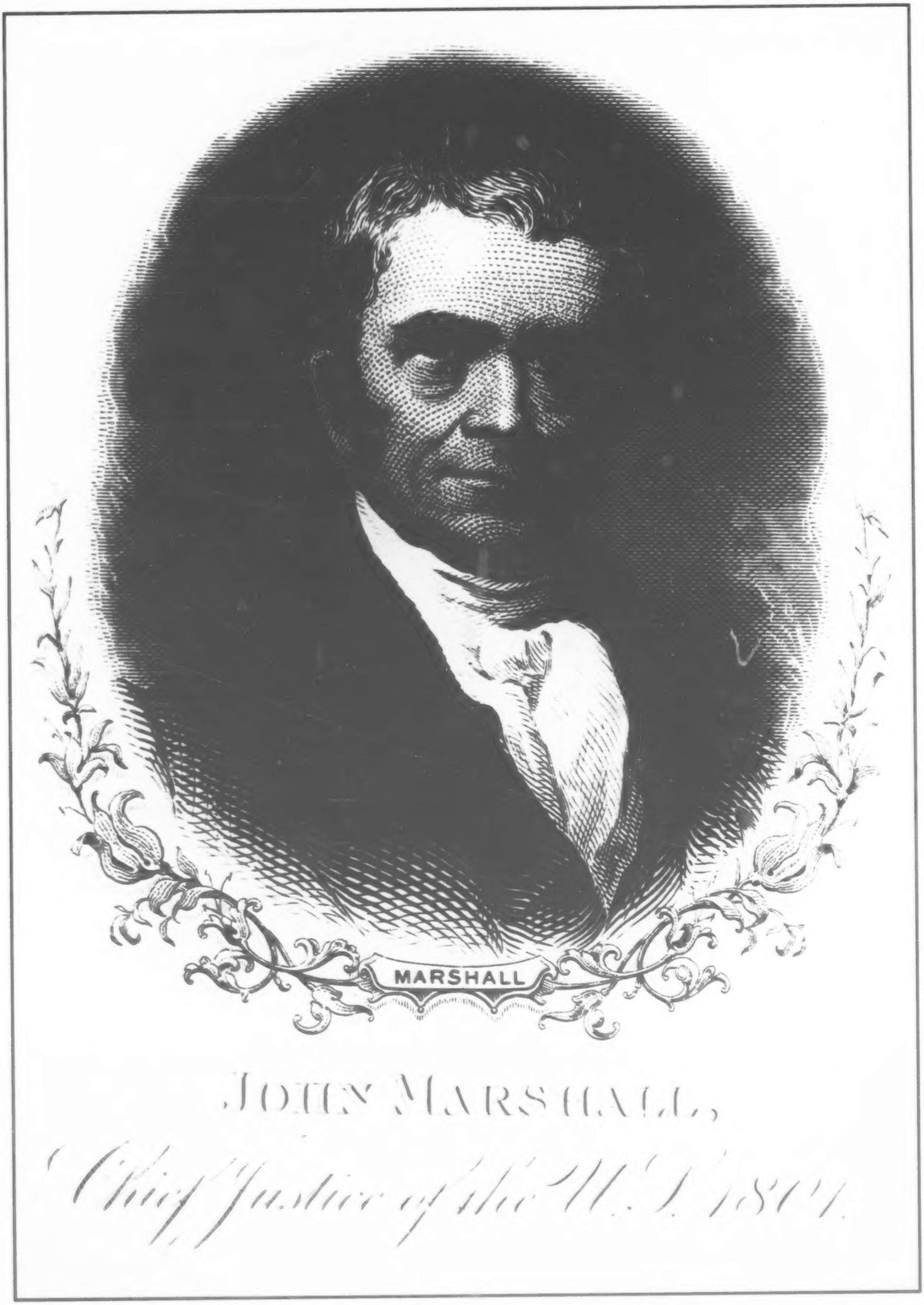
Resistance Under the New Constitution

A theoretical justification for state resistance emerged within a decade of the founding. Thomas Jefferson and James Madison developed this early formulation during the controversy over the Alien and Sedition Acts. When, early in John Adams' administration, the Federalist-dominated Congress passed the Alien and Sedition Acts, a series of measures which Democratic-Republicans viewed as an attempt to muzzle the voice of opposition, Jefferson and Madison countered with the Virginia and Kentucky Resolutions. The Resolutions asserted that the Sedition Act violated the First Amendment's prohibition against congressional interference with free speech and a free press. They claimed further that the states possessed the power to judge the constitutionality of national laws. As the confrontation persisted, Jefferson advanced an even more extreme proposition. In a second Kentucky Resolution he argued that state authorities could nullify federal laws that they considered unconstitutional. Jefferson's position was that the states which had created the Constitution "being sovereign and independent, have the unquestionable right to judge of the infraction; and, that a nullification [by] those sovereignties, of all unauthorized acts done under color of that instrument is the rightful remedy."

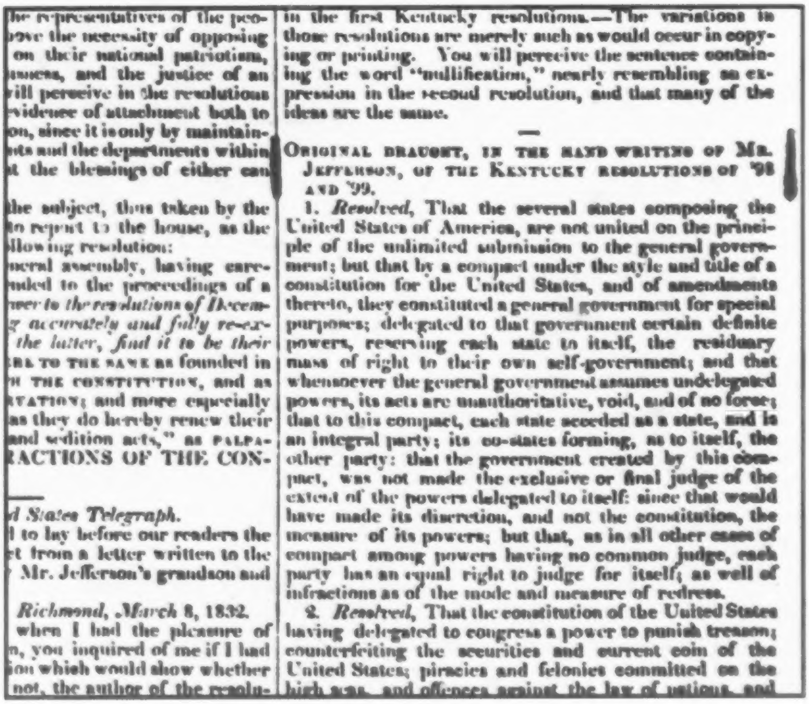
No one did more to counter state-sovereignty theories than John Marshall. Chief Justice Marshall and the Supreme Court established the principle that the federal government possessed the supreme power to supervise nation-state relations. Without this supreme authority, particularly as sanctioned in the supremacy clause, the Union would have remained essentially a confederation of sovereign states.

Central to Marshall's national-supremacy argument was the principle that the American people, not the states, had created the United States with the ratification of the Constitution after 1787. Through their exercise of sovereign authority, the people had sanctioned the full grant of powers that the Constitution had allotted to the federal government. Thus, within the limits approved by the people, all individuals and governments within the territorial United States were subject to federal authority. When Pennsylvania refused to enforce the contract right of an American citizen, Marshall strongly upheld federal power to protect the individual's constitutional liberty in *U.S.* v. *Peters* (1807). "If the legislatures of the several states," he said, "may at will annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals."

But the federal government's record of defending its own authority and individual rights was uneven. During the War of 1812, New England generally succeeded in avoiding compliance with national calls for taxes and the mobilization of the militia. The resistance climaxed in the Hartford Convention of December, 1814, where New England-


MARSHALL
JOHN MARSHALL,
Chief Justice of the U. S. 1801.

Chief Justice John Marshall. *Library of Congress.*



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in the first Kentucky resolutions.—The variations in those resolutions are merely such as would occur in copying or printing. You will perceive the sentence containing the word "nullification," nearly resembling an expression in the second resolution, and that many of the ideas are the same.

—

ORIGINAL DRAUGHT, IN THE HAND WRITING OF MR. JEFFERSON, OF THE KENTUCKY RESOLUTIONS OF '98 AND '99.

1. *Resolved,* That the several states composing the United States of America, are not united on the principle of the unlimited submission to the general government; but that by a compact under the style and title of a constitution for the United States, and of amendments thereto, they constituted a general government for special purposes; delegated to that government certain definite powers, reserving each state to itself, the residuary mass of right to their own self-government; and that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force; that to this compact, each state acceded as a state, and is an integral party; its co-states forming, as to itself, the other party: that the government created by this compact, was not made the exclusive or final judge of the extent of the powers delegated to itself: since that would have made its discretion, and not the constitution, the measure of its powers; but that, as in all other cases of compact among powers having no common judge, each party has an equal right to judge for itself; as well of infractions as of the mode and measure of redress.

2. *Resolved,* That the constitution of the United States having delegated to congress a power to punish treason; counterfeiting the securities and current coin of the United States; piracies and felonies committed on the high seas, and offences against the law of nations, and

Beginning of Kentucky Resolutions from Niles' Register . . . (Baltimore: Franklin Press, 1833). Photograph courtesy of the Kentucky Historical Society.

ers met and published a strong statement claiming not only the right but the duty of states to defy the federal government when its unconstitutional actions threatened the liberties of the people. Similarly, when the Court upheld the rights of the Cherokee Indians in Georgia and those of foreign landholders in Kentucky, state-supported, local interests effectively evaded the Court's decision. Local control thus prevailed often enough to keep federal supremacy a matter of dispute. However, in confrontations in Virginia, Kentucky, Georgia, Ohio, and other states involving property or creditor rights, the Supreme Court defeated state resistance.

Yet perhaps the most conspicuous example of pre-Civil War resistance to federal authority was the Nullification Crisis. The crisis erupted in the winter of 1832–33 when South Carolina used Vice-President John C. Calhoun's theory of state sovereignty in an attempt to nullify a tariff passed by Congress in 1828. South Carolinians hated the "Tariff of Abominations" not merely for economic reasons, but also because it symbolized outside federal power which threatened the state's slave-based society. In 1830 the legislature issued an "Exposition" which attacked the tariff as unconstitutional and claimed for the state the authority to nullify federal law. Calhoun had secretly written the Exposition, grounding his argument on the Antifederalist idea of state sovereignty proclaimed in Jefferson's Kentucky Resolution. Calhoun, who went beyond Jefferson in claiming for the states the right of secession, nonetheless developed the nullification theory because he wanted to give the state the constitutional means to resist federal law while making it possible for South Carolina to remain within the Union.

President Andrew Jackson, however, repudiated the state's action and Calhoun's doctrine. Relying upon the Federalist theory of Union expounded by Madison and Marshall and such constitutional provisions as the supremacy clause, Jackson exclaimed that the states could not overrule federal law. The very notion, he said, was inconsistent with the Union. And armed resistance, the president declared ominously, was treason, which he would meet with the full strength of national authority. Finally, South Carolina backed down, but Southerners did not forget Calhoun's theory.

Unsurprisingly, state resistance reemerged out of the struggle over slavery. For decades before the Civil War, the right of northern public officials to interpose the state's authority between its citizens and the federal government was an enflamed issue. Northern and western states refused to comply with the fugitive slave clause of the Constitution and passed personal liberty laws which affirmed for blacks as well as whites such basic constitutional rights as the writ of habeas corpus, jury trial, and other principles of due process. These laws challenged the slaveholders' claim that slaves were property and that their own rights of ownership were constitutionally protected. According to the Constitution, slaves remained slaves when they escaped or were taken into free states or territories. By extending constitutional rights to blacks, the personal liberty laws threatened southerners' power over sojourner and fugitive slaves.

In the 1850s, the conflict over the liberty laws and slavery in the territories came to the Supreme Court for resolution. Taney and a divided Court in *Dred Scott* v. *Sandford* (1857) sustained the southern state's power by declaring unconstitutional the right of Congress to exclude slavery from the territories. Moreover, as far as the federal government was concerned, Taney said, blacks—whether slave or free—possessed "no rights" that "white men" were "bound to respect." Shortly after the *Dred Scott* decision, the Court confronted a direct challenge to federal authority from Wisconsin. Pursuant to the state's liberty law, Wisconsin officials defied a federal court order involving a fugitive slave. Even after the U.S. Supreme Court struck down the Wisconsin law in *Ableman* v. *Booth* (1859), state resistance in Wisconsin and throughout the North persisted. And as in *Dred*

The end of bloodshed at Appomattox brought about the triumph of national supremacy as an abstract principle, but the nation's subsequent failure to protect the liberty of black Americans revealed the limits of victory.

Scott itself, the Court's action merely exacerbated the larger sectional conflict.

Northern opposition to both decisions encouraged the southern extremists' arguments that the South's constitutional rights could not be preserved within the Union. In the Congress and the northern states, Republicans tenaciously supported local control of constitutional rights, despite federal and southern assertions to the contrary. Entwined as it was with the status of slavery in the territories, the controversy over the personal liberty laws thus aggravated a confrontation that contributed to bringing about the nation's greatest tragedy.

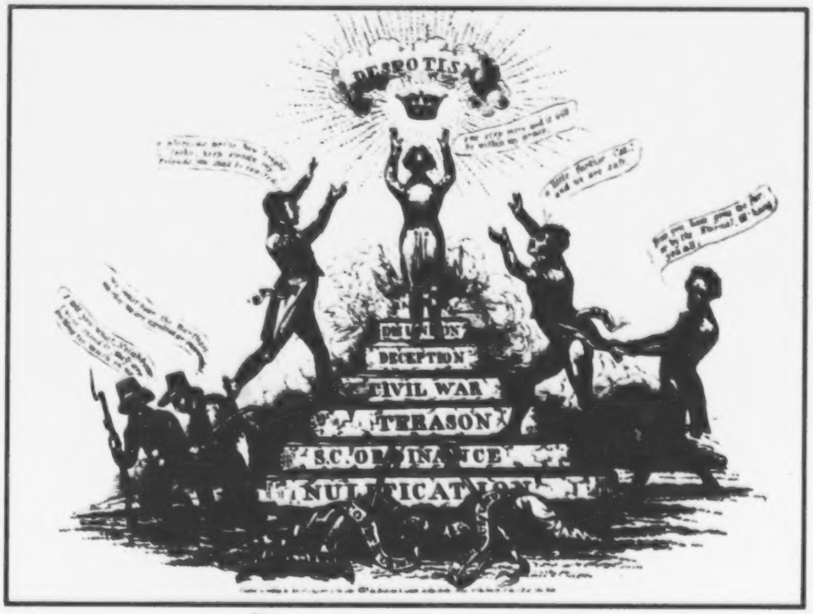
The secessionist arguments of 1860 fundamentally challenged the American federal system. In keeping with Calhoun's justification for nullification, the proponents of secession claimed that the Constitution established a mere league of sovereign states from which any member could withdraw at will. The secessionists rejected the framers' principle that the people—possessing supreme authority—could divide sovereignty between state and national governments. Instead they returned to the theory of state sovereignty of the Antifederalists, asserting that the states were supreme. President Abraham Lincoln in turn denied the South's claims in favor of the founders' principle of national sovereignty so forcefully affirmed by Jackson during the Nullification crisis. Eventually, Lincoln tied this idea of federal supremacy to a defense of the abolition of slavery. Thus, at stake on the battlefield was the constitutional meaning of both national and state sovereignty and individual and state's rights. The end of bloodshed at Appomattox brought about the triumph of national supremacy as an abstract principle, but the nation's subsequent failure to protect the liberty of black Americans revealed the limits of victory.

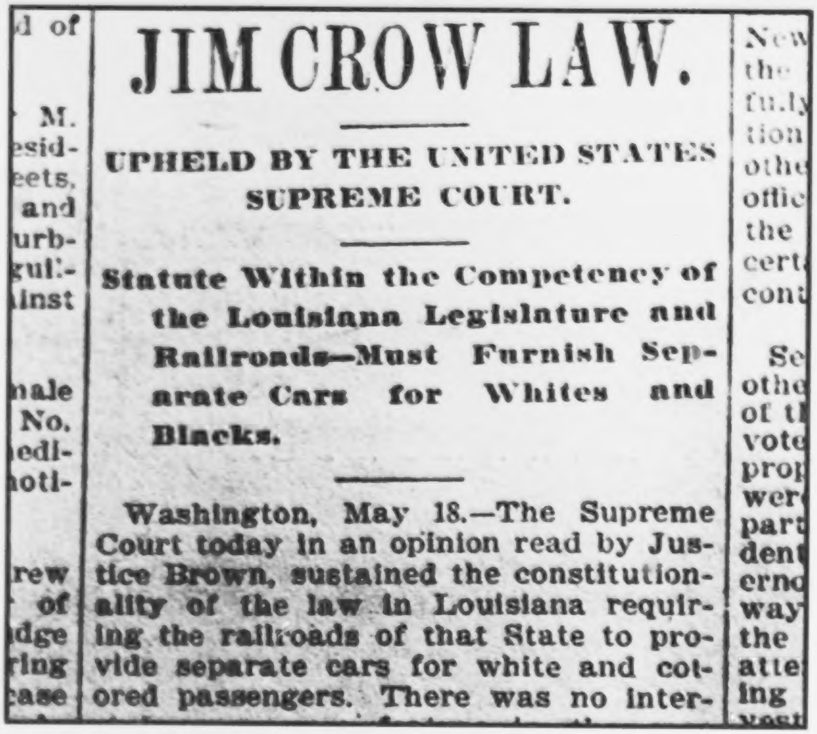
Continuing Resistance

During Reconstruction, the Republican Party pursued peace with a firm commitment to both national sovereignty and states' rights. The Supreme Court reflected these dual concerns in asserting in *Texas* v. *White* (1869): "The Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States." Yet, Reconstruction brought about unquestionably the most important changes in the nation's fundamental law in the form of three constitutional amendments. In order to end the Constitution's indirect approval of the institution, and to give the fullest possible scope to Lincoln's emancipation policy, the Thirteenth Amendment abolished slavery. Through its privileges and immunities, equal protection, and due process clauses, the Fourteenth Amendment overturned Taney's holding in the *Dred Scott* case that blacks possessed virtually no constitutional rights. The Fifteenth Amendment carried this principle further by establishing that neither race nor previous condition of servitude should abridge a citizen's right to vote. Along with civil rights legislation and increased federal court jurisdiction, these Reconstruction measures seemed to guarantee legal and political equality for blacks.

By Reconstruction's end in 1876, however, the Republicans' retreat from support for the freed slaves' rights and the rise of such brutal groups as the Ku Klux Klan destroyed the promise of these amendments. The Supreme Court contributed to this result by strik-

In this 1833 cartoon, John C. Calhoun climbs toward despotism, while Andrew Jackson, on the right, threatens to hang the nullifiers. Courtesy of the New-York Historical Society.





JIM CROW LAW.

UPHELD BY THE UNITED STATES SUPREME COURT.

Statute Within the Competency of the Louisiana Legislature and Railroads—Must Furnish Separate Cars for Whites and Blacks.

Washington, May 18.—The Supreme Court today in an opinion read by Justice Brown, sustained the constitutionality of the law in Louisiana requiring the railroads of that State to provide separate cars for white and colored passengers. There was no inter-

News article reporting Supreme Court decision on Plessy v. Ferguson, *May 18, 1896,* Daily States *newspaper. Courtesy Louisiana State Museum.*

ing down the Civil Rights Act of 1875, the last major Reconstruction measure, in the *Civil Rights Cases* of 1883. Then in *Plessy* v. *Ferguson* (1896) it further undermined blacks' civil rights when it established the "separate but equal" doctrine. This doctrine permitted southern states to establish separate facilities based on race throughout society. The South thus reestablished local control of race relations.

With the question of control over race temporarily settled, from the Civil War to the 1890s the issue most litigated in the Supreme Court involved the contractual obligations of local governments. Throughout the trans-Mississippi West and the South, local communities had floated bonds to stimulate development, particularly railroad construction. Poor judgment, mismanagement, corruption, and economic depression soon resulted in massive default on the bonds. Foreign and domestic creditors sued to get their money back, which amounted to between $100,000,000 and $150,000,000. State and local officials searched for ways to maintain local control against foreign creditors. State judges, sensitive to their public standing as elected officials, generally approved or ignored such efforts.

The federal judiciary's defense of the creditors aroused attack. "He who can look upon these things," exclaimed a writer in the St. Louis-based *Central Law Journal* of 1884, "and not feel his State pride offended lacks elements of patriotism. It is time to call a halt." This outburst was mild compared to the Iowa farm organization that in 1890 called for the abolition of the Supreme Court. Such demands resulted in attempts to curtail the jurisdiction of the federal judiciary; but the national tribunals led by the Supreme Court eventually overcame state and local resistance.

In the first half of the twentieth century, race reemerged as a major issue, as Southern officials continued successfully to defy federal authority in racial matters. Softening somewhat its earlier position, the Supreme Court in response to litigation sponsored by the National Association for the Advancement of Colored People upheld in a few cases blacks' right to vote. In spite of this, Southern legislatures and courts generally succeeded in keeping blacks from exercising their voting rights. Similarly, some southern states passed measures that violated federal prohibitions against involuntary servitude. The purpose of the state laws was to give local governments and individual white southerners the power to control black labor. Under one such law, for example, blacks were entrapped in a sharecropping system which was virtually inescapable. The Supreme Court invalidated this system in 1911 in *Baily* v. *Alabama*, and yet the practice persisted as local custom.

Moreover, racial segregation in the South generated what was for twentieth century America unprecedented defiance. After decades of NAACP-sponsored litigation eroded the edges of the South's segregated society, the Supreme Court dealt it a mortal blow in its famous 1954 decision, *Brown* v. *Board of Education of Topeka*. Yet although the Court struck down segregation in public education, it waited a year to establish the terms governing compliance. In 1955, a second *Brown* opinion announced that desegregation should proceed "with all deliberate speed." This vague standard encouraged a campaign of massive resistance throughout the Old Confederate states. Proclaiming states' rights, elected officials advocated and legislatures passed laws designed to delay if not prevent altogether the enforcement of the *Brown* rulings. Enmeshed in complex political cross pressures, President Dwight D. Eisenhower did comparatively little publicly to support the federal judiciary. In the face of congressional and executive inaction, defiance increased.

The Little Rock crisis of 1957–1959 revealed the way federalism fostered intransigence. Following the first *Brown* opinion, the city's school board, after some initial indecision, voluntarily developed a plan designed to achieve token desegregation of Little Rock Central

United States soldiers in front of Little Rock High School, 1957. Library of Congress.

High School. The plan encountered opposition from the local NAACP because it was too limited; it aroused extreme segregationists because it did anything at all. Criticism did not, however, deter local, state, and federal authorities from initially giving their approval. Arkansas' Orval Faubus, a moderate on race who was known as the best "welfare" governor the state had ever had, also did not oppose the plan. Only after the segregationists' campaign fostered a complex interplay of secret maneuvers among leaders at the local, state, and national level, was the plan jeopardized. As these officials fought to shift from one another the responsibility for desegregation, a deadlock ensued. Finally, to protect his political future and populist economic programs, Faubus defied the federal court and, later, President Eisenhower. A struggle resulted which lasted intermittently for two years. The Supreme Court's holding in *Cooper* v. *Aaron* (1958) that Arkansas' actions were unconstitutional merely aggravated the conflict. Not until a coalition of local blacks and white moderates organized and won a campaign advocating compliance with the federal court's desegregation orders did the crisis end.

Little Rock set the tone for resistance during the early 1960s. In such places as New Orleans, Louisiana, Oxford, Mississippi, and Tuscaloosa, Birmingham, and Selma, Alabama, local and state officials defied federal authority and denied the constitutional rights of black Americans. Martin Luther King, Jr. and civil rights activists responded with skill and courage in a campaign of nonviolent opposition. King's strategy focused national and world public opinion on the conduct of southern governmental authorities, which stimulated Congress to enact path breaking civil rights legislation. This legislation established the basis for continuing federal intervention in state and local affairs in defense of constitutional rights. The persistence of racial injustice in the late twentieth century, however, confirmed Madison's prophecy that official resistance is inevitable in American federalism.

An Ambivalent Heritage

In the long run the impact of the framer's federal system was ambivalent. A diffusion of governmental authority gave slave masters, foreign creditors, and property holders the means to protect their vested rights. Conversely, this same fragmentation of power provided debtors, the opponents of slavery, and civil rights activists the means to fight for their rights. The Constitution created, then, and federalism reinforced, a tension between minority and majority interests, freedom and slavery, equality and segregation, discrimination and equal justice. Thus even though state resistance growing out of this tension imperiled individual liberty, through guarantees of rights in the Fourteenth Amendment, the supremacy clause, and other constitutional provisions, the federal system possessed a remedy for its own weakness.

Suggested additional reading:

Tony Freyer, *The Little Rock Crisis: A Constitutional Interpretation* (1984).

Charles Grove Haines, *The Role of the Supreme Court in American Government and Politics, 1789–1835* (1960).

Harold M. Hyman and William M. Wiecek, *Equal Justice Under Law: Constitutional Development, 1835–1875* (1982).

Thomas D. Morris, *Free Men All, The Personal Liberty Laws of the North, 1780–1861* (1974).

Paul L. Murphy, *The Constitution in Crisis Times* (1972).

Tony Freyer is associate professor of history and law, University of Alabama. His books include *Forums of Order* (1979), *Harmony & Dissonance* (1981), and *The Little Rock Crisis* (1984).

The Constitution and the Welfare State

by KENNETH M. HOLLAND

On December 10, 1948, the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights. Article 25 boldly states: "Everyone has the right to a standard of living adequate for the health and well being of himself and his family, including food, clothing, housing and medical care and necessary social services." In a similar vein, Article 20 of the West German Constitution stipulates that "the Federal Republic of Germany is a democratic and *social* federal state." To the Germans, this provision means that the state is duty-bound to protect each of its inhabitants from social insecurity and to work toward social justice, goals which are met by an array of welfare legislation ranging from sickness, accident and old age insurance to child support, rent subsidy and employment.

In 1971, Supreme Court Justice William O. Douglas expressed chagrin at the fact that unlike the German and other "modern" constitutions, the United States Constitution imposes no duty upon the state to provide the material conditions for a dignified life. Douglas' embarrassment could be overcome by enactment of a constitutional amendment guaranteeing to every citizen adequate food, shelter, clothing, medical care, and education. In today's climate, however, a balanced budget amendment is far more likely to pass than a right-to-welfare amendment. If the welfare state is to have a constitutional foundation, the change will have to come by judicial fiat, by a re-interpretation of the document by the Supreme Court.

In the 1960s, it appeared as if the liberals on the Warren Court, William Brennan, Thurgood Marshall, Earl Warren and Douglas, were devising a concept of "equal protection" as a weapon to impose on government an affirmative obligation to redistribute wealth in order to ensure economic subsistence for everyone. The election of Richard Nixon in 1968 prevented a redefinition of equal protection, because he appointed several justices who rejected the liberals' thesis. The Burger Court has provided little constitutional ammunition for the war on poverty. Under its reading, not only is there no constitutional right to welfare, government is free to make regulations adversely affecting the poor and welfare recipients (if the legislature chooses to provide assistance to the needy) as long as they have a "reasonable" basis—a test which nearly all such regulations meet easily. Given the kind of appointments to the high court President Reagan has made and is likely to make, public assistance will remain an act of government largesse rather than a constitutional right for the foreseeable future.

Politics, however, is an arena of change. The presidency and thus the judiciary will not remain indefinitely in conservative hands. The "modernization" of the Constitution could occur quickly, given the right change in the attitude of the majority of the Supreme Court, because scholars sensitive to Douglas' lament have worked diligently to prepare an interpretation of the text according to which the Constitution guarantees social welfare. These readings, both novel and ingenious, lie ready-made, awaiting sympathetic hands. The history of constitutional development teaches us, moreover, that the ascendant philosophies are the philosophies of reform rather than those that accept the status quo. The "almost-Constitution" of the 1960s could very well become the Constitution of the twenty-first century. It is the purpose of this article briefly to describe the major attempts to create a constitutional right to be free from poverty.

Proponents of constitutionalizing welfare have discovered government obligations to the poor in the provisions of several constitutional amendments: "Congress shall make no law . . . abridging the freedom of speech" (First Amendment); "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people" (Ninth Amendment); "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" (Fourteenth Amendment); "No person shall . . . be deprived of . . . property, without due process of law" (Fifth Amendment); "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" (Fourth Amendment).

Welfare and the First Amendment

What exactly are the constitutional obligations of the state to the impoverished? In order to avoid the criticism that the contents of such a list are merely an expression of the advocate's preferences, proponents attempt to link new affirmative duties to explicit constitutional language. The Supreme Court has held repeatedly that rights need not be named in the text in order to have constitutional status. Fundamental rights, that is, rights that cannot be infringed by government except on a showing of compelling interest, now include the right to travel, the right to marry and to procreate, the right to vote in state elections, the right of association, and the right of

William O. Douglas. *Library of Congress.*

These reformers employ the following logic: (1) The Constitution mandates that government meet the requirements of justice. (2) Justice requires the welfare state. (3) Therefore, the Constitution mandates the welfare state.

privacy—none of which is explicitly mentioned in the Constitution but each of which is implied by rights specifically stated.

In *Griswold* v. *Connecticut* (1965), the Court declared Connecticut's ban on the use of contraceptives a violation of the right to privacy, which it located not in the text but in the "emanations and penumbras" of the First, Fourth and Fifth Amendments. This constitutional privacy right, the Court subsequently ruled in *Roe* v. *Wade* (1973), contains the right to procure abortions. Employing similar reasoning, Justice Brennan would elevate education to the status of fundamental right because "it is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment." The present doctrine, however, is that states may infringe even fundamental rights in certain circumstances. Other interpreters, therefore, would elevate fundamental rights to the status of *absolute* rights that government could under no circumstances deny. They argue that because one cannot make effective use of the constitutional rights to speak and to vote if one is hungry, cold, or illiterate, the Constitution furnishes a guarantee of food, shelter, clothing, and education.

The chief stumbling block to such an analysis is that the explicit and implicit rights involved here are of two different kinds. Freedom of speech is a "negative right," that is, the government cannot take it away—it precludes government intrusion. Housing, on the other hand, is a "positive right," a legal claim the individual can make on government, which it can meet only by taking a positive action to provide a benefit. Failure to touch the individual is here a violation, not a virtue. Reformers attempt to solve this problem by proving that "negative" rights are meaningless in the absence of "positive" rights. If government is bound by the Constitution to secure rights to life and liberty it is ipso facto bound to provide the material prerequisites of a minimally decent human life.

Justice Douglas attempted to bolster the implicit rights argument by pointing to the language of the Ninth Amendment. Although the framers probably had in mind negative rights here, Douglas contended that the rights to education, to work, to recreation, to pure air and pure water, which depend on positive government action, "may well be rights 'retained by the people' under the Ninth Amendment. May the people," he asked, "vote them down as well as up?"

Justice and the Welfare State

The Constitution's Preamble announces that one of the purposes of the Constitution is to "establish Justice," and the Fifth and Fourteenth Amendments guarantee "due process of law." Several scholars have sought to persuade the Court that only the welfare state meets the constitutional standard of justice, of the treatment that is due. In an important article in the *Harvard Law Review* (1968), Professor Frank Michelman set out systematically to identify those "needs" or "wants" that are so "fundamental" as to call for a constitutional obligation to fulfill them when the individual cannot do so himself. The claim to "minimum protection" means that persons are entitled to have certain wants satisfied by government. Everyone should be insured against certain risks. "Just wants" are those that every person ranks higher on his list of priorities than any other and would be immediately satisfied if the individual had access to the means. The key point about this conception of justice is that the justice of a political community is determined largely by how it treats its least-advantaged members.

Others believe justice requires that government compensate the poor for their contribution to today's complex, industrial society which relies on the existence of a vast "reserve army" of the unemployed. The poor, they say, are no longer to blame for their poverty. Poverty is a consequence of economic forces like automation, competition, and changing technologies, beyond the control of individuals. The unemployed have a right to a minimal share in the commonwealth whose wealth they help generate by their existence as a pool of idle laborers whose presence keeps wages down.

These reformers thus employ the following logic: (1) The Constitution mandates that government meet the requirements of justice. (2) Justice requires the welfare state. (3) Therefore, the Constitution mandates the welfare state.

The New Property

In a well-known 1964 *Yale Law Review* article, cited by Justices Douglas, Brennan, and Marshall in a number of their opinions, Charles Reich described welfare benefits as a species of "new property" brought into being by modern industrial and bureaucratic society. Reich's primary intention was to elevate public assistance from the category of charity or largesse to a right that could not be lost without due process of law. As long as welfare was considered largesse, government could impose otherwise unconstitutional conditions, such as the right to conduct "mid-

U.S. Department of Agriculture distributes free food. Library of Congress.

night raids" on recipients' homes in order to see if all eligibility requirements were being complied with. Implicit in Reich's formulation was the view that the word "property" as used in the Constitution has no fixed meaning. It is the role of judges to define the concept of property, a term undefined by the Constitution but which can include a variety of interests and relations. By defining property broadly, as some have done, e.g., to mean "the development and enjoyment of human capacities," it is easy to conclude that constitutional property protections encompass guaranteed jobs, public low-cost housing, education, and other "subsistence goods."

Welfare and the Right to Privacy

Albert Bendich and others reject the attempt to ground the welfare state in the constitutional protections for property. In the first place, property is not very secure against government intrusion, as the development of zoning and land use laws have demonstrated. Secondly, property is an economic right, while welfare benefits are, in their opinion, civil liberties. Under the Constitution, civil liberties, such as free speech and freedom from self-incrimination, are much more precious than property rights. It is, therefore, more attractive to locate the right to welfare within the civil liberty of privacy than in the economic right of property.

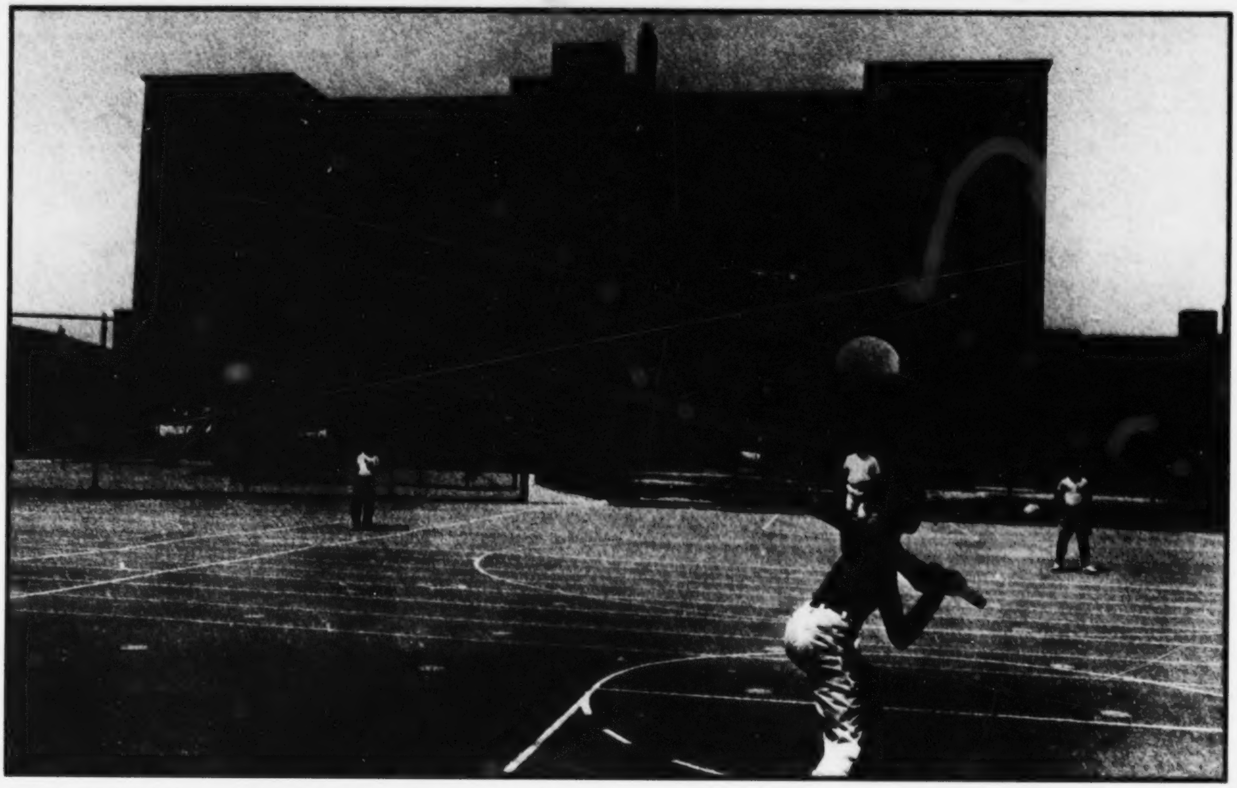
The Constitution, say these scholars, presumes that citizens have privacy. Otherwise why provide protections for it? The reality, however, is that millions of Americans lack privacy because they suffer from economic deprivation. Thus, they conclude that "if poverty is at war with the Constitution, the Constitution is equally at war with poverty." If Americans have a constitutional right to privacy, they also have a right to "the conditions which are indispensable to its regulation."

The conception of privacy involved here is broad. Privacy includes "the freedom and dignity of the individual, his right to determine his own destiny." Important consequences flow from the inclusion of dignity within privacy, for it can be argued that persons in American society cannot achieve dignity without minimal income, minimal housing, or minimal education.

A major obstacle to anchoring welfare entitlements in the implied constitutional right to privacy is that, in the words of Justice Louis Brandeis, privacy essentially means "the right to be let alone," by government as well as by one's fellow citizens. In other words, is privacy not a negative right? The reformers' response is that the negative rights of property and life do not mean that the government should leave someone alone when he is being assaulted or his house is burning. In a similar way, government cannot insure privacy by leaving alone the destitute. It must provide financial assistance. Negative rights, in other words, inexorably yield positive rights.

Equality and the Safety Net

Does justice demand that the state eliminate the most serious privations associated with poverty—lack of adequate food, housing, medical care, education—or does it require that the gap between the rich and the poor be narrowed or even eliminated? Which is the real evil, poverty or inequality? Advocates of a constitutional basis for welfare split on this issue. Some identify the evil as "absolute privation"; others abhor "relative deprivation." The latter adopt a more far-reaching view of justice which assumes that equality of result is of higher worth than equality of opportunity. They reject, however, a strict equality in condition, which their premises imply, because it would remove all incentive to produce beyond what one can consume. Equality of result, they acknowledge, would in fact become an equality of poverty. Because individual incentives are necessary to generate a wealthy society, the least-advantaged are actually better off in a system that allocates unequal shares than in one that allocates equal proportions. The adherents of this modified equality of result, however, insist that every



Lafayette-Douglass Public Housing Project, Baltimore, Maryland. Library of Congress.

stratification in income and accumulated wealth must be scrutinized constantly to determine whether it in fact serves the needs of the least well-off. They reject the familiar "safety net" image because it assumes that want rather than inequality is the evil to be eliminated.

Some advocates have attempted to anchor welfare entitlements in the Fourteenth Amendment's guarantee that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Confronted with what appears to be a prohibition on discriminatory government *action*, they reinterpret the clause as a prohibition on government *inaction*. In their hands, the equal protection clause becomes the source of substantive rather than procedural rights. If the state tolerates private conduct that produces inequality it has denied the poor "equal protection of the laws by treating unequals equally." They conclude that "to rectify these denials of equal protection the state may be required . . . to perform an 'affirmative duty'." Anatole France expressed a similar thought in his quip that the law in its majesty equally forbids the rich and the poor to sleep beneath bridges. The affirmative duty means, they say, that government is constitutionally obligated to fulfill "fundamental interests" or "just wants" for those who cannot afford them. Their view is consistent with the social safety net approach and the definition of equality as equality of opportunity.

Intention of the Framers

According to this school of scholars and judges, whatever provision is said to render the Constitution at war with poverty and inequality—that relating to free speech, equal protection, due process, privacy, or property—the result is a public obligation to provide a national welfare system. The system could take the form of payments in kind—food, housing, clothing, education, medical care, legal assistance—or payments in cash, i.e., a guaranteed minimum income or negative income tax. The key difference from the existing policy is that this redistribution of wealth would be mandated by the Constitution and removed from the discretion of legislators. These entitlements could be enforced in court if a legislature did not honor them. Precedents for judicial intrusion on the legislative taxing and spending powers have accumulated since the early 1970s when federal district courts began to order states to expend millions of dollars to alleviate unconstitutional conditions in their prisons and mental hospitals. The stakes of this controversy are high indeed.

A major roadblock to the judicial discovery of a constitutional right to welfare is that such a right is inconsistent with the concept of equality embedded in both the letter and genius of the Constitution. The views expressed in this novel doctrine are at war with the framers' understanding. That justice, in their opinion, does not mandate the welfare state is evident, for example, in *Federalist* No. 10, written by James Madison, "father of the Constitution" (including the Bill of Rights):

> The rights of property originate [from] the diversity in the faculties of men . . . . The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results.

What the reformers dispute is that the framers' intent is relevant to any discussion of what the Constitution means today.

Unlike those who believe that, because a person's intelligence or aptitude is not the product of free choice, it is immoral to reward the gifted and talented, Madison regards security for the fruits of nature's gifts to be "the first object of government." Thus, to Madison, laws that take from the rich and give to the poor violate the moral principle of desert. A just society, according to Madison and the other founders, is unequal because it is free.

The reformers do not in fact dispute this reading of the framers' intent. What they dispute is that the framers' intent is relevant to any discussion of what the Constitution means today. The Constitution, they say, is a living document with no fixed meaning. The words are empty vessels into which Supreme Court justices each generation pour in new meaning. As Justice Felix Frankfurter put it, privacy, due process, and other constitutional principles are "not confined within a permanent catalogue of what may at a given time be deemed the limits on the essentials of fundamental rights." Changes in social conditions inevitably produce changes in constitutional meaning. "The economic shift from a *laissez faire* to a welfare state system," says one reformer, "requires appropriate changes in legal conceptions in order that the law may remain viable."

The proponents of constitutionalizing the safety net must, therefore, convince the American people of the truth of two propositions: (1) justice requires the welfare state, and (2) the Constitution is, in the final analysis, whatever the judges say it is. On the outcome of this effort depends the nature of the Constitution of the twenty-first century.

Suggested additional readings:

C. B. Macpherson, ed., *Property: Mainstream and Critical Positions* (1978).
J. R. Pole, *The Pursuit of Equality in American History* (1978).
John Rawls, *A Theory of Justice* (1971).
Jacobus tenBroek, ed., *The Law of the Poor* (1966).

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Students register at the University of Maryland, 1960. © Washington Post. District of Columbia Public Library.

DOCUMENTS

The Separation of Powers: John Adams' Influence on the Constitution

by GREGG L. LINT AND RICHARD ALAN RYERSON

John Adams, revolutionary leader, diplomat, first vice-president of the United States, and its second president, did not attend the Constitutional Convention. Serving in London as the United States' first minister to Great Britain, he could have no direct impact on the outcome of the discussions in Philadelphia. As the author of *Thoughts on Government* (1776) and the Massachusetts Constitution of 1780, however, his political ideas, especially concerning the separation of powers, had helped shape the thought of every delegate to that epochal meeting. For it was Adams, more than any other of the nation's founders, who had thought, spoken, and written in defense of this concept for over twenty years.

The Student of the British Constitution

John Adams came to his views on government from his beliefs about the nature of human beings. Throughout his long life, Adams remained firmly convinced that all men were subject to inordinate self-love. This invariably created a keen desire for unmerited respect, fame, and power that could ruin any government. In an unpublished newspaper essay written in 1763, when he was only twenty-seven, he opened with the maxim, "All men would be tyrants if they could," then portrayed the abuses of unchecked power in the starkest colors, and concluded by expounding the practical implications of this human condition:

> *No simple Form of Government can possibly secure Men against the Violences of Power. Simple Monarchy will soon mould itself into Despotism, Aristocracy will soon commence an Oligarchy, and Democracy will soon degenerate into an Anarchy . . . and every one of these will soon mould itself into a system of subordination of all the moral Virtues, and Intellectual Abilities, all the Powers of Wealth, Beauty, Wit, and Science, to the wanton Pleasures, the capricious Will, and the execrable Cruelty of one or a very few.*
>
> **"An Essay on Man's Lust for Power", August 1763, *The Papers of John Adams*, vol. 1, p. 83.**

Long after the American Revolution was over, Adams re-read this youthful essay and commented: "This last Paragraph has been the Creed of my whole Life and is now [1807] as much approved as it was when it was written."

In 1763, however, Adams believed that under the British constitutional system the people of New England, armed with their effective system of public education and their active dissenting ministry, could defend their rights against any attack. The Massachusetts charter of 1691, he explained, had placed an important power in the hands of the common voter:

> *We have a check upon two branches of the legislature, as each branch has upon the other two; the power I mean of electing, at stated periods,* one *branch [the House of Representatives], which branch has the power of electing another [the Council]. It becomes necessary to every subject then, . . . to examine and judge for* himself *of* the tendency *of political* principles *and* measures. *Let us examine them with a sober, a* manly, *a* British, *and a* Christian *spirit.*
>
> **"U," in the *Boston Gazette*, August 29, 1763, *The Papers of John Adams*, vol. 1, p. 81.**

In John Adams' earliest political thought, Britain's constitution and its Massachusetts descendant needed no reformation:

> *Were I to define the British constitution, therefore, I should say it is a limited monarchy, or a mixture of the three forms of government commonly known in the schools, reserving as much of the monarchical splendor, the aristocratical independency, and the democratical freedom, as are necessary, that each of these powers may have a controul both in legislation and execution, over the other two, for the preservation of the subjects liberty. . . . And it is [the] reservation of fundamentals, of the right of giving instructions [to representatives], and of new elections, which creates a popular check, upon the whole government which alone secures the constitution from becoming an aristocracy, or a mixture of monarchy and aristocracy only.*
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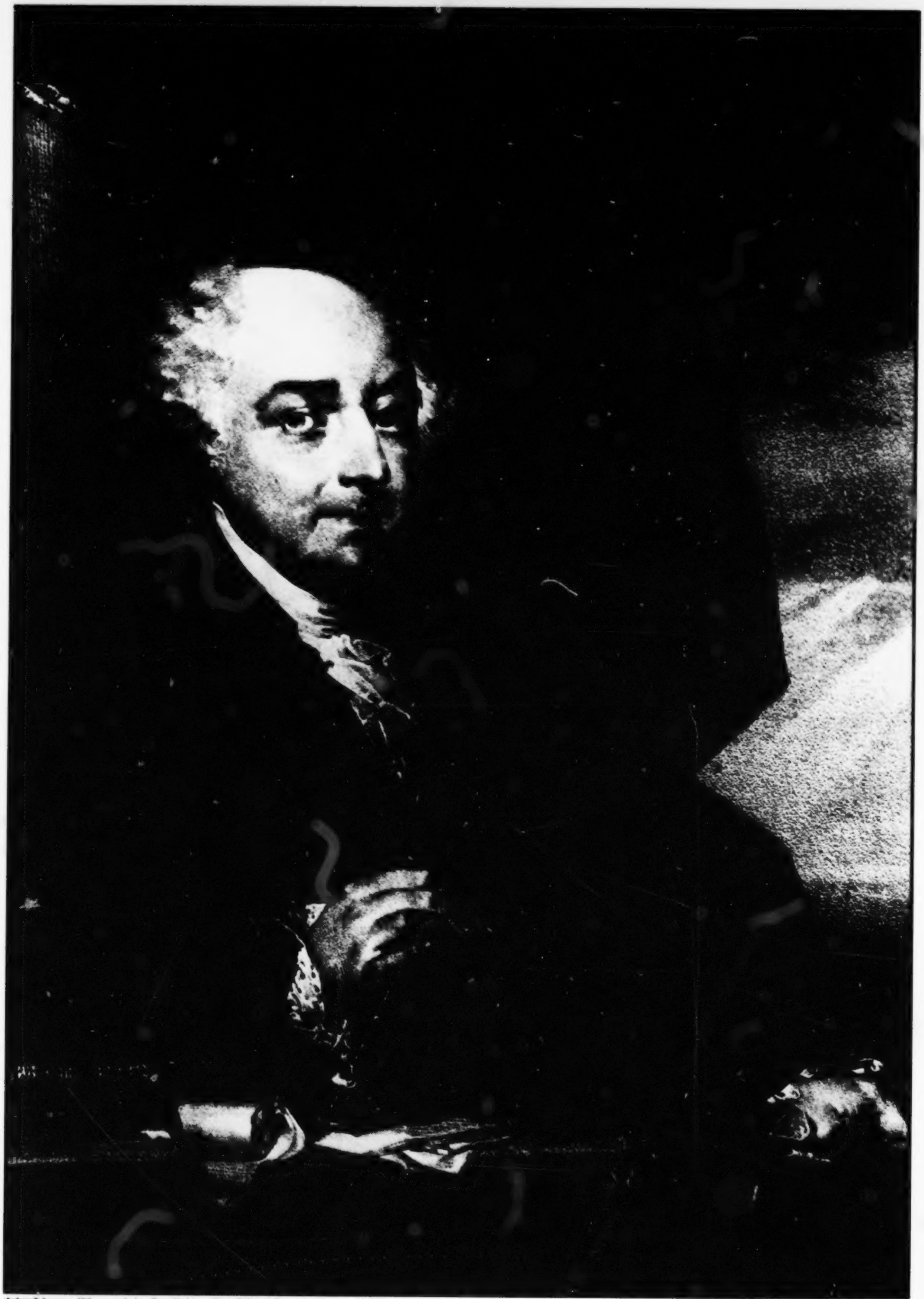
> ***Boston Gazette*, Jan. 27, 1766, *The Papers of John Adams*, vol. 1, pp. 167-168.**



John Adams, *lithograph by Pendleton after Gilbert Stuart. Library of Congress.*

The preservation of this constitutional system, however, depended upon each branch of government jealously guarding the precise, formal boundaries of power that fixed its proper constitutional position relative to the other two branches. As the imperial conflict between Great Britain and her colonies grew, John Adams began to study the historical development of Britain's complex, largely unwritten constitution. He soon discovered that the constitutional forms upon which liberty so much depended were often newer and less secure in England, and in America, than he had supposed. In early 1773 he wrote a series of learned newspaper essays on "The Independence of the Judges," in which he demonstrated that the Crown appointment of judges on terms of good behavior, making them immune from removal by arbitrary executives or tyrannical kings, was neither ancient, nor protected by the common law, but was of recent institution, and thus relatively weak and subject to attack by unprincipled Crown officials or members of Parliament.

The mounting conflict between Massachusetts' patriot leaders and Great Britain further refined both John Adams' appreciation of a balanced constitution and his awareness of its vulnerability in British North America. In January 1773 he was chosen to draft the response of the Massachusetts House of Representatives to Governor Thomas Hutchinson's sweeping assertion of Parliamentary supremacy in America. The reply denied this supremacy in the strongest terms yet used in America, but it concluded by accepting the necessity of maintaining certain powers of the Crown.

> *And should the People of this Province be left to the free and full Exercise of all the Liberties and Immunities granted to them by [the] Charter [of 1691], there would be no danger of an Independance on [i.e. from] the Crown. Our Charters reserve great Power to the Crown in its Representatives [the royal governors], fully sufficient to balance, analagous to the English Constitution, all the Liberties and Privileges granted to the People.*
>
> **Massachusetts *House Journal*, 1772–1773, pp. 178-190, *The Papers of John Adams*, vol. 1, pp. 329-30.**

At the height of their passion against an overbearing Parliament and a host of arbitrary and corrupt ministers and officers of the Crown, John Adams and his colleagues firmly believed that the local components of Massachusetts' government, popular and legislative, must be balanced by the more cosmopolitan powers of Crown prerogative. Only this balance could insure that the democratic elements of their constitution would not overwhelm its monarchical and aristocratic elements, causing the government to degenerate into anarchy.

The Revolutionary Lawgiver

The events of the next two years, however, permanently transformed John Adams' political world, and required a new approach to America's constitutional problems. In 1774 the British government, in response to the Boston Tea Party, closed the port of Boston, revised the Massachusetts Charter by parliamentary statute, and sent a military governor with an army of occupation to the province. Britain's sudden, unilateral alteration of its constitutional relationship to Massachusetts, followed by America's successful establishment of provincial congresses and the First Continental Congress, soon convinced Adams that the monarchical and aristocratic elements of a British-style constitution need not be centered in England, nor based on an inherited monarchy and a landed, titled aristocracy.

As the imperial crisis escalated toward war in the winter and spring of 1775, John Adams turned anew to those seventeenth-century English authors who had developed the revolutionary principles that America's patriot leaders held so sacred: Algernon Sidney, John Locke, and above all James Harrington, whose *Commonwealth of Oceana* (1656) had proposed an elaborate republic to replace England's recently abolished monarchy. In twelve scholarly newspaper essays written on the eve of the battles at Lexington and Concord, John Adams, as "Novanglus," moved into uncharted constitutional waters. By March, he had come to view the British constitution in a radically new light:

> *If Aristotle, Livy, and Harrington knew what a republic was, the British constitution is much more like a republic than an empire. They define a republic to be* a government of laws, and not of men [*from Harrington,* Oceana]. *If this definition is just, the British constitution is nothing more or less than a republic, in which the*

Birth place of John Adams, Library of Congress.

> *king is first magistrate. This office being hereditary, and being possessed of such ample and splendid prerogatives, is no objection to the government's being a republic, as long as it is bound by fixed laws, which the people have a voice in making, and a right to defend.*
>
> **"Novanglus," *Boston Gazette*, March 6, 1775, *The Papers of John Adams*, vol. 2, p. 314.**

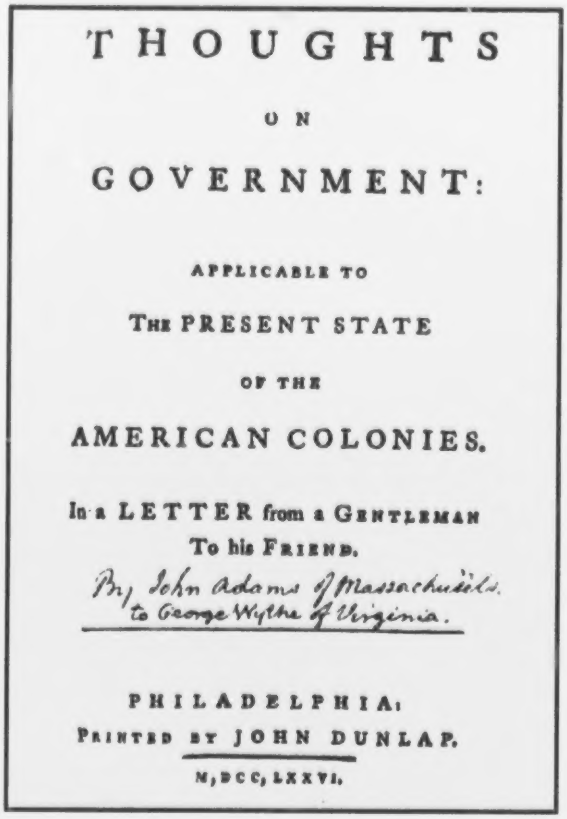
Once he had seized this new vision of what a just constitution might be, John Adams turned his thoughts increasingly to the plight of America's royal provinces. Suddenly stripped, by the rapidly spreading rebellion, of royal officials who could command the respect of their people, these colonies were in desperate need of executive and judicial authority that could maintain public order and allow the war with Britain's invading armies to proceed. Provincial leaders from north and south soon beseiged the Continental Congress for guidance. That summer and fall John Adams, who represented Massachusetts in Congress, urged his colleagues to advise his home province, and then New Hampshire, to set up new governments without Crown authority, although he did not yet advocate formal independence from Great Britain. Congress, to Adams' exasperation, refused to advise these bold measures, but the debates on these occasions set him to thinking hard about the best form for new American constitutions. By November 1775, John Adams was ready to step forward as America's first lawgiver.

The immediate occasion of Adams' debut as a constitution-maker was an evening's conversation with his Virginia colleague, Richard Henry Lee, who wanted Adams' thoughts as a guide to reforming Virginia's government to meet the challenge of the Revolutionary crisis. But Adams' carefully phrased letter of the following day reveals a mind long absorbed with the details of constitutional structure. Many of these details were simply taken from the Massachusetts Charter of 1691, which Adams had always revered, but the heart of his letter lay in several clauses in which he set forth his broader convictions about constitutional government:

John Adams to Richard Henry Lee,
Philadelphia, November 15, 1775
(The Papers of John Adams, vol. 3, pp. 307-8.)

> *A Legislative, an Executive and a judicial Power comprehend the whole of what is meant and understood by Government. It is by balancing each of these Powers against the other two, that the Effort in human Nature towards Tyranny can alone be checked and restrained and any degree of Freedom preserved in the Constitution.*
>
> *Let the Governor, Council, and House be each a distinct and independant Branch of the Legislature, and have a Negative on all Laws.*
>
> *Let all Officers and Magistrates civil and military, be nominated and appointed by the Governor, by and with the Advice and Consent of his Council.*
>
> *Let the Judges, at least of the Supream Court, be incapacitated by Law from holding any Share in the Legislative or Executive Power, Let their Commissions be during good Behaviour, and their Salaries ascertained and established by Law.*

In establishing such a government, Adams initially preferred that the popularly elected House choose the Council, and that both jointly choose the Governor, but he added that the legislature, "if it is thought more beneficial," might leave the election of the Governor and Council to the people "as soon as affairs get into a more quiet Course." In other passages, too, he stressed the need to adapt



THOUGHTS
ON
GOVERNMENT:

APPLICABLE TO
THE PRESENT STATE
OF THE
AMERICAN COLONIES.

In a LETTER from a GENTLEMAN
To his FRIEND.
By John Adams of Massachusetts.
to George Wythe of Virginia.

PHILADELPHIA:
PRINTED BY JOHN DUNLAP.
M,DCC,LXXVI.

Library of Congress.

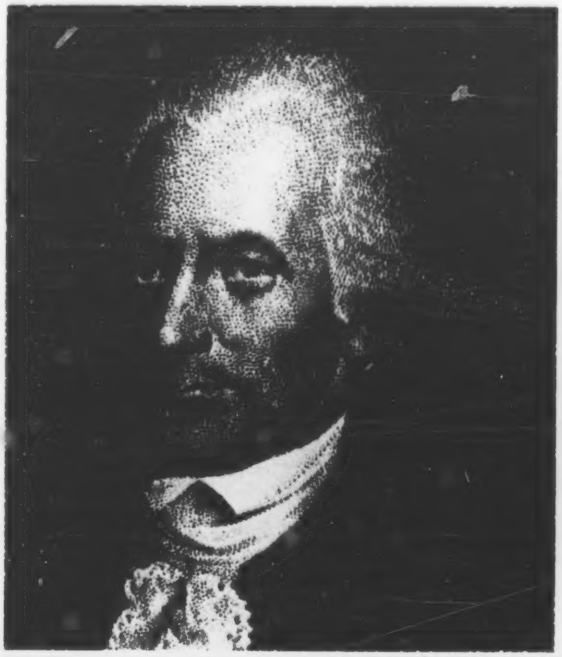
a constitution to the needs of a particular people, and he imagined that thirteen provinces might have thirteen different constitutions. On the separation and balance of powers, however, Adams stood firm, in this letter and in every succeeding statement to the end of his life.

The model of government presented in his letter to Lee became the basis for John Adams' first celebrated and widely influential constitutional plan, his *Thoughts on Government*, which appeared in Philadelphia in April 1776. Adams insisted on publishing this pamphlet anonymously, although the secret was not kept long. In May he dismissed his essay, which was intended as a practical guide for several colonies that were about to frame new constitutions, as a "hasty hurried Thing and of no great Consequence." But the tract is a succinct, well-written statement of his views, in 1776 and for decades thereafter, of how a government ought to be constructed. The model of government in *Thoughts* followed his November letter to Lee exactly, but Adams added his reasons for preferring each structural feature of his plan. He began by flatly asserting that "the blessings of society depend entirely on the constitution of government"; some models would advance human happiness, others would prevent it. Moreover, echoing his "Novanglus" letters of 1775, he declared that "there is no good government but what is Republican," and, quoting Harrington again, "the very definition of a Republic is 'an Empire of Laws, and not of men'."

Turning to his model, Adams set at its center a representative Assembly that "should be in miniature, an exact portrait of the people at large. It should think, feel, reason, and act like them." This Assembly, however, must never be allowed to become the whole government—as some Americans were then inclined to make their reformed legislatures, and as Pennsylvanians very nearly did five months later, following the Declaration of Independence. Any all-powerful legislature would soon be subject "to all the vices, follies and frailties of an individual," with no controlling, corrective power. Such an Assembly would grow ambitious and avaricious in the absence of any opposition, and it was, in any event, structurally unsuited for executive and judicial roles.

Moreover, Adams declared, even to place all legislative power in one house would concentrate that power too strongly; a second, upper house, or Council, was needed "as a mediator between the two extreme branches of the legislature, that which represents the people and that which is vested with the executive power." (Adams considered the governor a part of the legislative power because he could sign or veto legislation.) And that executive, Adams believed, ought to have an absolute veto over the Assembly and Council as a final check upon the legislative power. (This last opinion was almost universally unpopular in America, but Adams never retreated from it.) Adams again favored the election of the Council by the Assembly, and of the Governor by both houses, as he had in November, but he was not concerned that any province might prefer to choose the Governor and Council by popular vote, so long as they were granted the independence that they needed to balance the power of the Assembly. Finally, he insisted that "the judicial power ought to be distinct from both the legislative and the executive, and independent upon [of] both, that so it may be a check upon both, as both should be checks upon that."

The impact of John Adams' brief pamphlet was immediate and widespread. Of the eight constitutions that were framed in the year following its appearance, *Thoughts on Government* directly influenced three, those of New Jersey, Virginia, and North Carolina, and probably two others, in Maryland and Delaware. Adams himself felt that New York's Constitution of 1777 showed the stamp of his views. Only Pennsylvania and Georgia emphatically rejected his model. While it is often observed



Richard Henry Lee, engraving by P. Maverick from a drawing by Longacre. Library of Congress.

James Harrington. Library of Congress.

that the earliest state constitutions created weaker executives and, in a few cases, more dependent judiciaries than either their colonial antecedents or the revised constitutions that succeeded them after the war with Britain ended, they had far stronger executives and more independent judiciaries than many leaders in each of these states desired. The considerable success of those favoring the separation and balance of powers, in the strongly anti-executive political climate of 1776, owes greatly to John Adams.

The Massachusetts Constitution

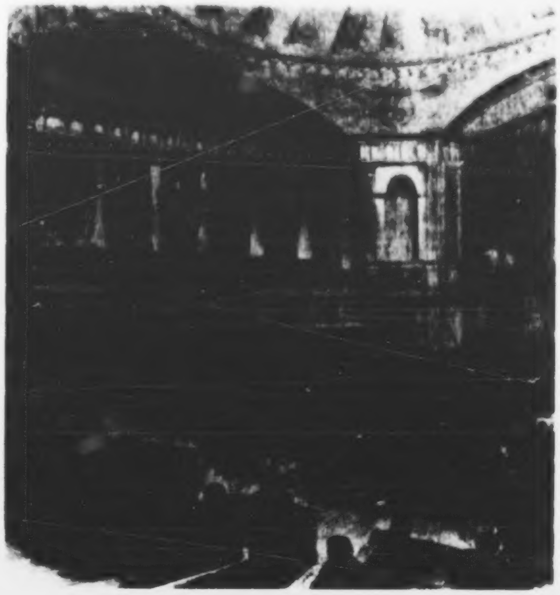
It was John Adams' firm conviction, however, that the new American constitutions of 1776–1777 were all imperfect in greater or lesser degree. Few of them had been framed by special conventions elected for that purpose, many restricted their judges to set terms in office, many lacked a bill of rights to protect the citizen, and nearly all had weak executives. And not one had ever been ratified by the people. With the exception of a bill of rights, Adams had recommended each of these features, either in *Thoughts on Government*, or to his colleagues in Congress.

In 1779, after three years of constant congressional and diplomatic labors during which he had little occasion to think or write about constitutions, John Adams unexpectedly got his grand chance to show Americans how a constitution should be written. In September of that year he was chosen to draft a constitution for a convention especially elected to that role by the voters of Massachusetts. Adams did not attempt to translate his *Thoughts on Government* directly into a working constitution, however, for the past three years had seen several important constitutional developments. First, Virginia, and then Pennsylvania, Maryland, and North Carolina, had incorporated highly popular bills of rights into their constitutions, and Adams quickly saw how useful a bulwark against tyranny they could be. Second, where Adams had been unsure, in *Thoughts*, whether Americans could effectively choose senators, councilors, and governors, as well as assemblymen, by popular vote during the unsettled conditions of war, experience had shown that they could—and that they would not accept any other method of electing them. Finally, Massachusetts' voters had already rejected one constitution, drawn by the legislature, that had not carefully attended to the voters' wishes.

Adams remained convinced, however, that three hard years of war had only proven his central contentions: legislative power must be divided between two houses, governors must be independent of legislatures, with a veto and strong appointment powers, and judges must hold their offices for unlimited tenure, on good behavior. In the text that he presented to the drafting committee, which was reported to the full convention with little alteration, he forthrightly declared his political faith:

> *In the government of Massachusetts, the legislative, executive, and judicial power, shall be placed in separate departments, to the end that it might be a government of laws and not of men.*
>
> **Introduction to the Frame of Government, *Report of a Constitution* . . . (Boston, 1779), p. 15.**

The whole convention then took this language and recast it in an even more compelling form, as Article XXX (the last) of the Declaration of Rights:



Massachusetts House of Representatives, 1773. (251-4/1 Box 2, Archives of The Commonwealth, Boston, Mass.)

> *In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative or judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.*
>
> **Journal of the Convention (Boston, 1832), p. 227.**

In drafting this constitution, Adams took a gamble. The towns had emphatically rejected the proposed constitution of 1778, objecting in several instances to its property qualifications for those voting for senators, and to the appointive powers of the governor and senate. Yet Adams, after studying the 1778 document carefully, made the governor more powerful and independent, strengthened the senate, called more clearly for a supreme judicial court, and instituted property qualifications for those voting for both assemblymen and senators. At the same time, he satisfied other objections to the 1778 constitution, primarily by writing a comprehensive bill of rights and by more carefully separating the legislative, executive, and judicial roles into distinct departments, which many Massachusetts voters desired as keenly as did Adams himself. By heading the sections of the text that described each department's powers with prominent titles, Adams invited each voter to visualize the principles of separation and balance. His gamble, and that of the convention, paid off. The Massachusetts Constitution of 1780, the first in America to be submitted to the people for ratification, was approved, despite severe criticism of several of its sections. Remarkably, it survives to this day, the oldest functioning written constitution in the world.

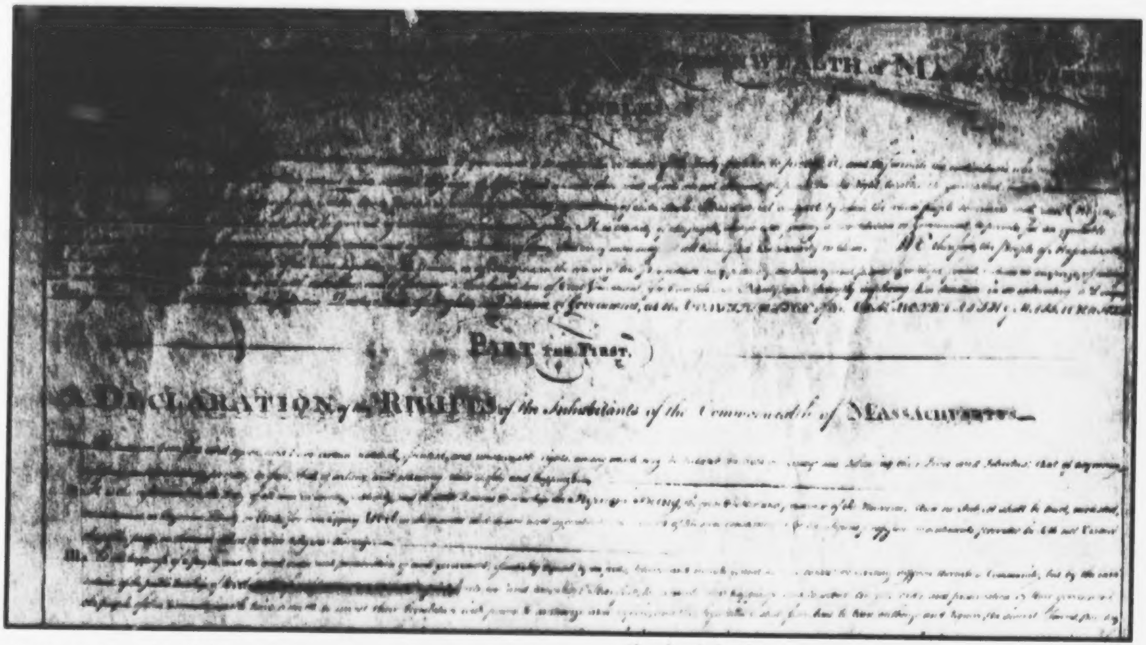
The Defender of Balanced Republican Government

For seven years following his authorship of Massachusetts' new constitution, John Adams' total involvement in diplomacy kept him from writing anything about constitutions beyond occasional remarks in private letters. When he next turned his attention to political theory, in the fall of 1786 while still in London, he at first had a European audience in mind, rather than an American one. His three-volume *Defence of the Constitutions of the United States* (1787-88) was an extended survey of the ancient origins and modern development of balanced republican government in Europe. It was initially designed to convince Europeans, and especially the Dutch, who were just then attempting a political revolution, that America's *state* constitutions, particularly those whose design he had influenced in 1776, and his own Massachusetts Constitution of 1780, represented the highest development of the European political tradition and were the only sound models for new constitutions. As he neared the completion of the first volume of the *Defence*, however, Adams learned of Shays' Rebellion in Massachusetts. Fearful that his beloved constitution might be destroyed in the ensuing civil strife, he hastily added a few passages to the text that spoke directly to Americans, so that he might call them back to the constitutional restraint of 1780.

This first volume of the *Defence* reached Philadelphia in the spring of 1787, just as the delegates were gathering for the Constitutional Convention. It was immediately and widely read and, for the most part, approved. But Adams' latest work did not offer the founding fathers fresh advice or new ideas for constructing a constitution, nor had Adams intended that it should. Writing to John Jay on 22 September 1787, he remarked:

> *[The delegates] want no assistance from me in forming the best possible plan; but they may have occasion for underlaborers, to make it accepted by the people. . . . One of these underworkmen, in a cool retreat, it shall be my ambition to become.*
>
> **C. F. Adams, ed., *Works of John Adams* (Boston, 1853), vol. 8, p. 452.**

The *Defence*, both in its first and subsequent vol-



PART the FIRST.

A DECLARATION of the RIGHTS of the Inhabitants of the Commonwealth of MASSACHUSETTS

Massachusetts Constitution of 1780. (11A-1/3 Notebook 2, Archives of The Commonwealth, Boston, Mass.)

umes, was as its title suggests an explication of what American constitutional thinkers had already done. Adams, who referred only rarely to the Convention, whether before, during, or immediately after its sitting, seemed largely unaware of that gathering's potential to introduce novel constitutional ideas into the American political tradition. Adams' constitutional writings before 1780 had an enormous impact upon the Convention, as the baseline of most delegates' political thought, absorbed through their state constitutions; but the influence of his *Defence*, in either the Convention or the ratification debates that followed, is both difficult to assess and far less important. The Massachusetts Constitution of 1780 is crucial to an understanding of the U.S. Constitution; the *Defence of the Constitutions of the United States* is largely peripheral to that document.

As his letter to Jay suggests, however, Adams saw his role as one of supporting and explaining the Constitution, as he did in occasional letters. Upon reading the document in November 1787, he concluded that the president, lacking an absolute veto and forced to face reelection every four years, needed stronger powers to counter-balance the Congress. But he also knew that the federal executive was stronger than the governors of most of the states, and in other respects he was well pleased with the new frame of government. The United States Constitution, with its sharply differentiated two-house legislature, its relatively strong executive, and its independent judiciary, embodied just those principles for which John Adams had striven so faithfully for twenty-five years. To judge the success of his struggle, one need only compare the central principle of his draft version of the Massachusetts Constitution with the opening sentences of the three principal articles of the U.S. Constitution. What in 1779 read:

> *the legislative, executive, and judicial power, shall be placed in separate departments, to the end that [the government of Massachusetts] might be a government of laws and not of men. . . .*

had by 1787 become the familiar:

> *All legislative Powers herein granted shall be vested in a Congress. . . . The executive Power shall be vested in a President. . . . The judicial Power . . . shall be vested in one supreme Court. . . .*

Select Bibliography:

John Adams' constitutional writings through 1776 are in Robert J. Taylor and others, eds., *The Papers of John Adams*, vols. 1-4 (Cambridge, Mass., Harvard University Press, 1977, 1979). The text of the Massachusetts Constitution of 1780, with accompanying documents, appears in Robert J. Taylor, ed., *Massachusetts, Colony to Commonwealth* (New York, W. W. Norton, 1961). The best analysis of the constitutional thought of the Revolutionary era is Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill, University of North Carolina Press, 1969). Valuable works on John Adams' constitutional ideas are Correa M. Walsh, *The Political Science of John Adams* (New York, G. P. Putnam's Sons, 1915); Edward Handler, *America and Europe in the Political Thought of John Adams* (Cambridge, Mass., Harvard University Press, 1964); and John R. Howe, *The Changing Political Thought of John Adams* (Princeton, Princeton University Press, 1966).

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For the Classroom

Selections on the Constitution from Secondary School History Books of Other Nations

E PLURIBUS UNUM
LIBERTY
CONSTITUTION & LAWS

In 1976, the U.S. Office of Education of the Department of Health, Education and Welfare published *The American Revolution: Selections from Secondary School History Books of Other Nations* [cited below as *TAR*]. Now out of print, this book included sections about the Constitution in most of the entries. These selections follow.

Argentina

(Translated from Oscar Secco Ellauri's *Los Tiempos Modernos y Contemporáneos* (5th ed.), Buenos Aires, Argentina: Editorial Kapelusz, 1969. The material is designed for the 9th year of a 12-year primary-secondary school cycle.)

The Constitution of 1787.–A Convention meeting in Philadelphia drafted the Constitution of 1787 which, with some amendments, still governs the United States of America.

The Convention named Washington President, and the latter's prudent action contributed to eliminating the violent opposition that appeared to impede approval of a constitution.

The Constitution of 1787 created a federal and democratic republic, organizing, on the one hand, the central government with its legislative, executive, and judicial powers, and on the other, the relationships among the States of the American union.

This Constitution, because of its democratic and republican nature and its structure, which for the first time embodied the division of powers, influenced Europe through the French Revolution, and the rest of America at the time when Latin American independence was effected. (*TAR*, p. 20)

Egypt

(Translated from A. Radwan, M. Afifi, and M. El-Ghanam's *Ousool Elalam Elhadith: Muntha Elnahtha Elorupia Hata Waktana Elhather* (Foundations of the Modern World: From the European Renaissance to Modern Times). Cairo: Government Press, 1974. The material is designed for the 10th year of a 12-year primary-secondary school cycle.)

The American Republic.–The first step after the success of the American Revolution against English imperialism was to lay a foundation for the governance of the United States. In September 1787, the representatives of the States gathered for a conference at Independence Hall in Philadelphia in order to establish a constitution for the whole country. At that time each State had ratified its own constitution.

According to this American Constitution, a united federal republic was established without deemphasizing the importance of each State and its freedom to lay down its own special laws. Among the important functions of the Federal Government were the right to issue currency, regulate trade, declare war, and make peace. Each State government had the right to maintain its own police, to regulate its own factories and work agencies, to establish its civil and criminal codes, and to be responsible for the education, health, and welfare of its citizens as well as for other matters related to its internal well-being.

The United States under the Constitution.–As a result of their revolution, the Americans succeeded in establishing their state on the basis of the republican, democratic system. They became the first people to adopt this system in modern times, a system based on a written constitution stemming from the following principles:

–The people are the source of all powers and have the right to amend the Constitution.

–Power is distributed between the Federal Government and the State governments.

–The [Federal] Government's power is divided into major branches: the legislative (the Congress), the executive (the President and his ministers), and the judicial (the courts).

–The Congress has the authority to make laws, the President has the authority to execute them, and the courts uphold the law and the Constitution.

–Officials are to be accountable and the rights of individuals are to be protected.

Consensus on George Washington as President.—after drawing up the Constitution, the Congress, (a name that the conference [at Philadelphia in 1787] has retained ever since) began necessary procedures to elect a President. There was but one man who was invariably viewed by the delegates as being worthy of the presidency. This man was George Washington, and he was elected President unanimously. (*TAR*, p. 43)

France

(Translated from Jean Michaud's *1715–1870, La Formation du Monde Modern*. Collection Jules Issac. Paris: Classiques Hachette, 1966. The material is designed for the 9th year of a 12-year primary-secondary school cycle.)

Organization of the United States

The American war had many consequences. The most important was the creation of a new state, the United States, the first free state ever founded by Europeans outside Europe.

After a lot of difficulties—a financial crisis, political and commercial squabbles between colonies, strong social antagonism between rich and poor—in 1787 the 13 States adopted a Constitution which, in its major outlines, is still in force today. Like the United Provinces[b] in Europe, the United States constituted a federal republic. Each State had its own institutions; but above those 13 State governments there was a federal government responsible for their common affairs: war, diplomacy, currency, and commerce. The executive power was vested in a president; the legislative power, in a Congress made up of two chambers—a Senate, in which each State has two representa-

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[b] Compilers' Note.–At the time of the American Revolution, the "United Provinces" was a political entity in the area now known as the Netherlands.

Carousel horse, 1921, collection of Hoyt and Gail Griffith. Restored by Tobin Fraley Studios, Oakland, CA. Photograph by Gary Sinick, from The Carousel Animal (Zephyr Press, 1983).

tives, and a House of Representatives, in which each State is represented by a number of congressmen proportional to its population. Finally, there were the federal courts, the highest of which is the Supreme Court.

Repercussions in America and in France

The example of the emancipation of the English colonies had profound repercussions. As early as the end of the 18th century, there were uprisings in Spanish America and, 40 years after the Treaty of Versailles, there was nothing left of the Spanish empire on the American continent. In France, the example of the United States was even more swiftly followed. The principles the French *philosophes* had argued and preached were the foundations of the Declaration of Rights in 1774 and again of the Declaration of Independence in 1776. The French had made those principles victorious in America; would they not make them prevail in France itself? Furthermore, the expenditures connected with the war had increased the financial difficulties: Louis XVI had to agree to summon the Estates General into session in 1789. And the convocation of the Estates General marked the beginning of the French Revolution.

Summary

- In 1774, an American Congress published the Declaration of Rights, and then, on July 4, 1776, another Congress proclaimed the independence of the United States.
- The early years of the war were hard for the Americans. But in 1777 they forced the surrender of an English army at Saratoga and that victory won them alliance with France.
- France, backed by Spain, declared war on England (1778). By the Treaty of Versailles (1783), England recognized the independence of her 13 American colonies and restored to France and Spain some of their colonies.
- The Republic of the United States gave itself a federal Constitution (1787). Its example spurred the emancipation of the Spanish colonies in America and in France it hastened the hour of the Revolution. (*TAR*, p. 4)

The Federal Republic of Germany

(Translated from Erich Goerlitz's *Das Werden der Modernen Welt (1648–1900)*. Paderborn-Hannover: Schöingh-Schroedel, 1968. The material is designed for the 9th year of a 13-year primary-secondary school cycle.)

The United States Constitution

During the war, most of the individual states had adopted constitutions that gave only little authority to the Congress as the federal authority. This resulted in considerable internal troubles after the war that could be overcome only through a Constitution for the entire Union. That Constitution materialized in 1787. Human rights, such as were found in the Declaration of Independence and especially in the Constitution of Virginia, became a part of the American Constitution. It implemented the separation of powers into a legislative, an executive, and a judicial branch. The state's mission was to secure the liberty of the individual.

The Constitution left the individual States extensive internal independence but strengthened federal authority to such an extent that a federal state capable of taking action did arise. The President, who is elected for a 4-year term by the people, holds executive authority. The President and the government, which is made up of men who enjoy his confidence, thus do not depend on Parliament [Congress]. Legislative authority is exercised by Congress-Parliament. It consists of two chambers: the House of Representatives, the actual people's assembly, and the Senate, the body representing the individual federal States. The Supreme Court is the third authority here and it must see to it that all measures of the Government agree with the Constitution. To declare war, the President needs the approval of Congress; for treaties, Senate approval is enough.

George Washington was elected first President of the United States in 1789. It was due to his efforts and achievements that the new state soon grew strong internally in spite of considerable tensions. The [French] Declaration of Rights of Man and the American Constitution became models for countries that wanted to build up a liberal democratic system. The American Constitution of 1787, later provided with several amendments, is still in force today.

The 3 million inhabitants were mostly farmers who lived far away from each other. Philadelphia, the biggest city, had about 30,000 inhabitants. Society here differed considerably from European society. There were no privileged classes. America did not experience the burden of an outdated form of society that made political life in Europe appear increasingly questionable. Anybody who worked in America could generally acquire property and thus also political rights. Thus, America became a model for the dissatisfied Europeans. Out of the 30,000 German mercenaries who—sold into English service by their princes—had fought against the Americans, 12,000 remained in the country whose freedom and independence they were supposed to have prevented. Among the French, who fought on the side of the Americans, it was especially the Marquis de La Fayette (1757–1834) who was a convinced supporter of the new political ideas. Freedom, which had been implemented in

America, was something that many citizens in Europe yearned for. (*TAR*, p. 8)

India

(From K.S. Yajnik, R.H. Dave, Lora Tibbets, Om Prakash, B. Ghesh, T.S. Mehta, Q.M. Zaidi, R. Vajreshwari, and Arjum Dev's *Social Studies: A Textbook for Secondary Schools*. Vol. 1 (rev. ed.). New Delhi: National Council of Educational Research and Training (NCERT), 1973. The material is designed for the 9th or 10th year of an 11-year primary-secondary school cycle. (Original in English.))

The American Constitution

When the war of independence started, each of the thirteen colonies was a separate state with its own army, boundaries, customs duties and finances. But they co-operated against a common enemy. In 1781, as states of the United States, they united through a plan for a national government called the Articles of Confederation. They sent their representatives to the Congress, but the national government under the Articles was very weak. It could not levy taxes, nor regulate trade between the states. It had no rights over the states and their people. There was jealousy and quarrelling. The new nation was about to fall apart. A constitutional convention was called in Philadelphia to frame a new constitution which came into effect in 1789. It established a republican form of government at a time when states in other parts of the world were governed by monarchies. The American Constitution set up a federal system under which powers were divided between a central or federal government and the state governments.

Under the constitution, the federal government became the supreme authority, though the individual states retained a considerable amount of independence in local matters. The executive functions were separated from the legislative or law-making functions. A president, elected for a term of four years, was the chief executive authority. The American Congress, or law-making body, consisted of two houses—the House of Representatives, whose members were elected by each state on the basis of population, and the Senate made up of two members from each state. The Supreme Court was the chief judicial authority in the country and had very wide powers. It was the guardian of the constitution and had the power to declare laws unconstitutional.

Jefferson, the author of the Declaration of Independence, and his followers campaigned for the addition of a Bill of Rights to the federal constitution. This was done through ten amendments which guaranteed many rights to the American people. The most noted of these are freedom of speech, press, and religion, and justice under law.

The constitution marked the emergence of the United States of America as a nation in world history. It was the first republican constitution ever framed in history and is still in operation.

Significance of the American Revolution

The words of the Declaration of Independence regarding the equality of all men and the 'unalienable rights' of men electrified the atmosphere in America and outside. Lafayette, the French general who fought on the side of American revolutionaries, was soon to become a hero of the French Revolution. Thomas Paine, a kind of international revolutionary, also participated in the French Revolution. By its example, the American Revolution inspired many revolutionaries in France and revolutions in Europe later in the 19th century. It encouraged Spanish and Portuguese colonies in Central and South America to rebel and gain their independence.

The new achievement of the American Revolution was the establishment of a republic. The republic was not truly democratic. The right to vote was limited. Negroes—still more so American Indians, and women had no vote. Election laws in all states favored men of property for many years. But progress towards democracy began. In some states, state religion was abolished, along with religious qualifications for holding public offices. The foundations of aristocracy were attacked, by abolishing such privileges as *quitrents* and titles. But for slavery, compared with other governments at that time, the American republic was very democratic. (*TAR*, pp. 77–78)

Israel

(Translated from Michael Ziv and Shmuel Ettinger's *Divrey hayamin, Kerech Gimel, Hazman Hakhadash, Khelek Alef* (History, vol. III, Modern Times, pt. 1). Haifa: Yovel Publishers, Ltd., 1960. The material is designed mainly for the 11th year of a 12-year primary-secondary school cycle.)

The Northwest Ordinance of 1787

. . . The Ordinance of 1787 determined the future road of development of the United States and the methods of its colonization in North America throughout its extension to the shores of the Pacific Ocean. The States that were established during the 19th century became a part of the United States in accord with the principles of this Ordinance. Meanwhile the movement for unification grew. The followers of the young and able politician Alexander Hamilton and the man of science James Madison brought up a proposal to convene a convention of States' representatives to discuss means of improving the constitution of the Union. The convention met in spring 1787 in Philadelphia. In it participated representatives of 12 States, including, among others, the old and experienced leaders of the generation, Franklin and Washington, and also the younger ones, Hamilton and Madison. The representatives, whose number reached 55, were subsequently called the Fathers of the Constitution to honor them. Among the leaders known from the time of the struggle for liberation who were absent from the convention were Jefferson, who was then in France, Thomas Paine, and also several others who were opposed to the establishment of a strong central government.

The Dispute on the Principles of the Constitution

During the discussions of the contents of the Constitution, several central problems crystallized, and fundamental differences of opinion arose among the participants concerning desirable approaches to their solution. It became clear very quickly that a new formulation of the Constitution would not be satisfactory, as was at first believed. The small colonies feared that they would lose their independence to the large ones and demand[ed] equal rights in decisionmaking. No less important was the question of the central government's authority in relation to that of the local governments. Several of the participants demanded establishment of a strong central government with broad authority; others were opposed to this in principle. This led to the question of the method that would determine the composition of the individual States' delegations to the central governing bodies—whether according to the principle of equality or according to the size of their populations. It was unclear how the black slaves should be counted, how the President would be elected, and what his authority would be. In the answers that were offered to these questions, conflicts due to economic interests were also reflected, especially conflicts between the industrial-mercantile North and agricultural South. These conflicts found their expression also in the attitude of the participants toward slavery. There also were differences of opinion between those who tended toward an aristocratic form of government—and several of these did not eliminate from consideration the possibility of establishing a monarchy—and the advocates of a full realization of democratic principles of equality.

The Compromise

These problems and the strong differences of opinion connected with them could have precluded any possibility of agreement. The fact that George Washington, who did not lean to any party, was elected president of the convention, that the discussions were held behind closed doors, and that the convention agreed in one of its first sessions to decide questions by simple majority—all these developments smoothed the way to the success of the convention and its redefinition of the governmental institutions of the United States. Its sessions continued for about 5 months and all the various problems in the conflict were settled by compromise. Thus, for instance, a compromise was offered concerning the question of determining States' representation in the organs of the central government, according to which the legislative organ, the Congress, was to be composed of two houses—the Senate and the House of Representatives. To the first, each State, whether small or large, would send two representatives, and to the second house it would send a number of representatives proportionate to the size of its population. The second compromise concerned the slaves, who were essentially concentrated in the South. In order to determine the size of the representation of States in the House of Representatives only three-fifths of the slaves would be taken into consideration. Concerning demands for the abolition of slavery, in accordance with the principles of equality and the basic rights of man, it was agreed that for 20 years the Congress would not involve itself in the question of the importation of slaves and would not impose any duty on them above a fixed sum, and it was decided that there would be an obligation to turn over escaped slaves to their owners. Concerning the democratic principle, it was determined that the members of the House of Representatives would be elected by direct vote, and that members of the Senate would be nominated by the legislative body of each State. Also, the President would be elected by indirect vote.

Ratification of the Constitution

The new Constitution was accepted by a majority of 39 votes out of 55, but among those who voted for it were representatives from all the States. It was decided at the same meeting that it would take effect after ratification by at least 9 States. During the struggle for ratification, which was not an easy matter in several of the States, it became clear that there was a need to make certain changes in the Constitution, but by the summer of 1788 it received the necessary ratification. Within 2 years the ratification was confirmed by all 13 States. In 1789 Washington was elected the first President of the United States of America.

The Constitution of the United States

As has been mentioned, the Congress represents the legislative institution of the state. The President has veto power over the decisions of the Congress, but his opposition will not prevail if a decision is reconfirmed by a two-thirds majority in both Houses. In affairs relating to foreign policy, war, the military, and export-import matters, the Congress decides. According to the original Constitution, the members of the Senate are chosen by the legislatures of the States, but since 1913 they, too, are elected by direct vote. Every 2 years one-third of the Senate members leave, and in their place new ones are elected. The members of the House of Representatives are elected every 2 years.

The executive power is placed in the hands of the President and his ministers (Secretaries), whom he nominates and whose appointment is ratified by the Senate. The competencies of the President, who is simultaneously the head of state and head of government, are very broad. He is the supreme commander of the army and navy, he concludes international treaties and forms alliances with the Senate's ratification. He appoints high officials and judges. The President and his Vice President are elected every 4 years. The Vice President presides as chairman over the Senate, and takes the President's place after his death for the duration of his unexpired term.

The Constitution defines the authority of the central government, but that of the different state governments is defined negatively—that is, all prerogatives that are not explicitly assigned to the central government are reserved to them. They are mostly concerned with local matters: education, traffic, police, hospitals, etc. The States are headed by a Governor who is elected every 2 or 4 years. A legislative body is active by his side; it consists of two houses, which are also elected. The judiciary authority is placed in the hands of a Supreme Court which has very broad prerogatives. The judges of the Supreme Court are appointed for life by the President. They are authorized to decide controversies that arise between the legislative and executive authorities. In addition, it is their duty to decide if the laws and their implementation by government conform to the Constitution.

The authors of the Constitution wanted to assure its solidity, but at the same time to provide the possibility of effecting changes in it when necessary. In accord with this aim it was decided that proposals to change the Constitution would have to be ratified by a majority of two-thirds in the two Houses of Congress and also by three-quarters of the local legislatures. Since 1789 about 2,000 proposals for changes in the Constitution have been made, but only 21 have been ratified. Ten of these were adopted during the first years after the Constitution took force, and they include the ratification of the basic rights of man and citizens and represent the Bill of Rights of the American people (1791).

The Constitution of the United States is the first written republican constitution of modern times. For the first time the basic rights of man and citizens are explicitly noted and listed—rights and freedoms that, subsequently, through various channels, became the foundations of democratic society in the 19th and 20th centuries. The authors of the Constitution consistently implemented the principle of the separation of powers, and each of the three authorities serves as restraint to the others. The task of each is defined: the Congress determines the law, the President implements it, and the Court explains it. To be sure, the President has the opportunity to influence the lawmaking process by means of his right to veto, but the Congress on the other hand can influence the implementation of the law thanks to its right to confirm certain of the President's decisions and its right to judge the President legally under certain conditions. The Supreme Court, on its part, is authorized to set a specific law aside or to void a specific decision of the executive power if it is satisfied that this decision is contrary to the Constitution. To be sure, this mutual interdependence of the authorities is likely to complicate the legislative process and also to hamper the methods of implementation but, at the same time, it serves as a guarantee for the preservation of democracy.

The American Constitution was formulated 170 years ago for a nation of about 3 million people that occupied a territory incomparably smaller than that of today. Since that time the economic, social, and demographic realities of the state have totally changed, as has its international position, yet the Constitution, apart from a few added changes, remains valid. It did not interfere in the development of the American nation, and—except for the war between the North and the South during the second half of the 19th century—that nation had no need for the use of force in order to adapt its Constitution to the changes that took place in society. The foundations of the Constitution gave it sufficient solidity, as well as elasticity, to meet its needs. (*TAR*, pp. 50–52)

Japan

(Translated from Kentaro Murakawa, Namio Egami, Tatsuro Yamamoto, and Kentaro Hayashi's *Shosetsu Sekai Shi* (Detailed World History). (New ed.) Tokyo: Yamakawa Shuppan Sha, 1973. The material is designed for the 10th, 11th, or 12th year of a 12-year primary-secondary school cycle.)

Adoption of the Constitution and Establishment of the United States

After the United States became independent, the 13 States were loosely bound by the Articles of Confederation, and political and economic distress continued because the central government was weak. Therefore a movement to form a stronger central government began to grow, and in 1787 a Constitutional Convention was held in Philadelphia and drew up the Constitution of the United States. This Constitution recognized the broad autonomy of the respective States and provided for the separation of the three powers [of government] by establishing an office of the President to execute the affairs of the United States, a legislature consisting of a Senate for State representation and a House of Representatives for representation of the people, and a judicial authority consisting of the Supreme Court. Then a struggle began between the Federalists, who supported the Constitution, and the Anti-Federalists, who criticized it, thereby creating the basis for political parties.

In this way, the foundation of the United States was laid down, and in 1789 Washington became the first President (1789–97). Moreover, the city of Washington was created and became the capital (in 1800). After that, the United States exerted efforts to recover from the war and to expand her territory, welcomed many immigrants as settlers from Europe, and endeavored to promote the growth of her commerce and industry. (*TAR*, pp. 57–58)

Mexico

(Translated from Ida Appendini and Silvio Zavala's *Historia Moderna y Contemporánea*. Mexico City: Editorial Porrúa, 1974. The material is designed for the 10th year of an 11- or a 12-year primary-secondary school cycle.)

Creation of the Federal Government.—George Washington, of whom it was said that he was "first in war, first in peace, and first in the hearts of his countrymen," Alexander Hamilton, and Benjamin Franklin undertook the enormous task of uniting the 13 colonies, divided among themselves, into a single nation. Seven years had been ample to demonstrate the inadequacies of a confederation that was, from the political and judicial point of view, merely the limited representative of an association of independent States. In 1787 the colonies agreed to the election of a Constitutional Convention that was charged with drafting the Constitution of the 13 States. The convention met in Philadelphia.

The Constitution of 1787.—Washington was elected president of the Convention. His patriotism, his wisdom, and his equanimity were the best guarantee of the outcome of the undertaking.

The agreements reached in 1787 still exist, aside from some reforms, even in our time, in spite of the economic and social changes the nation has experienced.

A federal government was created to transform the 13 colonies into one nation with respect to foreign countries.

The laws issued by the Federal Government apply in matters of war, peace, the army, the navy, money, commerce, weights of measures, the mail, and customs controls.

The federal and democratic republic has on the one hand a central government with legislative, executive, and judicial powers. On the other hand, it respects the local government in each State, and it establishes the relations that should exist among the States.

The executive power.—This is represented by a President, selected by indirect vote of as many electors from each State as the Representatives and Senators sent to Congress. His term of office is 4 years and he may be reelected. He has the power to appoint and remove his cabinet secretaries. In case of resignation, death, or removal of the President, the Vice President succeeds to the reins of government.

The legislative power.—It is represented by the Senate, composed of two members for each State occupying their seats for 6 years, and by the House of Representatives, elected in proportion to the number of inhabitants, and their term of office is for only 2 years. The two chambers constitute the Congress, and it is its duty to make the laws referring to the army, the navy, foreign relations, the national debt, taxes, coinage of money, commerce, mail, customs regulations, weights and measures, naturalization of foreigners, revision of boundaries among the States, and the annexation of new States to the national territory. The original States, numbering 13, are represented by stripes of the national flag, and the present number of States are represented by the 49 stars adorning it.

The judicial power.—It is composed of a Supreme Court and such secondary courts as Congress may deem it necessary to establish.

The three powers are independent and their responsibilities are not overlapping.

The amendments.—The members of the Constitutional Assembly understood that it was necessary to have a certain flexibility in the Constitution so that it could be adapted to the needs of the future. This led to the procedure of amendments, mentioned in one of its chapters. This permits additions, deletions, and modifications when Congress, representing the sovereign will of the people, considers it necessary.

The States of the federation commit themselves mutually to respect each other, to recognize the same rights for the citizens of all States, and to preserve forever the republican form of government.

Laws on rights and guarantees.—These laws appear as the first amendments to the Constitution, at the request of Massachusetts. They declare the right to freedom of thought, press, belief, assembly, and the right of petition before competent authority.

The Constitution of 1787, democratic in its principles, elaborated along the ideas of the natural rights of man, served as a model for the future republican constitutions of the European and American continents. It is the most typical example of the concepts of the liberals of the 18th century.

The first President of the American union was George Washington. (*TAR*, p. 28)

The U.S.S.R.

(Translated from A. V. Efimov's *Novaia istoriia, chast' l, uchebnik dlia vos'mogo klassa srednei shkoly* (Modern History, pt. 1, Textbook for the Eighth Grade of Secondary School). Moskva: Izdatel'stvo "Prosveshchenie" (Moscow: "Enlightenment" Publishers), 1970. The material is designed for the 8th year of a 10-year primary-secondary school cycle.)

The Law Setting Up the Government—The Constitution (from the Latin word constitutio*—establishment).*

After independence was proclaimed, every State became a separate nation with its own armed forces, finances, and customs boundaries. These almost independent States sent their representatives to a Congress that had little power.

Under the 1787 Constitution the central power was strengthened, but the States retained considerable independence in local affairs.

Under this constitution a President elected for 4 years became the chief executive authority in the country. He commanded the army and navy, ran the government, and appointed officials—in short, he had enormous authority. Washington was elected the first President.

The American parliament—Congress—enacts laws, which are subject to approval by the President. Congress consists of two houses. Deputies are elected to the lower house—the House of Representatives—according to the number of inhabitants in each State. The upper house of Congress—the Senate—consists of representatives of the States (two from each).

The American Constitution reinforced the domination of the large bourgeoisie and slaveholders. A number of the basic principles of the new American Constitution and of the State constitutions were manifestly aimed against the masses of people. In almost all the States one had to have property—land or capital—in order to obtain the right to vote. Women, slaves, and Indians did not enjoy suffrage.

In 1791 the United States Constitution was supplemented by the Bill of Rights. This law recognized the rights of citizens to freedom of assembly, freedom of speech, and freedom of conscience; i.e., the freedom to profess any religion or to renounce religion altogether. Arbitrary arrests without court order were prohibited.

These "freedoms" exist even now on paper, but they are constantly violated.

The Supreme Court, consisting of members appointed for life, was given large authority. This court could quash any American law by declaring it unconstitutional. The United States Supreme Court repeatedly supported the slaveowners and bourgeoisie in their struggle against the popular masses. With its help the American capitalists succeeded on many occasions in having worker strikes declared illegal, and they dealt harshly with the revolutionary workers.

The land that previously had belonged to the Indians was proclaimed the property of the new States and put up for sale.

So-called bourgeois democracy was established in North America under the name "popular sovereignty" (democracy), but it is actually the rule of the bourgeoisie.

The fervent Russian revolutionary A. N. Radishchev welcomed the struggle of the Americans for independence, but condemned the capitalist system in the United States. In 1790 he wrote that in America there were "100 proud citizens in luxury for the thousands who had no reliable means of subsistence and no shelter of their own against the intense heat and cold."

Nevertheless, the War of Independence did advance the development of the United States. The former English colonies became a republic. England was no longer able to hold back the development of American industry and trade. Customs were abolished among the former colonies, which now had become States, and this accelerated the development of trade relations. But since slavery had been preserved throughout the South, it subsequently, almost 100 years later, brought the United States to a new revolution, a civil war—the war between the North and the South. (*TAR*, pp. 13–16)

This material was made available to ***this Constitution*** *by Robert Leestma, Office for Educational Research and Improvement, U.S. Department of Education.*

Bicentennial Gazette

ORGANIZATIONS AND INSTITUTIONS

Smithsonian Institution Plans Bicentennial Program

Planning for the commemoration of the two-hundredth anniversary of the United States Constitution at the Smithsonian is underway.

A newly reinstalled exhibition at the Smithsonian's National Museum of American History, titled "After the Revolution: Every Day Life in Eighteenth-century America," provides an historical context for the Constitution in terms of its own history. A portion of the exhibition relates the large political issues of the Constitution and its ratification to the everyday lives of eighteenth-century Americans. The exhibition includes a graphics exhibit, to be opened in 1987, on the debate over ratification and a second exhibit relating the history of the Constitutional Convention and juxtaposing the views of ordinary citizens on the issues under debate with those of the founding fathers.

The museum's Division of Armed Forces History will describe and contrast the Japanese American experience in the United States and that community's civil rights ordeal with patriotic contributions during World War II. The pros and cons of the constitutionality of the Japanese American internment program will be described as will the question of how this experience helped to change the attitudes of many Americans toward ethnic minorities. The heroic saga of the 442nd Regimental Combat Team, composed of Japanese Americans, will be featured.

In addition, two exhibitions are planned by the National Portrait Gallery. Portraits of outstanding jurists throughout U.S. history will be displayed in conjunction with an examination of some of the great constitutional issues of our times through the careers of these important individuals. A second exhibition will study the roots of eighteenth-century American portraiture and provide insight into life in the United States during that period.

A major international symposium, "Our Constitutional Roots," is planned by the Smithsonian Office of Symposia and Seminars with the American Bar Association in collaboration with several U.S. and foreign universities. The Woodrow Wilson International Center for Scholars hopes to launch a symposium or seminar on the transformation of U.S. law beginning with the Constitution. Further, the Smithsonian's Resident Associate Program plans to participate with lectures, classes and other live events, and the Office of Elementary and Secondary Education hopes to produce an issue of its popular flyer "Art to Zoo" on the Constitution.

A unifying theme for the celebration is that the living Constitution still works, but that eternal vigilance is essential in maintaining constitutional guarantees.

Washington Masons Make Plans for Bicentennial

The Grand Lodge of Free and Accepted Masons of Washington have named a Constitution Observance Committee, which has developed a Bicentennial program. All Lodges have received material on the history and events of the Constitutional convention and each has been asked to have a program in the fall of 1986. The Lodge intends to have a statewide essay competition in the spring of 1986. For further information, write: Arthur S. Thomas, Constitution Observance Committee, Grand Lodge of Free and Accepted Masons, 117 Crestwood Drive, SW, Tacoma, WA 98498.

Brigham Young University Holds Conference

On January 16–17, 1986, scholars discussed "The Constitution, Government Regulation and Public Policy" at Brigham Young University, Provo, Utah. The list of panels follows:

The Constitution, Bureaucracy, and Administrative Law
Martin Shapiro, School of Law, University of California, Berkeley
Louis Gawthrop, School of Public and Environmental Affairs, Indiana University
The Constitution and Theories of Government Regulation
Sheldon Wolin, Department of Politics, Princeton University
Don Sorenson, Department of Political Science, Brigham Young University
Civil Rights, Equality, and the Regulatory Power of Government
Owen Fiss, School of Law, Yale University
Bruce Hafen, School of Law, Brigham Young University
The Constitution and Government Regulation of Risk
Theodore Lowi, Department of Government, Cornell University
Aaron Wildavsky, Survey Research Center, University of California, Berkeley

For further information, please contact Gary Bryner, Department of Political Science, Brigham Young University, Provo, Utah 84602; (801) 378-3276.

American Studies Association in Brazil Sponsors Symposium on the Constitution

On September 26–28, 1985, the Associacao Alagoana De Estudos Americanos hosted a symposium that included four panels. Eliseu Diogenes, president of the Association (Federal University of Alagoas), presented "The Constitution: Text and Context"; Paulo Lobo (Federal University of Alagoas) discussed "The Constitution: Its Typology of State and Structure of Power"; Lincoln M. Rocha (University of Brasilia) spoke on "Federalism and Judicial Activism in the United States"; and Ronald Rassner (Yale) addressed "The Constitution at Work and the Black Experience of the Forties." For further information, write: Eliseu Diogenes Martins, Associacao Alagoana de Estudos Americanos, Rua 7 de Setembro, 16-1.0 andar-Centro-57.000-Maceio-Alagoas-Brasil.

Ford Hall Forum Presents Mini-Series on Constitution

The Ford Hall Forum, a free public lecture series in Boston which began in 1908, is offering a series of speakers on "Constitutional America." In 1984, two lectures were held: "Religion in Politics," and "Justice for All?" In spring, 1986, Louis Menand, III, Lloyd Cutler and Elliot Richardson will discuss "Government Gridlock: Is Government Responsive Enough for the 21st Century?" Two additional programs on constitutional themes will complete the 1986 series.

Each series is planned to include liberal and conservative, Democrat and Republican, pro and con. Forum programs are broadcast over public radio stations through the American Public Radio Network. Funding for "Constitutional America" is provided by the Boston Globe Foundation, the Cullinane Foundation, Digital Equipment Corporation, the Ellis L. Phillips Foundation and the Massachusetts Foundation on the Humanities and Public Policy. For further information, write: Ford Hall Forum, 8 Winter Street, Boston, MA 02108.

Wisconsin Bar Forms Committee

The State Bar of Wisconsin and the Wisconsin Bar Foundation have formed a joint committee to help to coordinate Wisconsin's celebration of the Bicentennial. James D. Ghiardi of Marquette University Law School will chair the committee, which is currently planning on creating Bicentennial curriculum materials. For further information, write: Wisconsin Bar Foundation, 402 West Wilson Street, Madison, WI 53703; telephone: (608) 267-9569.

LEO'S NEWSSTAND
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New York Public Library Mounts Major Exhibit

The New York Public Library is preparing a major exhibition on the origins of the Constitution of the United States as the centerpiece of its efforts to commemorate the Bicentennial of the drafting and ratification of the Constitution. Tentatively entitled "Are We To Be a Nation?: The Making of the Federal Constitution," the exhibition will be on view from February through September of 1987 in the D. Samuel and Jeane H. Gottesman Exhibition Hall of the Central Research Library at Fifth Avenue and 42nd Street in New York City.

Working with the Library to plan the structure of the exhibition and to identify and select materials for it is Richard B. Morris, Gouverneur Morris Professor of History Emeritus at Columbia University, and a 23-member National Advisory Committee of distinguished judges, legal scholars, historians, and attorneys.

The exhibition will trace the history of constitution-making and efforts to form an American nation, from the Albany Plan of Union of 1754 through the First and Second Continental Congresses to the Articles of Confederation and the Constitution (as well as the states' constitutions of the 1770s and 1780s). It will emphasize the crucial decade 1781-1791 — from Maryland's ratification of the Articles of Confederation to Virginia's ratification of the first ten amendments to the Constitution, the Bill of Rights.

The principal sources for the Library's exhibition will be its own extensive collections of original books, magazines, newspapers, pamphlets, broadsides, manuscripts, documents, correspondence, prints, maps, and other materials from this period. These collections will be supplemented by major loans from other national institutions. Among the key items from the Library's own collections to be included in this exhibition are one of the two copies of James Madison's *Notes of Debates in the Federal Convention of 1787* that he permitted to be made in his lifetime, the minutes of the Annapolis Convention of 1786, letters from James Madison to his brother from the Annapolis Convention and the Federal Convention, Gilbert Livingston's notes of debates in the New York ratifying convention of 1788, Alexander Hamilton's manuscript "Plan for a Constitution for America" prepared at the Federal Convention of 1787, and one of the original engrossed copies of the first twelve proposed amendments to the U.S. Constitution, signed by Vice President John Adams (as President of the Senate) and Speaker of the House Frederick Augustus Mehlenberg.

The Library is now exploring the possibility of sending a traveling version of the exhibition to several cities in New England, the South, the Rocky Mountain States, and the West Coast in late 1987 and 1988.

The Library is also developing a series of public programs associated with the exhibition that will explore the enduring issues of American constitutionalism in the two centuries since 1787. These programs will take place at the Central Research Library. Associated public programs will take place at several of the branch libraries, which will also receive poster versions of the exhibition and related materials to stimulate public interest in the bicentennial and the constitutional legacy of 1787-1987.

Inquiries should be directed to: Richard B. Bernstein, U.S. Constitution Exhibition, The New York Public Library, Fifth Avenue and 42nd Street, New York, NY 10018; telephone: 212-930-0679.

American Philosophical Society Plans Program for Bicentennial

At its April 1987 meeting, the American Philosophical Society will host a symposium on the Constitution organized by Judge Arlen M. Adams and Professor Arthur S. Link. The Society is also participating as one of four sponsors of the Bicentennial exhibit, "Miracle at Philadelphia," to be on display at the Second Bank of the United States in Philadelphia. In addition, it will mount its own exhibit, "Service, Technology, National Expansion and the Constitution, 1787-1820." For further information, contact: Randolph S. Klein, American Philosophical Society, 104 South Fifth Street, Philadelphia, PA 19106; telephone: (215) 627-0706.

Hofstra University Plans Bicentennial Conference

The Hofstra University Cultural Center is seeking papers for a conference titled "The Bicentennial of the Constitution: A Celebration," to be held April 23, 24, and 25, 1987. The Conference Committee welcomes papers on the historical, philosophical and political origins of the Constitution: the framers' intent; and the enduring constitutional issues then and now, i.e., federalism, separation of powers, the role of the judiciary, equality as a constitutional value and constitutional change. The deadline for completed papers is December 1, 1986. For further information, contact Natalie Datlof, Hofstra Cultural Center, Hempstead, NY 11550; telephone: (516) 560-5669.

PUBLICATIONS

DOCUMENTARY HISTORY

As the bicentennial of the Constitution approaches, four documentary history projects which deal with the ratification and implementation of the Constitution have combined in a consortium to collaborate on joint ventures and fundraising. The four projects are:

The Documentary History of the Ratification of the Constitution and the Bill of Rights at the University of Wisconsin-Madison
The Documentary History of the First Federal Elections, 1788–1790 at the University of Wisconsin-Madison
The Documentary History of the First Federal Congress, 1788–1791 at The George Washington University
The Documentary History of the Supreme Court of the United States, 1789–1800 at the Supreme Court of the United States.

The projects are sponsored by their home institutions, and the National Historical Publications and Records Commission, the Supreme Court Historical Society, or the National Endowment for the Humanities.

These four historical editing projects collect and publish documents related to the ratification and implementation of the Constitution during the critical, formative years of the new federal government. Copies of almost 200,000 documents have been obtained from hundreds of libraries, archives, historical societies, and private collections, and from 150 eighteenth-century newspapers. Most of these documents have never been published before. No single researcher could have collected this wealth of material, but now this documentary heritage is being edited and published in readily available volumes.

Volumes 1 and 2 of The Documentary History of the Supreme Court, *edited by Maeva Marcus and James R. Perry, were published by Columbia University Press in the fall of 1985. Reports on the Supreme Court and First Federal Congress projects appeared in the Spring 1984 issue of* ***this Constitution****. A description of the other two projects follows.*

THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION AND THE BILL OF RIGHTS

University of Wisconsin-Madison
Editors: John P. Kaminski and Gaspare J. Saladino

The Ratification of the Constitution project collects, edits, and publishes documents related to the debate over the ratification of the Constitution and the Bill of Rights between 1787 and 1791. Nearly 1,700 men were members of the thirteen state legislatures that called the state ratifying conventions to consider the Constitution, and those conventions contained 1,648 men. There was an even greater number of local officials and private citizens who directly or indirectly influenced the political decisions of the time. Many of these individuals left manuscripts, and a comprehensive search of hundreds of libraries, archives, historical societies, auction-sale catalogs, and private collections has been carried out to locate them.

Because of the nature of the project, every collection with the inclusive dates 1787–1791 had to be examined. The types of documents accessioned are the records of the Confederation Congress; legislative and executive records of the states; town and county records; proceedings, debates, and records of the state ratifying conventions; public and private letters; French, British, Dutch, and Spanish diplomatic correspondence; diaries; newspapers, broadsides, and pamphlets; and records gleaned from published sources such as genealogies and local histories.

The writing of the Constitution and the debate over its adoption were extraordinary historical events: representatives of the people met together and drafted a new form of government; their handiwork was then submitted for approval to state conventions elected by the people. This process of ratification, by which the people were consulted, gave legitimacy to the new government. The Ratification of the Constitution project makes this record available to governmental officials, scholars, lawyers, and others who seek insight into the meaning of the Constitution and the Bill of Rights.

Six volumes have already been published. Volume I, *Constitutional Documents and Records, 1776–1787*, consists of documents essential to an understanding of America's constitutional development from the Declaration of Independence to the promulgation of the Constitution. Volumes II and III, *Ratification of the Constitution by the States*, document the ratification by Pennsylvania, Delaware, New Jersey, Georgia, and Connecticut. The last three volumes published are part of a five-volume national series entitled *Commentaries on the Constitution*. This series presents the day-by-day regional and national debate over the Constitution that took place in newspapers, magazines, broadsides, and pamphlets. This series also contains private, public, and diplomatic correspondence commenting on the Constitution in general and speculating on the prospects for ratification in several states rather than describing political events in any one particular state. The remaining volumes will consist of the documentary account of the ratification by Massachusetts, Maryland, South Carolina, New Hampshire, Virginia, New York, North Carolina, and Rhode Island; and a final volume on the proposal and adoption of the Bill of Rights.

THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS, 1788–1790

University of Wisconsin-Madison
Editor: Gordon DenBoer

This four-volume project records both the process by which the electoral provisions of the Constitution were implemented and the issues and personalities involved in the election of the first federal representatives, senators, presidential electors, president, and vice president. Contemporaries understood that the First Federal Congress would enact legislation to implement the Constitution, and that the first federal elections were therefore important steps in the continuing struggle to shape, influence, and control the central government.

Many key provisions of the newly-adopted Constitution were minutely examined during the course of the elections. This public debate helped solidify support for amendments to the Constitution and offers insights into the interpretation of the Bill of Rights. The elections also provided the states with an unusual opportunity to experiment with electoral forms. The Constitution and the Confederation Congress allowed the states wide latitude in choosing senators and in framing their laws for the election of the first representatives and presidential electors. This latitude encouraged experimentation and a lively public discussion about the entire electoral process.

Included are documents collected from state legislative journals, debates, official election returns, and compilations of laws; executive and judicial records; and material from personal letters, diaries, newspapers, pamphlets, broadsides, and other unofficial sources. These documents illuminate the critical political events of the time, giving judges, lawyers, scholars, and researchers important materials that have usually been available only under the most difficult of circumstances.

Two of the projected four volumes have been published. Volume I covers the Confederation Congress' call for the first federal elections and the elections in South Carolina, Pennsylvania, Massachusetts, and New Hampshire; while Volume II documents the elections in Connecticut, Delaware, Maryland, Virginia, and Georgia. Volume III will cover the elections in New Jersey and New York, while Volume IV will deal with the election of the president and vice president and the elections in North Carolina and Rhode Island.

THE FOUNDERS' CONSTITUTION

The Founders' Constitution, a five-volume documentary history edited by Philip B. Kurland and Ralph Lerner, will gather in one place—for the first time—important documents from the seventeenth, eighteenth, and early nineteenth centuries with a bearing on the American Constitution from the preamble through the Twelfth Amendment.

To be published by the University of Chicago Press in early 1987, the anthology encompasses the Constitution's English and colonial origins, from English statutes and texts and debates in the press to the Convention of 1787 and the subsequent ratifying conventions and from the letters and documents of the creators of the Constitution to its interpretations and applications by courts and legislatures through 1835.

The volumes of *The Founders' Constitution* will be organized in two ways. Volume 1 is introductory in nature, and is arranged by seventeen major themes underlying the Constitution. These include right of revolution, separation of powers, union, bicameralism, representation, equality, and rights. Each theme is introduced by a brief essay followed by a series of documents relevant to the theme.

Volumes 2 through 5 are arranged under the relevant constitutional provisions on a clause-by-clause basis. In addition, each section will be followed by a bibliography supplying additional sources for the reader wishing to conduct a fuller inquiry. Each volume will contain approximately 700 pages. The five-volume set will sell for $250 until June 30, 1987, and for $300 thereafter.

Philip B. Kurland is the William R. Kenan, Jr., Distinguished Service Professor in the College and in the Law School at the University of Chicago.

Ralph Lerner is Professor in the Committee on Social Thought and the College at the University of Chicago.

Publication of *The Founders' Constitution* is partially supported by grants from the National Endowment for the Humanities, the Mellon Foundation, the Institute for Educational Affairs, the Olin Foundation, and the Earhart Foundation.

HISTORY BOOKS FOR CHILDREN

Lerner Publications Company has published five books for children dealing with the founding period. The titles are: *The American Revolution, The Constitution, The Founding of the Republic, The Indian Wars,* and *The War of 1812.* The volumes, which range from 66 to 88 pages and cost $8.95 each, were written by Richard B. Morris, with illustrations by Leonard E. Fisher. They are suitable for grades 5–10. For further information, contact: Lerner Publications Company, 241 First Avenue North, Minneapolis, MN 55401.

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CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT

In *Constitutional Reform and Effective Government*, published in January 1986 by the Brookings Institution, James L. Sundquist reviews past and current debates about whether reform of the Constitution is needed and examines what changes might work best if a consensus should emerge that the national government is too prone to stalemate to meet its responsibilities. Sundquist is a senior fellow emeritus in the Brookings Governmental Studies program. He identifies what he considers to be fundamental weaknesses in the constitutional structure, and proposes a series of amendments to the Constitution to rectify these problems.

Financial assistance for this book was provided by the Ford Foundation, the Rockefeller Foundation, the American Express Foundation, and the Dillon Foundation. The volume, which is 272 pages, may be ordered from Brookings, 1775 Massachusetts Avenue, N.W., Washington, D.C. 20036; telephone: (202) 797-6000. The price is $26.95 (hc), $9.95 (pb).

SPECIAL ISSUE OF *PROLOGUE* CELEBRATES THE CONSTITUTION

In the fall of 1985, the National Archives and Records Administration published a special issue of *Prologue: Journal of the National Archives* focusing on the forthcoming Bicentennial of the U.S. Constitution. The richly illustrated issue includes essays first presented at a conference cosponsored by the Constitution Study Group of the National Archives Volunteers and the Commission on Public Understanding About the Law of the American Bar Association. Among the essays are the following: "The Bicentennial Era: A Time to Think Boldly" by James MacGregor Burns; "Why Celebrate the Constitution Today?" by A. E. Dick Howard; "Celebrating the Constitution: A Symposium" by Warren E. Burger, Lloyd N. Cutler, A. E. Dick Howard, and Strom Thurmond; "A Special Anniversary" by Frank G. Burke; "Using Documents to Teach the Constitution" by Wynell G. Burroughs and Jean W. Mueller and "Studying the Constitution: Resources in the National Archives" by R. Michael McReynolds. The issue is available for three dollars from the editor, *Prologue* (NEPJ), National Archives, Washington, D.C. 20408.

REFORMING AMERICAN GOVERNMENT: THE BICENTENNIAL PAPERS OF THE COMMITTEE ON THE CONSTITUTIONAL SYSTEM

The Committee on the Constitutional System, a group of two hundred citizens chaired by Senator Nancy L. Kassebaum, C. Douglas Dillon and Lloyd Cutler, is undertaking an assessment of the problems of modern governance and proposed reforms. This book, edited by Donald L. Robinson, Professor of Government at Smith College, presents draft language for each of these proposals and an assessment of "pros" and "cons." The 350-page volume is available from Westview Press, 5500 Central Avenue, Boulder, CO 80301; telephone (303) 444-3541. The price $35 (hc), $13.85 (pb).

WITNESSES AT THE CREATION

WITNESSES AT THE CREATION by Richard B. Morris tells the story of Hamilton, Jay, and Madison and the parts they played in the creation and ratification of the Constitution. Two of these famous federalists were delegates to the Constitutional Convention; the third was secretary for foreign affairs. How and why these statesmen planned and wrote a series of newspaper letters called "The Federalist," an American classic in political science, and their reasoned defense of the Constitution, which was adopted against formidable opposition, is the theme of this book. *Witnesses at the Creation* is also the basis for a television series funded by Capital Cities Communications and created by Lou Reda Productions. The series is expected to air in late 1986 or 1987.

Richard B. Morris is Gouverneur Morris Professor Emeritus of History at Columbia University and editor of the John Jay papers. He is also co-chair, with James MacGregor Burns, of Project '87. The book is published by Holt, Rinehart and Winston, 521 Fifth Avenue, New York, N.Y. 10175; telephone: (212) 599-7668. The price is $16.95.

HOW FREE ARE WE? WHAT THE CONSTITUTION SAYS WE CAN AND CANNOT DO

Written by John Sexton, professor of constitutional law at New York University, and Nat Brandt, a journalist and editor specializing in American history, *How Free Are We?* includes more than 250 pages of questions and answers about the Constitution, arranged by subject within two broad categories: the history and theory of our constitutional system and constitutional issues that arise in the course of daily events. The book, which includes an introduction by James MacGregor Burns, Project '87 co-chair and Woodrow Wilson professor of political science at Williams College, and a foreword by Senator Edward M. Kennedy, also contains an index, a bibliography, and the text of the Constitution. It is available from M. Evans & Co., Inc., 216 E. 49 St., New York, N.Y. 10017; telephone: (212) 688-2810.

AMERICAN ENTERPRISE INSTITUTE OFFERS PUBLICATIONS ON THE CONSTITUTION

As a component of its decade-long commemoration of the Bicentennial, AEI has several publications now available on the Constitution. They include *How Capitalistic is the Constitution?* (Robert A. Goldwin and William Schambra, eds., 1982), *How Democratic is the Constitution?* (Goldwin and Schambra, eds., 1980), *In Defense of Liberal Democracy* (Walter Berns, 1984), *Religion and the Constitution* (Berns et al., 1984), *War Powers and the Constitution* (Dick Cheney et al., 1984), *The Constitution and the Budget* (W.S. Moore and Rudolph G. Penner, ed., 1980), *Tradition and Morality in Constitutional Law* (Robert Bork, 1984), *Human Rights and U.S. Human Rights Policy* (Howard J. Wiarda, ed., 1982). For further information, write: AEI, 1150 Seventeenth Street, N.W., Washington, D.C. 20036.

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CQ'S GUIDE TO THE U.S. CONSTITUTION: TEXT, INDEX AND GLOSSARY

A 65-page indexed guide to the Constitution, this book includes the text of the Constitution with a glossary by Ralph Mitchell to explain legal terminology; a thirty-page essay covers the origins, foundation and powers of the Constitution. It is available for $7.95 from CQ, 1414 22nd Street, N.W., Washington, D.C. 20037.

UNIVERSITY OF OKLAHOMA LIBRARIES PREPARES BIBLIOGRAPHY IN CELEBRATION OF THE BICENTENNIAL OF THE U.S. CONSTITUTION

Librarians at the University of Oklahoma are working on a bibliographic guide to library materials on the United States Constitution. This guide will be useful to social science teachers, school librarians, public librarians, and college librarians (especially in community and undergraduate colleges) for research and study in the University libraries, for inter-library loan use, and for book acquisition at their individual libraries. The guide is also designed to complement and supplement several workshops on teaching of the U.S. Constitution, which have been held or are planned by the political science faculty at the University of Oklahoma.

The final, comprehensive guide will include features, such as a list of organizations and foundations which are involved in Bicentennial programs; an annotated core collection on the Constitution for school, public, and small college libraries; and possibly a bibliography on the Oklahoma Constitution and state constitutions generally. For further information, contact Anne Million, University of Oklahoma Library, 401 West Brooks, Norman, OK 73019.

Project '87

Project '87 would like to know about events being planned for the Bicentennial of the United States Constitution, which we will report on in ***this Constitution***. Please send notices to:

this Constitution
1527 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Around the States

Massachusetts Creates Commission to Commemorate U.S. Constitution Bicentennial

On February 19, 1986, Gov. Michael S. Dukakis signed an executive order establishing the Massachusetts Advisory Commission to Commemorate the Bicentennial of the United States Constitution and named Supreme Judicial Court Chief Justice Edward F. Hennessy to chair it.

The Bicentennial Commission, banking on the special talents and historical expertise of its members, as well as the talents of a special projects committee chaired by Robert "Tex" McClain, undersecretary of the Executive Office of Administration and Finance, will seek to make the commemoration of the Constitution a joyous celebration and an educational experience. It will plan activities to take place in Heritage Parks, town halls, and courtrooms and schoolrooms across the state. The Shawmut Corporation has contributed $25,000 toward funding these activities.

In addition to the chief justice, commission members are: Senate President William M. Bulger; House Speaker George Keverian; Margaret Burnham, Fellow, Bunting Institute, Radcliffe College; Archibald Cox, Professor Emeritus, Harvard Law School; Kit Dobelle, Chr., Humanities Division, Berkshire Community College; Thomas H. Eliot, educator and former congressman from Massachusetts; John P. Hamill, Executive Vice President, Shawmut Corporation; Anthony Lewis, columnist, *New York Times*; Ian Menzies, Professor, McCormack Institute, U-Mass. Boston; Melvin B. Miller, Editor & Publisher, *Bay State Banner*; Alice E. Richmond, Esq., President Elect, Mass. Bar Association; Donald Robinson, Professor of Government, Smith College; S. Stephen Rosenfeld, Chief Legal Counsel to the governor; Abram L. Sachar, Chancellor, Brandeis University; Michael S. Sahady, Esq., Fall River; Susan Shaer, President, Massachusetts League of Women Voters; Louis L. Tucker, Director, Massachusetts Historical Society.

For further information, contact: Chief Justice Edward F. Hennessy, Chair, Massachusetts Advisory Commission to Commemorate the Bicentennial of the United States Constitution, c/o Margaret Cavanaugh, Executive Director, State House, Room 259, Boston, MA 02133; telephone: (617) 727-2200.

Georgia Endowment Announces Special Initiative

The Georgia Endowment for the Humanities has announced a new two-year special initiative, "American Ideals and Aspirations," to encourage grant proposals for projects developed in conjunction with the initiative.

One component of the initiative will be an emphasis on traditions and writings that have influenced the American character. For example, programs on political philosophies, jurisprudence, and human rights could be developed in observance of the Bicentennial of the United States Constitution. Public programs concentrating on the Constitution may take place during 1986 and 1987.

The 1985–86 *Program Announcement* contains GEH guidelines and application procedures, and is available, along with the official application form, from the GEH office. GEH urges prospective applicants to contact GEH staff about the eligibility of projects, and to consult with staff during preparation of applications.

Deadlines in 1986 are August 1 and November 15.

Contact GEH, 1589 Clifton Rd., N.E., Emory University, Atlanta, GA 30322.

Maryland Observes Bicentennial of Annapolis Convention

"The Annapolis Connection: Maryland and the U.S. Constitution," a one-day conference celebrating Maryland's role in the creation of the U.S. Constitution, will be held at the State House in Annapolis, Maryland on September 13, 1986.

The conference will feature the Honorable Benjamin R. Civiletti, former U.S. Attorney General, and Dr. Richard B. Morris, Gouverneur Morris Professor of History Emeritus of Columbia University, as keynote speakers. Other participants will include: James Adomanis, Marianne Alexander, Herman Belz, Carl Bode, Naomi Collins, Margaret Crews, Louis Goldstein, James Hutson, Robert Murphy, Edward Papenfuse, Joseph Phelan, Whitman Ridgway, James Schneider, and Gregory Stiverson.

Panels will address the following topics: "Maryland on the Eve of the Philadelphia Convention," "The Annapolis Call for the Constitutional Convention," "Maryland at the Philadelphia Convention," "Ratification in Maryland," and "Transformation in Maryland: The Conversion of the Anti-federalists." The afternoon session will focus on "The Living Constitution: Taking the Constitution to your Community." There will also be two workshops: "Teaching the Constitution" and "Commemorating the Bicentennial of the Constitution."

"The Annapolis Connection: Maryland and the U.S. Constitution" is sponsored by The Maryland Humanities Council with grant funds from The National Endowment for the Humanities. Registration is on a first-come, first-served basis due to limited space. The fee for registration is $15. For more information contact Maria M. Heyssel, Maryland Humanities Council, 200 Ridgewood Road, Baltimore, Maryland 21210.

Bicentennial Task Force Appointed in New Mexico

On January 13, 1986 Gov. Toney Anaya of New Mexico appointed a task force to plan for the combined observances next year of the U.S. Constitution Bicentennial and New Mexico's 75th anniversary of statehood.

Anaya designated the Office of Cultural Affairs to coordinate the program and named state library Director Virginia Downing as executive director of the task force.

Members of the state task force include Clara Apodaca, director of the Office of Cultural Affairs; Dan Lopez, state finance secretary; Bob Gold, economic development and tourism secretary; Gilbert Peña, All Indian Pueblo Council chairman; Brad Hayes, New Mexico Amigos representative; Sen. Les Houston, R-Bernalillo, the Senate president pro tem; Rep. C. Gene Samberson, D-Lea, the House speaker; Michael L. Keleher, representative of the state bar and judiciary; Keith Spradlin, New Mexico Municipal League; Patrick Padilla, Association of Counties; Evelyn Prentiss, Keep New Mexico Beautiful; Shirley Garfield, Federated Women's Club; Alan Morgan, state school superintendent; and Jude Mason president of the National Education Association-New Mexico.

For further information, write: Virginia Downing, Exec. Dir., N.M. Task Force, 325 Don Gaspar, Santa Fe, NM 87503.

Crawford County, Ohio, Committee Celebrates Bicentennial

The Crawford County Bicentennial Steering Committee currently plans to observe the Constitution's Bicentennial by publishing and distributing an educational handbook about the Constitution and the Northwest Ordinance of 1787 to be used by the county's teachers; by sponsoring a television quiz team competition called "Constitutionally Yours"; by mounting a series of three "Dialogues" featuring university faculty; and by organizing tree-plantings and parades. For further information, write to: Betty Gorsuch, Gen. Chair, Crawford County U.S. Bicentennial Steering Committee, Crawford County Courthouse, Bucyrus, OH 44820.

New Jersey Humanities Committee Offers Seminar

The New Jersey Commitee for the Humanities will offer secondary school teachers a four-week seminar in July on New Jersey's place in constitutional history. It will be directed by Wilson Carey McWilliams, a professor of political science at Douglass College, Rutgers University.

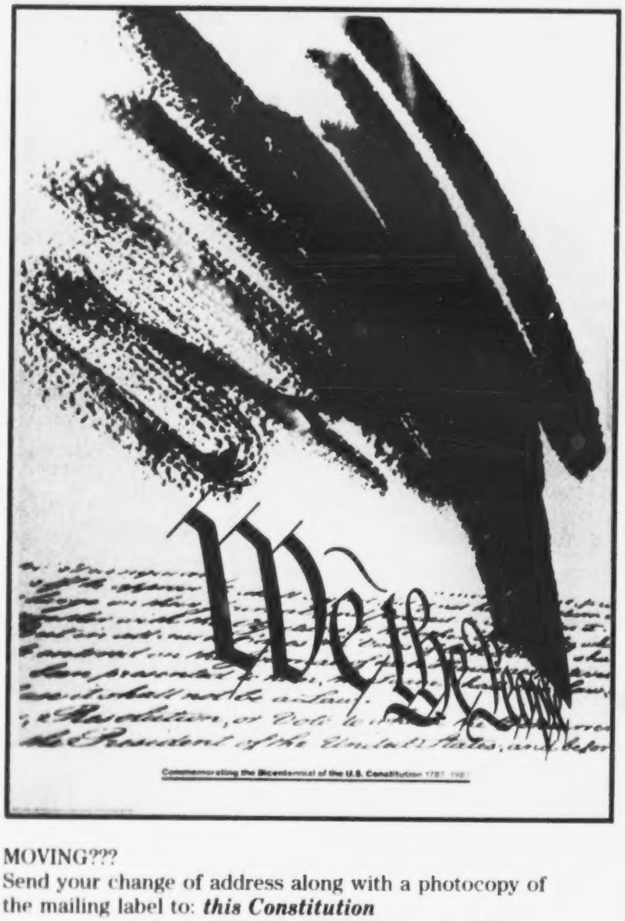
Each week will take up the contribution of one of the New Jersey justices of the U.S. Supreme Court: William Paterson (1793–1806), who was a delegate to the Constitutional Convention in 1787; Joseph Bradley (1870–1892), who played a crucial role in the development of the Fourteenth Amendment; Mahlon Pitney (1912–1922), who expounded the conservative doctrine of "Freedom of Contract"; and William Brennan (1965–), champion of civil liberties who has played a vital role in the reinterpretation of the Fourteenth Amendment.

The seminar will include discussion of the ideas, issues and conflicts that shaped American political life and thought during the careers of these men and an examination of their doctrines and opinions.

History and social studies teachers in the state's public, parochial and private secondary schools are eligible for admission. If they are graduate students they may apply for up to three hours of credit by consulting Professor McWilliams. For information or application, contact: NJCH, 74 Easton Ave., New Brunswick 08903.

Friends of Independence National Historical Park Commission Poster

Through a grant from the National Endowment for the Humanities, the Friends of INHP commissioned artist Saul Bass to create the first in a series of three posters to commemorate the signing of the Constitution. The poster, "Commemorating the Bicentennial of the U.S. Constitution, 1787–1987," is 24" × 32". Other posters in the series will be by Ray Metzker and Larry Rivers. The poster is available from Eastern National Park and Monument Association, 313 Walnut Street, Philadelphia, PA 19106 for $8.00 plus $2.00 postage and handling.


We the People
Commemorating the Bicentennial of the U.S. Constitution 1787-1987

"Commemorating the Bicentennial of the U.S. Constitution 1787-1987," by Saul Bass. Friends of Independence National Historical Park.

MOVING???
Send your change of address along with a photocopy of the mailing label to: ***this Constitution***
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New Hampshire Commission Issues Interim Report

The New Hampshire Bicentennial Commission on the United States has issued an interim report describing its plans for the commemoration. These include: scholarly studies, published in book form, looking at eight diverse New Hampshire communities; a traveling exhibition in panel form; a "Reader's Theater" based on the New Hampshire ratifying conventions, written by David Magidson of the University of New Hampshire Drama Department, and suitable for performance by local theater groups; a commemorative medal and postage stamp; reproduction of the original ratification document and the statewide planting of the state flower, the purple lilac. For further information, write: Hon. Russell C. Chase, Chair, State of New Hampshire Bicentennial Commission, Concord, NH 03301.

Virginia Commission Proposes Programs

The Virginia Commission on the Bicentennial of the Constitution has proposed that it undertake the following Bicentennial activities: the publication of a newsletter and a calendar to enhance its function as a Bicentennial clearinghouse in the state; the use of public service time on television and radio as educational tools; conferences for media representatives; regional conferences involving scholars, teachers and civic leaders; commemorative events to mark specific historic anniversaries; support for the educational program developed by the state's Department of Education for the schools; modest grants for local activitites; publication of a series of monographs on Virginians who played a role in the founding; and production of a film on the ratification debate in Virginia. For further information, contact: Timothy J. O'Rourke, Institute of Government, 207 Minor Hall, University of Virginia, Charlottesville, VA 22903.

Delaware Starts Speakers' Bureau

The Delaware Humanities Forum and the Delaware Heritage Commission are sponsoring a speakers' bureau to provide the public with lectures by scholars and teachers concerning the United States Constitution. These talks are available to non-profit civic, patriotic, social, and historical groups at no charge.

The following lectures are available: "Delaware and the Constitutional Period" by Barbara Benson, Director of the Library, Historical Society of Delaware; "Delaware Becomes the First State" by William Williams, Associate Professor of History, University of Delaware; "The Antifederalists" by Holly A. Baggett, Ph.D. candidate, University of Delaware; "The Birth of the United States Constitution" by William H. Flayhart, III, Professor of History and Political Science, Delaware State College; "Constitutional Arrangements for the Conduct of Foreign Policy" by James E. Valle, Professor of History and Political Science, Delaware State College; "The Constitution and Society" by Larry D. Barnett, Professor of Law, Widener University; "The Struggle for Ratification" by James R. Soles, Professor of Political Science, University of Delaware; "John Dickinson and the Constitution" by Susanne Fox, Assistant Professor of Social Science, Wesley College; "Origins of Judicial Review" by Leslie Goldstein, Associate Professor of Political Science, University of Delaware; "The Insanity Defense: A Constitutional Principle?" by Janet Tighe, Research Assistant Professor, Temple University; "Separation of Church and State" by Raymond Wolters, Professor of History, University of Delaware; and "The Philosophy of the Founding Fathers" by John Crum, Teacher of Social Studies, Mt. Pleasant High School.

Additional lectures include: "Delaware Quarrels That Have Shaped the Constitution," "Equal Protection and Social Reform," and "Minorities and the Constitution." For further information, contact: Claudia Bushman, Exec. Dir., Delaware Heritage Commission, 820 N. French Street, 3rd floor, Wilmington, DE 19801; telephone: (302) 652-6662.

State and Municipal Bicentennial Commissions

Supplement as of March 17, 1986

*(The initial listing of commissions appears in issue no. 10, **this Constitution**)*

MASSACHUSETTS

Chief Justice Edward F. Hennessy, Chair
Massachusetts Advisory Commission to Commemorate
the Bicentennial of the United States Constitution
c/o Margaret Cavanaugh, Executive Director
State House, Room 259
Boston, MA 02133
(617) 727-2200

NEW MEXICO

Virginia Downing, Executive Director
New Mexico Task Force on the U.S.
Constitution Bicentennial and the
75th Anniversary of Statehood
325 Don Gaspar
Santa Fe, NM 87503

LOCAL

Betty Gorsuch, Gen. Chair
Crawford County U.S. Bicentennial Steering Committee
Crawford County Courthouse
Bucyrus, OH 44820

Sally Ivanauskas, Rec. Sec.
County Council of Harford County, Maryland
Constitution Bicentennial Planning Committee
1907 Churchville Road
Bel Air, MD 21014

Joan Bowes, Chair
San Diego County Commission on the Bicentennial of
the U.S. Constitution
P.O. Box Constitution 2368
San Diego, CA 92038
(619) 459-5909

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Federal Bicentennial Agenda

United States Bicentennial Commission Issues Regulations Governing Project Recognition and Support

(Note: The following is a brief summary of the interim regulations governing project recognition. Please contact the Commission for the complete final regulations and copies of the application.)

All public and private groups are encouraged to conduct activities during the Bicentennial years of 1986–1989 that will foster awareness, knowledge and appreciation of the Constitution of the U.S. The Commission will offer information, advisory assistance, and coordination, insofar as resources permit, to individuals and groups interested or involved in Bicentennial activities.

The following regulations make clear the criteria for Commission involvement, and the limitations on such involvement, with any projects, programs and other activities designed to commemorate the 200th anniversary of the drafting, signing, ratification, and adoption of the U.S. Constitution, and the beginnings of the Federal Government under the Constitution. The provisions of these regulations will enable individuals and private and public groups, including governmental agencies and states, to obtain official recognition of their projects by the Commission.

Authority to decide Commission involvement with projects remains with the full Commission, unless delegated by vote of the Commission to a committee of the Commission, or to the Commission's Staff Director, and shall be determined by written decisions on each project. The Commission reserves the right at all times and with respect to any project to withdraw its involvement or recognition, or both, including any authorization for use of the Logo.

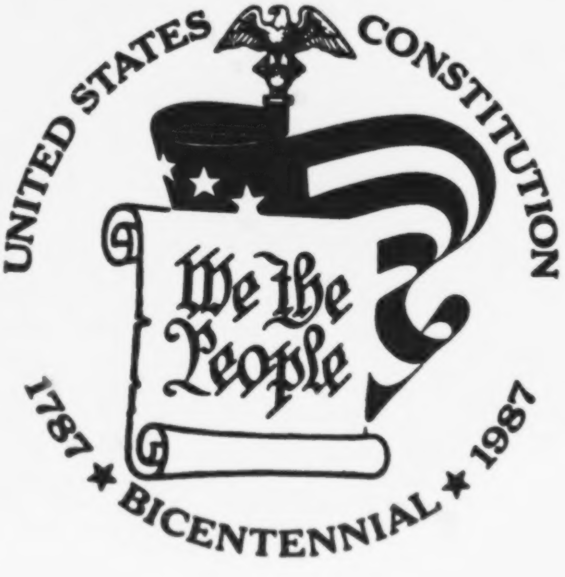
Commission involvement with a project does not obligate the Commission to contribute financial support; any decision (in rare instances) to do so shall be considered by the Commission separately and on its own merits in relation to the resources of the Commission.

No commercial use of the National Bicentennial Logo is authorized. The Commission shall review all requests for noncommercial use of the Logo by commercial organizations, including those requests originating from State Bicentennial Commissions and Designated Bicentennial Communities, for use of the Logo by commercial organizations, or by a commercial sponsor of a project officially recognized by such Commission or Community. In exercising its discretion, the Commission on the Bicentennial of the United States Constitution shall determine each case on its own merits. Unauthorized use of the Logo may be considered a violation of applicable federal law and subject to penalty thereunder.

Initially, there will be five forms of Commission involvement with Bicentennial projects:

1. *Commission Projects*: projects of national or international significance, for which the Commission takes full responsibility for development and implementation. Such projects will be few in number and approved in advance by the Commission.
2. *Cosponsored Projects:* projects that the Commission may choose to cosponsor with private and public organizations, domestic and foreign, including all branches and agencies of the Federal Government based on a determination that the project will (1) make an exceptional contribution to advancing the national commemoration; (2) increase public understanding and appreciation of the Constitution; (3) require a reasonable cost to the Commission, if any, relative to what the project will accomplish; and, (4) be adequately financed and directed. In so doing, the Commission reserves the option to participate in a project's development and implementation, although primary responsibility for the project will ordinarily rest with the other sponsor or sponsors. A Cosponsored Project shall be considered an Officially Recognized Project and shall be authorized to use the National Bicentennial Logo solely in connection with the project for which the Commission is cosponsor. Such use shall include the legend "Cosponsored by the Commission on the Bicentennial of the United States Constitution."
3. *Officially Recognized Projects:* projects deemed to be of exceptional merit with regional, national, or international significance, substantial educational and historical value in relation to the U.S. Constitution, and adequate financing and direction. Responsibility for development and implementation lies with the Project's Sponsor(s); to the extent feasible, the Commission will monitor all Officially Recognized Projects. Projects granted Recognition shall receive a Certificate of Official Recognition, and authorization to use the National Bicentennial Logo solely in connection with the Recognized Project. Such use shall include the legend "Officially Recognized by the Commission on the Bicentennial of the United States Constitution."
4. *State Bicentennial Commissions:* recognition granted, upon the request of the Governor or the legislature of a state, to any Bicentennial organization. The national Commission may delegate authority to such recognized state commissions to assist it in carrying out its purposes. Recognized State Bicentennial Commissions are authorized to use and to grant use of the National Bicentennial Logo, provided that: (1) use is granted only to nonprofit organizations which are sponsors of projects officially recognized by a State Bicentennial Commission as part of a State Bicentennial Program, and (2) such sponsors have been advised in writing of such recognition. In granting use of the National Bicentennial Logo the State Commission shall determine in advance that the project will increase public understanding and appreciation of the U.S. Constitution, and that ade-

Official logo of the national Commission on the Bicentennial of the United States Constitution, designed by Sarah LeClerc of the Institute of Heraldry of the Army.



quate funding and direction are in place. Such use shall include the legend, "Recognized by the [Name of State Bicentennial Commission.]" The state Commission shall be responsible for monitoring such use to assure that it is consistent with the requirements of the Commission.

5. *Designated Bicentennial Communities:* recognition granted to a community which has (1) established a Bicentennial committee broadly representative of the Community; (2) developed a commemorative program that will educate its residents about the meaning and significance of the Constitution; and, (3) received an official designation from the Commission. To obtain this designation, a community must first apply to its state Bicentennial Commission; upon approval, the application will then be forwarded, with the State recommendation, to the National Commission for review and decision. All approved applications will receive a Certificate of Designation from the Commission. Designated Communities are authorized to grant the use of the National Bicentennial Logo to nonprofit organizations which are sponsors of projects officially recognized by the Designated Community Bicentennial Committee as part of the community bicentennial program, provided the sponsors have been advised in writing by the local bicentennial commission of such recognition. Such use shall include the Logo with the legend, "Recognized by [Name of Community], a Bicentennial Community." The Designated Community shall be responsible for monitoring such use.

To apply for Commission Cosponsorship or Official Recognition of a Project, sponsors must complete a Commission application and submit it together with *ALL* required materials to:

The Commission on the Bicentennial of the United States Constitution
734 Jackson Place, N.W.
Washington, D.C. 20503

Applications should include a comprehensive description of the project and a narrative statement indicating how the project meets the criteria established by the Commission.

The Commission may issue a Letter of Encouragement when a project demonstrates merit but has not reached that stage of development or obtained that level of support which would provide reasonable assurance of implementation. This letter does not authorize the use of the National Bicentennial Logo.

Approval of an application shall be in writing and result in the issuance of a letter of agreement to cosponsorship or a Certificate of Official Recognition, or both. Approval of the appropriate State Bicentennial Commission shall be required if the project is to be conducted or carried out within a single state.

National Archives Branches Across Country Plan Programs

Archives centers in Denver, Philadelphia, San Francisco, Seattle, and Kansas City are planning an array of programs to commemorate the Bicentennial of the Constitution. The Denver branch (P.O. Box 25307, Denver, CO 80225; (303) 236-0817) hopes to host teacher workshops, symposia or film series; the Philadelphia branch (9th and Market Streets, Room 1350, Philadelphia, PA 19107; (215) 597-3000) will have an exhibit on "The Living Constitution"; the San Francisco branch (1000 Commodore Dr., San Bruno, CA 94066) expects to issue a guide to its records relating to constitutional issues, to develop an exhibit and possibly to sponsor an essay contest for students on "The Constitution and Its Influence on Western Society"; the Seattle branch (6125 Sand Point Way, Seattle, WA 98115) will sponsor a legal history symposium in cooperation with history departments and law schools; and the Kansas City branch (2312 East Bannister Road, Kansas City, MO 64131; (816) 926-7271) is planning a series of four public forums in conjunction with the University of Missouri - Kansas City.

THE CONSTITUTION: EVOLUTION OF A GOVERNMENT
Documentary Materials for Students

The National Archives has just published *The Constitution: Evolution of a Government*, the seventh in its series of documentary learning packages for secondary and post-secondary school students. The package contains 34 reproductions of documents from the holdings of the National Archives and a teacher's guide with suggested exercises.

The Constitution is divided into three sections, with documents provided for each section. The first part, "The Making of the Constitution," includes documents such as the Articles of Association, a working draft with annotations of the Bill of Rights, and George Washington's annotated draft copy of the Constitution. The second section, "The Beginnings of Government," includes a letter to Washington from a jobseeker, a petition from Benjamin Franklin to abolish slavery, a ledger page illustrating the problems of establishing currency, and a description of George Washington's oath of office ceremony. The third section, "Evolution of a Constitutional Issue," uses documents from 1789 to 1962 to illustrate issues relating to the establishment and free exercise of religion as found in the text of the Constitution.

The learning packages are created to disseminate the rich resources of the National Archives to students and to enliven the teaching of history. They are widely used in secondary schools and community colleges. The National Archives also offers an active training program to provide teachers with skills for using primary sources in their classrooms.

Other packages in the series include *The Civil War: Soldiers and Civilians*; *The Progressive Years, 1898–1917*; *World War I: The Home Front*; *The 1920's*; *The Great Depression and the New Deal*; and *World War II: The Home Front*. They are available from the publishers, SIRS, Inc., Boca Raton, FL 33427 and sell for $35 each. For more information about the packages and National Archives teacher training programs, call or write the Education Branch, National Archives, Washington, D.C. 20408; telephone: (202) 523-3347.

American Historical Association Publications

Bicentennial Essays on the Constitution

—Edited by Herman Belz—

* New Titles *

Quiet Past and Stormy Present? War Powers in American History

by Harold M. Hyman

Examines the nature and limits of constitutional war and emergency powers and discusses the constitutional ramifications of executive, legislative, and judicial responses to foreign wars and domestic crises. 67 pp.

The Constitution in the Twentieth Century

by Paul L. Murphy

Investigates the dramatic changes in the role of the Constitution in public policy and the disputes over proper constitutional interpretation between World War I and the 1980s. 70 pp. (Available May 1986).

Also Available Now

Constitutional Development in a Modernizing Society: The United States, 1803 to 1917
By William M. Wiecek 89 pp.

The Supreme Court and Judicial Review in American History
By Kermit L. Hall 60 pp.

Parties, Congress, and Public Policy
By Morton Keller 47 pp.

Available in 1987

Learning Liberty: American Constitutional Beginnings to 1803
By John Murrin
Civil Rights and Civil Liberties
By Michael Les Benedict
The Constitution and Economic Change
By Jon Lurie
Federalism in American Constitutional Development
By Harry N. Scheiber
The Presidency and Public Administration
By John A. Rohr
Constitutional Dissenters and Varieties of Constitutionalism
By George M. Dennison

A Contribution to Project '87—A Project Jointly Sponsored by the American Historical Association and the American Political Science Association.

Available from:

Publications Sales Department
American Historical Association
400 A Street, SE
Washington, D.C. 20003

Each essay $4 AHA members, $5 nonmembers. All orders must be prepaid. Please add $1 handling cost per order.

SUBSCRIPTION INFORMATION

The National Endowment for the Humanities is underwriting the publication of ***this Constitution*** as a quarterly magazine so that it may be distributed free to organizations planning programs for the Constitution's Bicentennial. The officer of the organization who is responsible for planning programs is invited to write us and ask to be placed on the free mailing list; requests should include a short statement about the program being planned. Free subscriptions begin with the next issue after receipt of the letter. Institutions wishing to receive more than one copy may do so by subscribing for additional copies at the rates below.

Individuals and organizations who are not planning Bicentennial programs but who wish to receive the magazine may subscribe as follows:

Individuals	$10.00 per year (4 issues)
Institutions	$16.00 per year (4 issues)

(Individuals and institutions outside the United States please add $5.00 per subscription.)

Paid subscriptions received by November 1, 1986 will begin with issue no. 10 (Spring, 1986) and end with no. 13 (Winter, 1986).

Single copies (less than 10) of back issues can be purchased for $4.00 each. Each issue of the magazine will also be available for purchase at bulk rate. (Issue no. 1 is no longer available.)

Bulk rate (10 or more copies of one issue)	$1.75 each

Shipping for bulk orders:
On orders of 26–75: zone 2–4, $4; zone 5–8, $6.
On orders of 76 or more: zone 2–4, $5.50; zone 5–8, $9.
On orders of 10–25: $3.50.
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In order to subscribe, or to order in quantity, please fill out the form on this page and return it, with your check, to: **Project '87, 1527 New Hampshire Avenue, N.W., Washington, D.C. 20036.** We must request that **all orders be pre-paid.** If you have already received the magazine, please include a photocopy of the mailing label with orders or changes of address.

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continued from inside front cover

FILMS

THE JUST AND ESSENTIAL FREEDOM

The film deals with Watergate, the Vietnam War, the Pentagon Papers, censorship and disclosure of sources to examine the confrontations between government and the press under the First Amendment. Uses several presidents to illustrate relations with the press. Through conflicts of Jefferson and Adams it explains the background of the First Amendment. Xerox Films, 1973, 52 minutes.

THE JUST FREEDOM

The First Amendment is examined in depth, with examples of how the press operates at local and national levels. The film focuses on the important historical role of the news media in the United States, and compares U.S. newspaper and television news coverage with that of other countries. Associated Press, 1974, 22 minutes.

THE PRIVILEGE AGAINST SELF-INCRIMINATION

The film uses drama to point out the Fifth Amendment's protection of the accused against coerced confessions and against overzealous law enforcement for "crimes" of thought and speech. BFA Educational Media, 1972, 23 minutes.

AMENDING AND INTERPRETING THE CONSTITUTION

FOCUS ON THE VICE PRESIDENCY

The film traces the history of the office of the vice-president, emphasizing vice-presidents of the twentieth century and the importance of the Twenty-Fifth Amendment. Hearst Metrotone News, 1974, 15 minutes, black and white.

WOMEN GET THE VOTE

Using historical footage the film shows the difficult and sometimes violent course of the campaign for women's voting rights leading to triumph in 1920. From the TWENTIETH CENTURY series, CBS, Contemporary Films, 1962, 25 minutes, black and white.

SPEECH AND PROTEST

As an introduction to the First Amendment, this film dramatizes situations where freedom of speech or assembly might be questioned. Students discuss foreign policy and academic freedom, and an anti-war demonstration at a chemical plant is enacted. Alternative conclusions are included. From the BILL OF RIGHTS series, Churchill Films, 1967, 21 minutes.

THE UNITED STATES SUPREME COURT: GUARDIAN OF THE CONSTITUTION

The continuing evolution of the Supreme Court is traced through historical highlights and landmark cases and through the insights of several prominent authorities commenting on the jurist's viewpoint and the power of judicial review. Concept Films, 1973, 24 minutes.

JUSTICE BLACK AND THE BILL OF RIGHTS

Supreme Court Justice Black explains his views on interpreting the Constitution, freedom of speech, freedom of assembly, and the rights of the accused. He also answers reporters' questions on the philosophy of the Bill of Rights in relation to current issues of law, morality, freedom of speech and civil rights. Columbia Broadcasting System; BFA Educational Media, 1968, 32 minutes.

RIGHTS, WRONGS AND THE FIRST AMENDMENT

The film uses such events as the Palmer Raids of World War I, forced relocation of Japanese Americans in World War II, hearings of the Cold War, conspiracy trials of the Vietnam conflict, and the Watergate invasions of privacy to trace the history of freedom of speech, freedom of the press and freedom of assembly in the U.S. It dramatizes the difficulties of integrating personal freedom with legitimate national security needs. Stuting Educational Films, 1974, 27 minutes.

THE CONSTITUTION AND MILITARY POWER

The film dramatizes the story of a U.S. citizen of Japanese ancestry who tries to avoid detention and relocation during World War II. The film follows his suit through the courts and also summarizes a previous related court decision of 1866, *Milligan Ex Parte*. From DECISION: THE CONSTITUTION IN ACTION series, National Educational Television, 1959, 29 minutes, black and white.

DECISION FOR JUSTICE

The film presents a dramatic reenactment of John Marshall's contributions to the establishment of the Supreme Court as the ultimate interpreter of the Constitution. No distributor noted, 1955, 27 minutes, black and white.

EQUALITY UNDER THE LAW—THE LOST GENERATION OF PRINCE EDWARD COUNTY

In 1959, public schools were closed and white children in Prince Edward County were encouraged to attend segregated schools. The film analyzes the case as a constitutional violation. From OUR LIVING BILL OF RIGHTS series, Encyclopedia Britannica Educational Corp., 1967, 25 minutes.

THE CIVIL WAR: THE ANGUISH OF EMANCIPATION

The film borrows dialogue from speeches and written records to dramatize Lincoln's personal struggle to ensure the preservation of the Union and uphold the Constitution, while simultaneously striking a blow at slavery. It shows the horror and futility of war as a means to resolve political disputes, and reveals how emancipation was determined more by military necessity than moral imperatives. Learning Corporation of America, 1972, 28 minutes.

GEORGE WASHINGTON AND THE WHISKEY REBELLION: TESTING THE CONSTITUTION

Enforcement of the federally imposed whiskey tax is the issue used to demonstrate the new nation's first challenge. The film uses dramatic action of Washington's military efforts against western Pennsylvania farmers' lawlessness. Learning Corporation of America, 1974, 27 minutes.

IMPEACHMENT

The film examines the process of impeachment and removal of the president from office, using excerpts from the Constitution and their relation to the practice of government. It reviews the impeachment and trial of Andrew Johnson. No distributor noted, 1974, 18 minutes.

IMPEACHMENT OF A PRESIDENT (ANDREW JOHNSON)

Issues such as the extent of the president's power, broad vs. strict interpretation of the law, and the comparative influence of the vice-president and the speaker of the House are examined through the case of Andrew Johnson v. Thaddeus Stevens. From the HISTORY ALIVE series, TW Productions/Walt Disney Productions, 1970, 14 minutes.

POWERS OF THE PRESIDENCY—ARMED INTERVENTION

This dramatization deals with the need for military intervention when the interests of the United States are vitally affected by events in another country. A fictional president of the U.S. must quickly choose a course of action in a swiftly changing situation with conflicting information; the film is open-ended. BFA Educational Media, 1973, 21 minutes.

POWERS OF THE PRESIDENCY—ECONOMIC CONTROLS

The complexity of the president's decisions is dramatized in this film. Runaway inflation and an inactive Congress force a fictional U.S. president to order wage and price controls. The film questions the constitutional authority for doing this, but leaves the answer open for student discussion. BFA Educational Media, 1975, 23 minutes.

THE RIGHT OF PETITION

This film dramatizes the viewpoints of John Quincy Adams and Thomas Marshall in 1842 as they argue the southern states' "gag rule." From the HISTORY ALIVE series. TW Productions, Walt Disney Productions, 1970, 13 minutes.

STATES' RIGHTS

The 1832 confrontation between President Jackson and John C. Calhoun over a tariff law favoring the industrial North to the detriment of southern cotton growers is dramatized in this film. The threat of South Carolina's secession from the Union raises the issue of the rights of a state to refuse to obey a national law. From the HISTORY ALIVE series, TW Productions/Walt Disney Productions, 1970, 14 minutes.

JUVENILE LAW

Two brothers—one age 18, the other, 15— are arrested for a crime. The film shows the contrast between adult criminal procedures and juvenile law, and raises questions about the paternalistic character of juvenile justice and the constitutional issues involved in reforming the juvenile justice system. From the BILL OF RIGHTS IN ACTION series, BFA Educational Media, 1974, 23 minutes.

WOMEN'S RIGHTS

A high school girl wants to swim on the boys' team but is thwarted by state bylaws which prohibit her from doing so. The film shows the unconstitutionality of the bylaws based on the Fourteenth Amendment's guarantee of equal protection of the law to all citizens regardless of race or sex. BFA Educational Media, 1974, 22 minutes.

FREE PRESS/FAIR TRIAL

This film reports in depth on the dilemma of balancing First Amendment guarantees of an uninhibited press and the public's right to know with the Sixth Amendment's guarantee of a defendant's right to a speedy and fair trial by an impartial jury. Film clips from the trials of Bruno Hauptman, Dr. Sam Sheppard, Bettie Sol Estes, Lee Harvey Oswald, and Wayne Henley, Jr., plus clips of Nixon and Agnew claiming press prejudices, are included. WNET/Teaching Film Custodians, 1973, 30 minutes, black and white.

INTERROGATION AND COUNSEL

The Fifth and Sixth Amendments are introduced in dramatic situations involving an accused person's privilege against self-incrimination and the right to legal counsel. From THE BILL OF RIGHTS series, Churchill Films, 1967, 21 minutes.

SEARCH AND PRIVACY

A suspected narcotics peddler and police efforts to make an arrest are the focus of three dramatic sequences. The film highlights the police's dual role in apprehending criminals yet protecting individuals from unreasonable search and invasion of privacy. Questions are raised about the reasonableness of search methods and the use of electronic surveillance. From THE BILL OF RIGHTS series, Churchill Films, 1967, 22 minutes.

LANDMARK CASES OF THE SUPREME COURT

BIBLE READING IN PUBLIC SCHOOLS: THE SCHEMPF CASE

This film asks whether Bible reading and the Lord's Prayer recited over a loudspeaker in a high school is a violation of the First Amendment. The issues and background are presented in the context of emotion-charged incidents, and the Supreme Court decision is reviewed. Encyclopedia Britannica Educational Corp., (no date), 35 minutes.

FREE PRESS VS. FAIR TRIAL BY JURY: THE SHEPPARD CASE

The conflict between the rights of the press and the rights of the accused to a fair jury trial are explored in this film. The 1954 case involving major constitutional issues and the 1966 Supreme Court decision establishing guidelines to protect the accused from prejudicial publicity are presented by documentary materials on the case. From OUR LIVING BILL OF RIGHTS series, Encyclopedia Britannica Educational Corp., 1969, 30 minutes.

JUSTICE UNDER LAW: THE GIDEON CASE

In the Gideon case, the defendant was tried and convicted without legal counsel. The film shows how Gideon, in prison, communicated with state and federal legislative bodies to obtain legal representation, and how the Bill of Rights and Oliver Wendall Holmes' interpretations guided the Supreme Court decision in the case. From OUR LIVING BILL OF RIGHTS series, Encyclopedia Britannica Educational Corp., 1966, 22 minutes.

MARBURY VS. MADISON

This film dramatizes the Supreme Court decision which established its responsibility to review the constitutionality of acts of Congress. From EQUAL JUSTICE UNDER LAW series, U.S. National Audiovisual Center, 1977, 36 minutes.

THE RIGHT TO LEGAL COUNSEL

The 1963 *Gideon* v. *Wainwright* decision, requiring that indigent defendants accused of serious crimes must be offered counsel, overruled an earlier decision in *Betts* v. *Brady*. When tried with adequate legal representation, the defendant, Gideon, was acquitted. BFA Educational Media, 1968, 15 minutes.

FREEDOM TO SPEAK: THE PEOPLE OF NEW YORK VS. IRVING FEINER

This film combines reenactments with interviews of participants in the case of a college student whose conviction for incitement to riot was upheld by the U.S. Supreme Court. It shows how constitutional interpretations vary with time and changes in public opinion and raises the issues of freedom v. security, liberty v. law, right v. responsibility, and liberty v. license. From OUR LIVING BILL OF RIGHTS series, Encyclopedia Britannica Educational Corp., 1967, 23 minutes.

...do ordain and establish

this Constitution

for the United States of America.

A Bicentennial Chronicle Fall 1986. No. 12

The Blessings of Liberty

Special Issue

The Annapolis Convention

Project '87

Annapolis Convention Report of Proceedings
September 14, 1786

On January 21, 1786, as one outcome of the meeting between commissioners from Maryland and Virginia at Mount Vernon in March 1785, the Virginia legislature adopted a resolution offered by John Tyler, at the suggestion of James Madison. The measure called for a conference of all the states "to examine the relative situations and trade of the States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and permanent harmony; and to report to the several States such an act relative to this great object." The meeting at Annapolis in September 1786, whose Bicentennial we commemorate in this issue, was the result. That convention issued a report calling for a meeting in Philadelphia in May of 1787 "to devise such further provisions as shall appear . . . necessary to render the constitution of the Federal Government adequate to the exigencies of the Union." That May meeting brought forth the Constitution. The report of the Annapolis Convention is reprinted below.*

……

To the Honorable, the Legislatures of Virginia, Delaware, Pennsylvania, New Jersey, and New York—The Commissioners from the said States, respectively assembled at Annapolis, humbly beg leave to report.

That, pursuant to their several appointments, they met, at Annapolis in the State of Maryland, on the eleventh day of September Instant, and having proceeded to a Communication of their Powers; they found that the States of New York, Pennsylvania, and Virginia, had, in substance, and nearly in the same terms, authorized their respective Commissioners "to meet such other Commissioners as were, or might be, appointed by the other States in the Union, at such time and place as should be agreed upon by the said Commissioners to take into consideration the trade and commerce of the United States, to consider how far an uniform system in their commercial intercourse and regulations might be necessary to their common interest and permanent harmony, and to report to the several States such an Act, relative to this great object, as when unanimously ratified by them would enable the United States in Congress assembled effectually to provide for the same." ...

That the State of New Jersey had enlarged the object of their appointment, empowering their Commissioners, "to consider how far an uniform system in their commercial regulations and *other important matters*, might be necessary to the common interest and permanent harmony of the several States," and to report such an Act on the subject, as when ratified by them, "would enable the United States in Congress assembled, effectually to provide for the exigencies of the Union."

That appointments of Commissioners have also been made by the States of New Hampshire, Massachusetts, Rhode Island, and North Carolina, none of whom however have attended; but that no information has been received by your Commissioners, of any appointment having been made by the States of Connecticut, Maryland, South Carolina or Georgia.

That the express terms of the powers of your Commissioners supposing a deputation from all the States, and having for object the Trade and Commerce of the United States, Your Commissioners did not conceive it advisable to proceed on the business of their mission, under the Circumstance of so partial and defective a representation.

Deeply impressed however with the magnitude and importance of the object confided to them on this occasion, your Commissioners cannot forbear to indulge an expression of their earnest and unanimous wish, that speedy measures be taken, to effect a general meeting, of the States, in a future Convention, for the same, and such other purposes, as the situation of public affairs may be found to require.

If in expressing this wish, or in intimating any other sentiment, your Commissioners should seem to exceed the strict bounds of their appointment, they entertain a full confidence, that a conduct, dictated by an anxiety for the welfare of the United States, will not fail to receive an indulgent construction.

In this persuasion, your Commissioners submit an opinion, that the Idea of extending the powers of their Deputies, to other objects, than those of Commerce, which has been adopted by the State of New Jersey, was an improvement on the original plan, and will deserve to be incorporated into that of a future Convention; they are the more naturally led to this conclusion, as in the course of their reflections on the subject, they have been induced to think, that the power of regulating trade is of such comprehensive extent, and

continued on page 53

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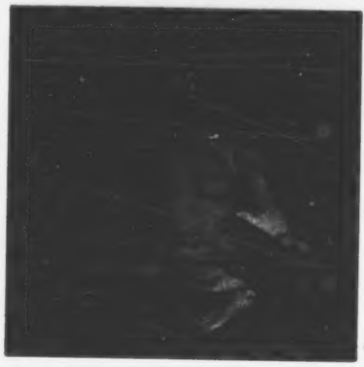
*From the *Virginia Independent: A Chronicle of the Constitution's Bicentenary in Virginia* (published by the Virginia Commission on the Bicentennial of the United States Constitution, University of Virginia, Charlottesville, VA 22903), No. 1, p. 8.

...do ordain and establish
this Constitution
for the United States of America.

A Bicentennial Chronicle

No. 12 Fall, 1986



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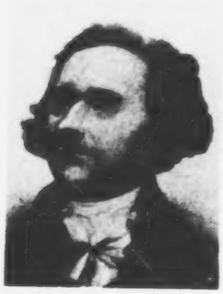

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Cover: "The Blessings of Liberty" is the first of the twelve posters in Project '87's poster exhibit on the story of the Constitution. See page 51 for more information. Calligraphy by J. Wasserman.

this Constitution **is published with the assistance of a grant from the National Endowment for the Humanities as part of its special initiative on the Bicentennial of the United States Constitution. Editorial offices are located at 1527 New Hampshire Avenue, N.W., Washington, D.C. 20036. All material in this publication may be photocopied if attributed as follows: "Reprinted from *this Constitution: A Bicentennial Chronicle,* Fall, 1986 published by Project '87 of the American Historical Association and the American Political Science Association." Project '87 would appreciate notification from those who photocopy material in this issue for use in presentations to other groups.** **© Copyright 1986 by the American Historical Association and the American Political Science Association**

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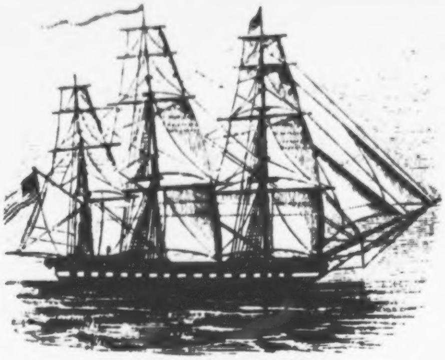

THE CONSTITUTION IN 1876.

published by Project '87 of the American Historical Association and the American Political Science Association

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From the Editor

September 1986 marks the Bicentennial of the Annapolis Convention, to which we dedicate the present issue of ***this Constitution.*** The Annapolis Convention was prompted by the inadequate power of the central government to meet national needs, and it issued the call for all the states to send representatives to a meeting in Philadelphia, "to render the constitution . . . adequate to the exigencies of the Union." Jack Rakove explains how remarkable an event this was in "The Gamble at Annapolis." Questions over the appropriate limits of national power remain an "enduring constitutional issue." The full report issued by the Annapolis Convention is reprinted in this issue; it begins on the inside front cover.

The Annapolis theme continues in the "For the Classroom" section, which contains lessons produced by the Maryland Office for the Bicentennial of the U.S. Constitution. The lessons are designed to help elementary school students understand Maryland's role in the adoption of the Constitution as well as to enjoy some eighteenth-century games. The Bicentennial Gazette highlights the commemorative activities taking place in Annapolis for this anniversary.

The Gazette also continues to record news about Bicentennial programs; this issue features a story on the exhibit to be opened in Philadelphia on September 17, 1986. A list of the new Bicentennial Younger Scholars, a program begun this year by the National Endowment for the Humanities for high school and college students, appears in the report of recent NEH grants.

Our feature articles focus on the presidency and on the subject of religion and the state. In the first, Thomas Cronin describes how inventive the framers were when they created the American presidency. He discusses the decisions of the Convention, the articles of the Constitution relating to the presidency, and the office's first incumbent, George Washington, who himself established many attributes of the chief executive's role.

A "Parley" considers the selection of the president. Judith Best and Lawrence Longley face off on the question of whether the Convention chose a wise method of electing the president. Best contends that the electoral college is a model of the federal system. Longley argues that it is a hazardous, cumbersome and unnecessary device.

The "Documents" article by Robert Alley presents an early statement by James Madison on the subject of religious liberty. Madison wrote his *Memorial and Remonstrance* in 1785, four years before he drafted the First Amendment to the Constitution, in response to a political question in Virginia. His eloquent expression of concern about the relationship of the state to religion remains a useful resource on this topic.

Finally, as ***this Constitution*** goes to press, Chief Justice Warren E. Burger has announced his retirement from the Supreme Court in order to devote his full energy to the work of the Commission on the Bicentennial of the Constitution. The commemoration will benefit greatly from his experience, commitment and guidance.

Thirteen Enduring Constitutional Issues

- National Power—Limits and Potential
- Federalism—the Balance between Nation and State
- The Judiciary—Interpreter of the Constitution or Shaper of Public Policy
- Civil Liberties—the Balance between Government and the Individual
- Criminal Penalties—Rights of the Accused and Protection of the Community
- Equality—its Definition as a Constitutional Value
- The Rights of Women Under the Constitution
- The Rights of Ethnic and Racial Groups Under the Constitution
- Presidential Power in Wartime and in Foreign Affairs
- The Separation of Powers and the Capacity to Govern
- Avenues of Representation
- Property Rights and Economic Policy
- Constitutional Change and Flexibility

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The Gamble at Annapolis

by JACK N. RAKOVE

On September 12, 1786, twelve commissioners representing five states gathered at Mann's Tavern in Annapolis, Maryland. They came with the limited task of finding some way to vest Congress, the governing body under the Articles of Confederation, with effective authority over the nation's commerce.

Though few in number, the commissioners mustered impressive talent and significant experience. John Dickinson of Delaware had prepared the original draft of the Articles in 1776. Abraham Clark of New Jersey had also contributed to the framing of the Articles; he spoke for a state that had supported the idea of national regulation of commerce since 1778. No one had thought more carefully about the difficulties perplexing Congress than James Madison of Virginia; no one had denounced the "imbecility" of the Confederation more pointedly than Alexander Hamilton of New York. Among the others present, Hamilton's colleague Egbert Benson had played a prominent role in the New York legislature, while Tench Coxe, the sole delegate to attend from Pennsylvania, was a former loyalist who had recently begun publishing insightful essays on the commercial interests of the new republic and other economic problems.

Exactly what these men said to each other during their brief deliberations remains a mystery. The commissioners kept no record of their discussions, and the considerations that weighed most heavily in their thinking have to be inferred from other evidence.

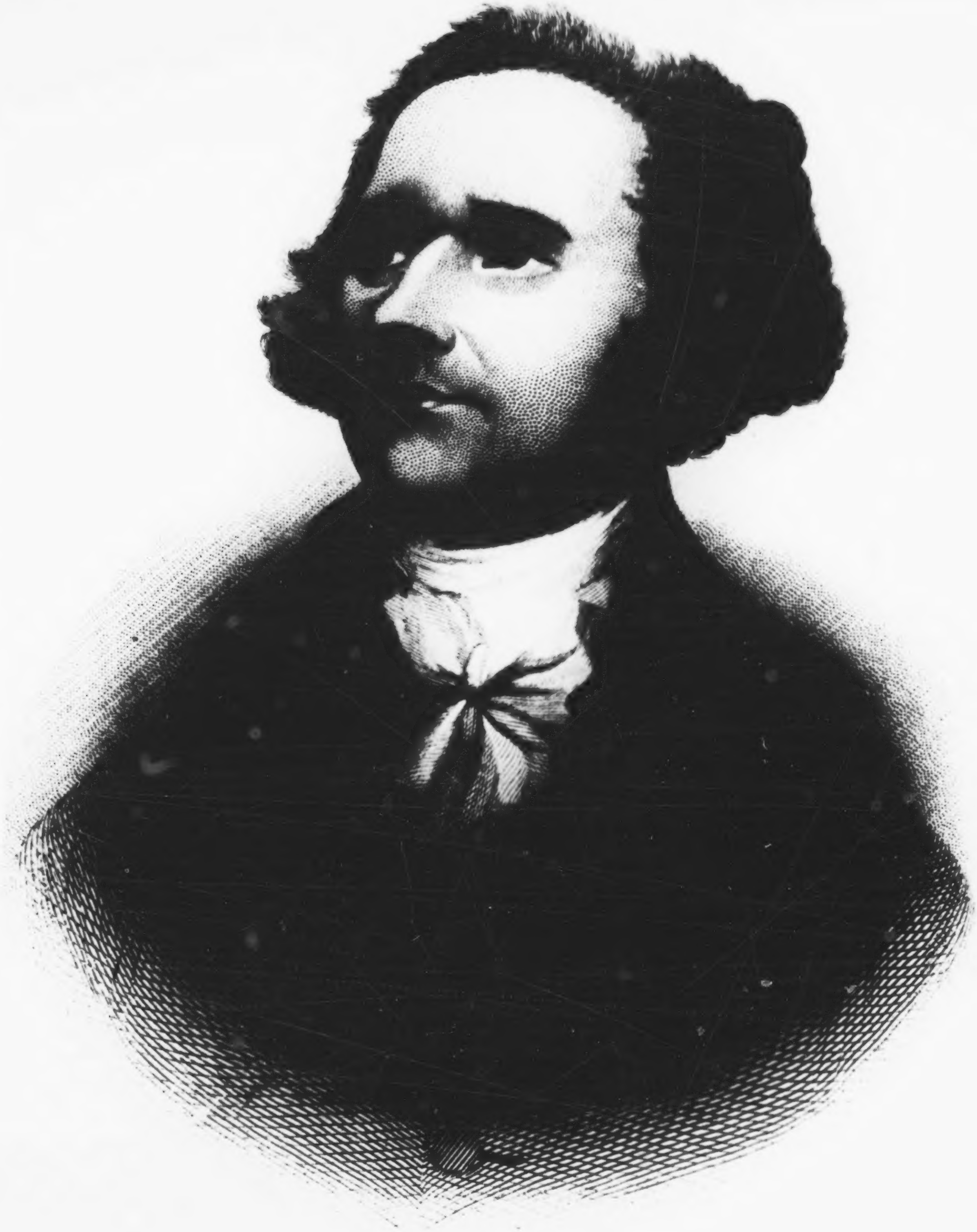
But there is nothing secret about the significance of what they did. When the Annapolis conference adjourned on September 14, after only two days of conversation, the commissioners issued a report drafted by Hamilton proposing something far more radical than their original instructions had envisioned. Taking their cue from the language of the credentials carried by the New Jersey delegation, the commissioners asked the state legislatures to elect delegates to a second convention that would be called "to devise such further provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the exigencies of the Union." Rather than trust their plan entirely to chance, the commissioners even went so far as to propose a time ("the second Monday in May next") and a place (Philadelphia) for the new convention to meet.

Despite the high hopes that the supporters of a stronger federal union had originally placed on the Annapolis meeting, it came close to dissolving in failure. But in light of the events that began to unfold almost immediately thereafter, the Annapolis Convention marked one of the boldest and most momentous gambles in American political history. For the publication of its report launched the movement that led to the gathering of the Constitutional Convention eight months later. In February 1787, after seven states had already agreed to send delegates to Philadelphia, Congress gave the convention its own endorsement. In succeeding weeks, all the remaining states save Rhode Island fell into line. Finally, the initiative taken by the Annapolis commissioners set an important precedent for the delegates at Philadelphia, who also ignored their nominal duty to revise the existing Articles of Confederation and instead chose to frame a radically new constitution. One risky gamble thus led to another, for far greater stakes.

What is difficult to recapture, after two centuries, is how large a gamble the Annapolis commissioners chose to take. Knowing that the road from Annapolis led directly to Philadelphia, many historians have portrayed the commissioners as bold and adept statesmen who knew exactly what they wanted—and how to obtain it. In fact, the call issued from Annapolis was very much the desperate maneuver of politicians who were ready to go for broke only because all other attempts to amend the Articles of Confederation had proved futile. So many false starts, dead ends and detours had marked the roundabout path that led Madison, Hamilton, Dickinson, and their colleagues *to* Annapolis in September 1786 that the commissioners must have left Mann's Tavern more than a little uncertain whether their next projected encounter would come off as planned.

Rather than view the Annapolis Convention simply as the prelude to Philadelphia, then, we should also see it as the last of a series of efforts, dating to 1781, to strengthen the existing federal union without violating the basic framework of the Articles of Confederation.

A few men had wondered all along whether the principles of the Confederation were worth respecting, and doubted whether any union that conceded so much power to its member states could govern a rising empire. Alexander Hamilton, the young New York attorney whom Madison later credited with drafting the Annapolis report, had long since concluded that the Articles, as drafted, fell far short of what the country needed. Hamilton had first broached the idea of a national convention as early as September 1780—half a year before the Confederation took formal effect. In the summer of 1783, during his final months as a member of



Alexander Hamilton, delegate from New York. Library of Congress.

Never one for partial measures, Hamilton believed that only radical treatment could preserve a viable federal union.

Congress, he had even gone so far as to draft a resolution calling for a general constitutional convention. Never one for partial measures, Hamilton believed that only radical treatment could preserve a viable federal union. If any one could claim to have been vindicated by the key proposal for a general convention that his fellow commissioners at Annapolis endorsed, it was Hamilton.

Yet in many ways it is the conversion of James Madison to Hamilton's position that makes the more compelling element in the story. Hamilton ended a political retirement of three years to attend the meeting at Annapolis; but Madison had participated in literally every effort to strengthen federal authority from the moment he had entered Congress in March 1780. He continued to do so even after the completion of his term in Congress forced him to return to Virginia in 1783. Moreover, while we usually regard Madison as the great *theorist* of federal reform—as the one framer of the Constitution who had thought most deeply about the entire range of issues that the Federal Convention had to consider—by 1786 he had also emerged as its great *tactician* as well. The shifting calculations that led Madison first to Annapolis and then to Philadelphia reveal far more about the obstacles that reformers of the Confederation had to surmount than the impatience with which Hamilton regularly dismissed partial efforts to amend the Articles.

At times, Madison, like Hamilton, had endorsed simple and drastic solutions to the problems of the Confederation. In 1781, for example, he had proposed using continental ships to blockade the ports of states that failed to fulfill their obligations to Congress. But his experience in Congress soon taught Madison to tailor his preferences to political reality.

Obstacles to Amending the Articles

Two major obstacles confounded every effort that Madison and other like-minded men made to strengthen the union. The first was formal. Under Article XIII of the Confederation, amendments to the federal charter had first to be proposed by Congress and then unanimously approved by each of the states.

Unanimity proved difficult enough to achieve even while the patriotic constraints of the Revolutionary War had worked to favor compromise and consensus. Maryland, after all, had unilaterally delayed the formal ratification of the Confederation for more than three years, until the states claiming vast tracts of western lands had indicated their willingness to cede their rights to the union. After 1783, with independence secured, it grew far more difficult to define a truly national interest that the individual states and regions could jointly recognize and pursue.

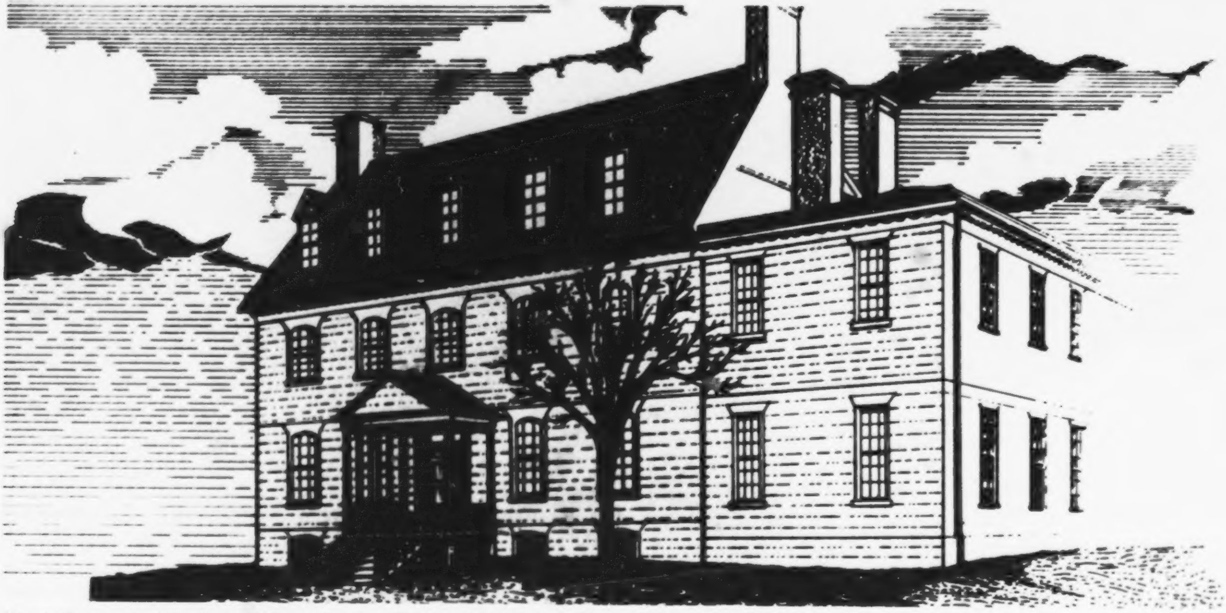
Thus the second great obstacle to amending the Articles was, in a sense, political. Unanimity outside Congress required some measure of consensus within its chambers. But as issues of finance and commerce involving the specific interests of individual states came to the fore after 1783, even Congress, once hailed as "the collected wisdom of America," found agreement difficult to secure. The more Congress stumbled in its efforts to resolve these problems, the more its reputation plummeted, which in turn made it ever less likely that its proposals would secure the unanimous approval of the states.

The first attempt to amend the Articles provided an ominous portent of the difficulties Congress would regularly encounter. In February 1781, only weeks before the Articles took effect, Congress proposed its first amendment by asking the states to permit it to levy a 5 percent duty, or impost, on foreign goods. The fact that virtually the entire membership of Congress supported this proposal carried little weight with Rhode Island, which obstinately refused its assent. In late 1782, Congress dispatched a committee to plead with the Rhode Island assembly, but its members turned back short of their destination after learning that Virginia had rescinded *its* approval.

By then most members of Congress recognized that the financial affairs of the union demanded more radical treatment. From October 1782 until April 1783, Congress was preoccupied with framing a comprehensive revenue program. Debate was especially vigorous, not only because Superintendent of Finance Robert Morris continually pressed Congress to adopt his own set of far-reaching recommendations, but also because the clamors arising from public creditors and the army added further urgency to an inherently difficult issue.

The defeat of the first impost had taught most delegates political lessons they could not afford to ignore. After months of debate and deadlock, Madison and a handful of other delegates broke with Superintendent Morris and took the lead in framing a compromise revenue proposal designed to answer as many objections as possible. To prevent the states from taking piecemeal action on these recommendations, Congress presented the proposals it adopted on April 18, 1783 as a package, to be ratified or rejected *in toto*.

Madison and his colleagues knew that ratification would take time—



Mann's Tavern, site of the Annapolis Convention, ca. 1786. Drawing by Polli Rodriquez. Maryland Office for the Bicentennial of the U.S. Constitution, Maryland State Archives.

but time, they also feared, was now running against them. News of the peace with Britain had arrived near the close of the debates. No one wanted the war to continue, of course. But Congress understood that the coming of peace would make it easier for individual states to refuse to follow its lead whenever they felt their particular interests would be injured.

Commercial Problems

Peace also enabled Americans to resume the wholehearted pursuit of private interest and comfort, to place wartime demands for sacrifice safely behind them. American merchants looked forward to restoring the commercial connections that had been interrupted after 1774 and to establishing new markets in nations to which the colonists had formerly lacked access. Consumers similarly hoped to purchase goods they had gone without or obtained only at great expense during the years of wartime scarcity.

British merchants had plans of their own to fulfill. At war's end they dispatched a stream of ships across the Atlantic, bringing all those items of European manufacture that Americans desired. At the same time, the British government took steps to prevent American merchants from reestablishing their prewar connections within the empire. The Privy Council issued an order prohibiting American ships from carrying exports to the British West Indies, which before the Revolution had provided them with their most valuable markets, as well as from carrying imports from Britain itself.

How should the United States attempt to counteract such discriminatory measures? The logical response was retaliatory: to restrict or prohibit the access of British ships to American ports until the government in London opened imperial harbors to American merchants. Such a strategy was urged with characteristic zeal by John Adams, whose principal task as the first American minister to Great Britain was to negotiate a treaty of commerce with the former mother country.

But one crucial obstacle hindered the adoption of such a policy. Under the Articles of Confederation, Congress lacked authority to regulate either foreign or interstate commerce. Individual states could impose whatever restrictions on British ships they pleased, but without a uniform set of regulations among all the states, these efforts would be pointless. If Massachusetts closed its harbors to British ships, their captains could simply sail on to neighboring Rhode Island or Connecticut and sell their cargoes there, leaving it to American merchants to carry the desired goods inland into the Bay State over existing roads or up the broad Connecticut River.

With the revenue plan of April 1783 still making the rounds of the state legislatures, Congress was reluctant to request further powers. But in April 1784 it did ask the states to consider two further amendments to the Articles of Confederation. The first would have authorized Congress to bar from American harbors ships owned or navigated by citizens of nations that had not concluded commercial treaties with the United States. The second would have empowered Congress to prohibit foreign merchants operating in the United States from importing goods manufactured in any country but their own.

By 1785, these measures seemed inadequate to the depression that northern merchants and artisans complained was ruining their prosperity. At the particular urging of James Monroe, who had replaced Madison in the Virginia delegation, Congress appointed a committee to consider whether it should ask the states to vest it with comprehensive powers over commerce. But when the committee did draft an amendment to grant Congress the power to regulate both foreign and interstate commerce, Congress only tabled the proposal.

Why did Congress fail to act? First, a number of Southern dele-

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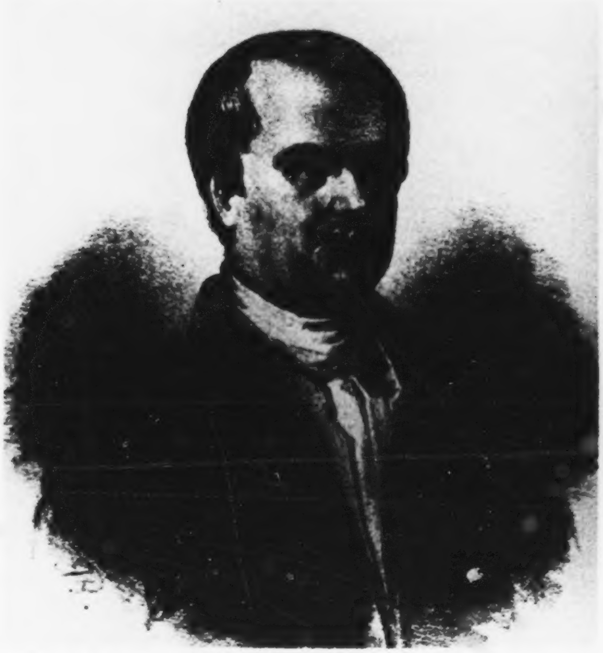


Abraham Clark, delegate from New Jersey.
Library of Congress.

John Dickinson, delegate from Delaware.
Independence National Historical Park collection.

gates (other than Monroe) feared that federal power over commerce would serve only northern interests. As much as they resented the British merchants who were even now demanding the repayment of prewar debts—with interest!—many southern planters feared their own countrymen even more. Second, a group of New England delegates, led by Elbridge Gerry of Massachusetts, saw the committee's recommendation as the insidious first step of a scheme to subvert the Articles of Confederation. Associating this proposal with the controversial plans of Robert Morris, whom they had bitterly opposed, they defied the apparent interests and even the instructions of their constituents and refused to endorse the commitee's report.

Without consensus in Congress, no amendment could possibly gain the approval of the states. But there was a third reason why Congress failed to act, and which pointed the way to the thinking that would lead to Annapolis.

By 1785 it seemed clear that the states would view any amendment that Congress proposed as tainted. Opponents of the impost of 1781 and the revenue plan of 1783 had repeatedly claimed that a Congress possessed of its own sources of revenue would destroy the entire fabric of republican liberty protected by both the Articles of Confederation and the constitutions of the states. Give Congress the power of the purse to add to that of the sword, they declared, and the road to tyranny would soon lie open. Supporters of Congress answered these charges as reasonably as they could, but repetition had its effect. Any efforts a discredited Congress might now take to follow the amendment procedures of Article XIII seemed doomed to failure.

A slim hope still existed that state ratification of the revenue plan of 1783 or the commercial amendments of 1784 would demonstrate that this procedure was workable. None of these proposals ever received unanimous state support, however. When New York definitively rejected the revenue scheme early in 1786, the inadequacy of the Confederation's formal amendment procedures seemed evident.

A Convention on Commercial Matters

These developments set the background against which Madison and other national leaders began to think seriously about the idea of holding some sort of convention to discuss changes in the Confederation. The idea of a convention was not entirely new. Thomas Paine had broached it as early as 1780; Hamilton had raised it again in 1783; and Congress had considered it informally in 1784 and 1785. But the proposal had little to commend it. The would-be reformers of the Confederation faced a dilemma. On the one hand, they sensed that the requirements of Article XIII could never be satisfied; on the other hand, they feared that the public admission of this fact would simply lead to the further erosion not only of the prestige of Congress but also of the authority of the Confederation.

Yet at some point they had to decide how much longer to honor the formal requirements of the Confederation. The turning point came during the fall 1785 meeting of the Virginia assembly. At the start of the session, Madison and a group of legislators introduced a bill to vest Congress with the power to regulate foreign trade. So severely did its opponents attack this measure, however, that its supporters decided it would be better to table the bill than risk approving the eviscerated version that seemed likely to pass the assembly.

It was probably at this point that Madison and his allies broached the idea of having Virginia, rather than

Congress, call for "a Meeting of Politico-Commercial Commis-s[ione]rs from all the States for the purpose of digesting and reporting the requisite augmentation of the power of Congress over trade." They found a useful precedent for this unusual procedure in the results of the Mount Vernon conference of March 1785, when a handful of delegates representing Virginia and Maryland had gathered at Washington's estate and amicably resolved a number of issues relating to the navigation of Chesapeake Bay and the Potomac River. The willingness of the Virginia assembly to ratify this compact, coupled with Maryland's invitation to Delaware and Pennsylvania to enter the agreement, suggested that this tactic of independent state action could work on a more ambitious scale.

Even so, only on January 21, 1786, the very last day of the session—in one of those closing rushes for which state legislatures were even then famous—did the assembly adopt a suitable proposal prepared by John Tyler. On its face, it was a simple measure. The resolution named seven commissioners—among them Madison, Edmund Randolph, and the crusty old whig, George Mason—and authorized them, in the name of Virginia, to invite deputies from other states to attend a meeting "to consider and recommend a federal plan for regulating commerce." In early March, the commissioners set a time and place: the first Monday in September, at Annapolis. "That city was preferred," Randolph noted, because it would be free "from the suspicion, which Phila[delphia] or N. York might have excited, of congressional or mercantile influence."

Madison remained doubtful whether this experiment would succeed, and Monroe, still in Congress, appeared at first even more skeptical. If the defects of the confederation were to be remedied by a convention rather than through amendments proposed by Congress, Monroe argued, the proposed conference at Annapolis was too narrowly conceived to do much good. But Madison had reached a different conclusion, and with typical care he calculated the advantage he hoped to reap:

> If all on whom the correction of these vices depends were well informed, the mode [of amendment] would be of little moment, [Madison wrote in mid-March]. But as we have both ignorance and iniquity to control, we must defeat the designs of the latter by humouring the prejudices of the former. The efforts of bringing about a correction thro' the medium of Congress have miscarried. Let a Convention then be tried. If it succeeds in the first instance, it can be repeated as other defects force themselves on the public attention, and as the public mind becomes prepared for further remedies.

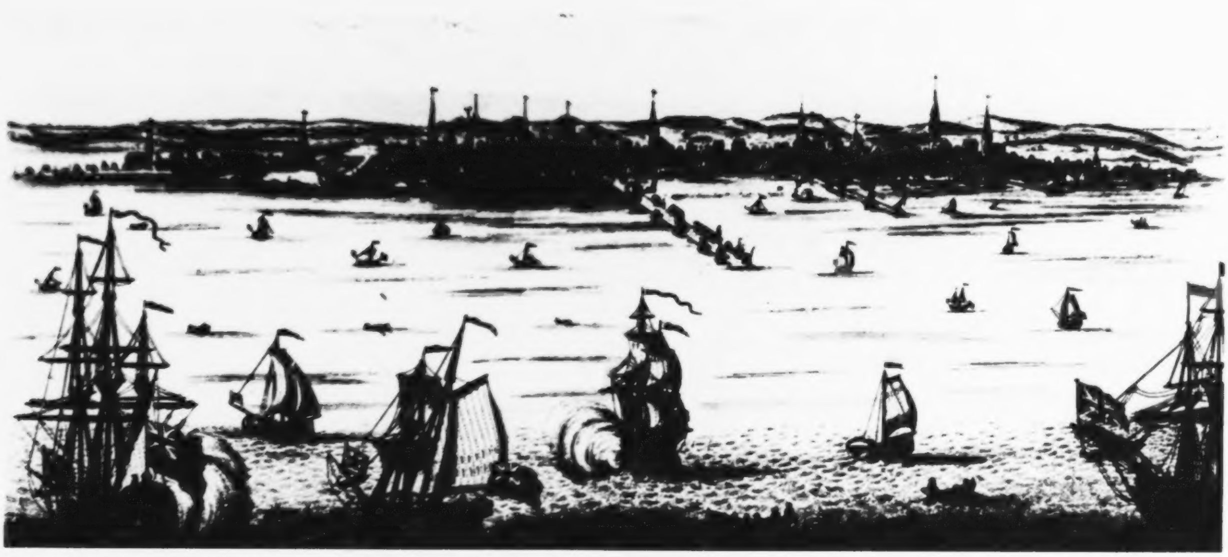
Madison's argument took on added urgency because Congress—prodded by Charles Pinckney of South Carolina—had again begun considering proposing additional amendments to the Confederation or even issuing its own call for a general convention.

Monroe led the opposition to both ideas. He condemned further congressional requests for amendments as pointless, because "recommendations from that body are received with such suspicion by the States that their success however proper they may be is always to be doubted." That liability would not apply to the Annapolis meeting, however, since it would convene "under the particular direction of the States for a temporary purpose" and consist of members "in whom the lust for power cannot be supposed to exist."

In the end Congress failed to act on Pinckney's suggestions. The delegates found no reason to think that a congressional call either for a general convention or the adoption of additional amendments would now succeed where all previous efforts at reform had failed. By default more than choice, the Annapolis conference had emerged as the one remaining alternative worth pursuing.

Taking the Risk

But would even this meeting manage to avoid the embarrassment that these other efforts had encountered? A poorly attended conference might do more harm than good, and by late August only eight states (New Hampshire, Massachusetts, Rhode Island, New York, Pennsylvania, Delaware, New Jersey, and North Carolina) had accepted Virginia's invitation. Two states balked at appointing delegates precisely because they feared the conference would detract even further from Congress's stature. One of these, embarrassingly enough, was Maryland, which was not only the nominal host of the conference but the other original signatory to the Mount Vernon compact; the other was Connecticut. In 1783 and 1784, a wave of popular conventions within the state had challenged the authority of the legislature, and Connecticut's political leaders still regarded all departures from settled procedures as subversive of good order. The South Carolina assembly apparently regarded its previous approval of an act vesting Congress with a power to regulate commerce for fifteen years as adequate proof of its concern; while Georgia, which rarely



Port of Boston, one center of American commerce in the eighteenth century. Library of Congress.

involved itself in national politics, never acted on the Virginia invitation at all.

When the Virginia commissioners had originally set September as the month of meeting, they must have hoped that the passage of additional months would produce a favorable atmosphere within which the conference could meet. Instead, developments since the spring had taken a more ominous cast. The most alarming of these involved a bitter debate within Congress over the navigation of the Mississippi, which Spain had closed to the Americans in 1784. Southern leaders felt strongly that Congress should insist on American rights. But northern leaders, fearing that the opening of the West would drain population from their own region, took a different view. They favored yielding the American claim for the time being in order to secure a favorable commercial treaty with Spain. This dispute had split Congress into two sectional blocs, leading Madison and other knowledgeable politicians fearful that the union might soon run the risk of breaking down into separate regional confederacies.

Against this background, optimism that the Annapolis conference would meet the deeper needs of the union proved hard to support. A sense that even the best outcome at Annapolis would not go nearly far enough did inspire some men to entertain more ambitious notions. "Many Gentlemen both within & without Congress wish to make the meeting subservient to a Plenipotentiary Convention for amending the Confederation," Madison informed Thomas Jefferson in August. "Tho' my own wishes are in favor of such an event," he continued, "yet I despair so much of its accomplishment at the present crisis that I do not extend my views beyond a Commercial Reform. To speak the truth *I almost despair even of this*." For Madison, caution remained the rule.

It is an open question whether that same caution would have prevailed had the Annapolis Convention actually been respectably attended. As it happened, too few commissioners appeared to enable it to act with a pretence of credibility. Virginia, New Jersey, and Delaware each had three commissioners present, which meant that their delegations could act lawfully under the terms of their official credentials. But with only two members present from New York (Hamilton and Benson) and one from Pennsylvania (Coxe), those two states lacked a quorum of their delegations. The commissioners could have stayed on a few more days, waiting for stragglers from Massachusetts and Rhode Island to arrive; and they probably knew that a few other commissioners, unaccountably delayed by private business, might yet attend. But even had they done so, their predicament would have been no different. Any substantive proposal concerning trade framed by such a body would carry little weight. Far from advancing the cause of reform, such a recommendation would only demonstrate anew how difficult it was to get the American states to unite.

Still, desperation had its uses. What other alternative would remain once the Annapolis Convention adjourned? Within this context, Hamiltonian boldness finally gained the advantage it had previously lacked. Recognizing that every likely method of proposing modest amendments to the Confederation had now proved fruitless, the commissioners concluded there was no longer anything to be lost by taking a greater risk. That is exactly what the commissioners understood they were doing when they decided to issue their call for a general convention. Such a proposal seemed likely to fail; but there was a chance that it would succeed if it indeed came to be perceived as the only remaining alternative to the breaking up of the confederation. The commissioners took that perilous gamble. It paid off dramatically the following year.

Suggested Reading:

Merrill Jensen, *The New Nation* (1950).
Jack N. Rakove, *The Beginnings of National Politics* (1979).
Robert Rutland, ed., *The Papers of James Madison*, vol. 8 (1973).

Jack N. Rakove, associate professor of American history at Stanford University, is completing a biographical study titled "James Madison and the Creation of the American Republic."

The Origins of the American Presidency

by THOMAS E. CRONIN

The invention of the American presidency in 1787 is sometimes described as one of the most fateful developments in American history. By no means, however, was it inevitable. The framers of the American Constitution could have strengthened their existing government under the Articles of Confederation—as indeed they were instructed to do by the Continental Congress. Many of the framers recognized the need for further centralization of power, yet centralization and the invention of a chief executive were not one and the same.

The Constitutional Convention

Few Americans now appreciate how close we came to adopting a kind of parliamentary system. The Virginia plan, the outline that guided discussions at the Constitutional Convention in Philadelphia, had proposed that the president and federal judges be selected by Congress. Delegates initially looked favorably upon this arrangement. Only after debate and deliberations had gone on for some time did the delegates move away from the idea. Nor can we completely dismiss the rumors about the possibility of Americans importing some kind of monarch. Gossip spread that Prince Henry of Prussia or Frederick, Duke of York might be suitable prospects for establishing a limited monarchy in America. Nonetheless, the notion of three separate and distinct branches gradually won out—the result of prolonged negotiations and extensive compromise.

At Philadelphia the framers recommended both a more centralized national government *and* a relatively independent executive. The creation of the presidency, like the development of the Constitution, was the result of the collective experience and wisdom of the nation. The founders carefully examined their own experiences—both good and bad—under the Crown, under royal governors, with their own governors, with General George Washington during the Revolution, and with the successes and failures of the Confederation. They also read about other systems—those of antiquity, and those described in legal commentaries and theoretical treatises. Still, the creation of the national executive involved imagination, vision and risk-taking, moving well beyond the lessons of history.

The framers acted against the backdrop of two explicit fears—that the national government would be ineffective or that it would be tyrannical. The last thing they wanted was the "second coming" of a George III on American soil; antimonarchical sentiment ran deep. They were distressed also by the popular uprisings, lawlessness and unchecked democracy Massachusetts had endured with Shays' rebellion the year before in 1786. They wanted a more potent national government, yet they were keenly aware that the American people would not accept too much central control, especially if a lot of power were to be concentrated in a single person or office.

In fact, however, most framers recognized that the nation's executive would have to enjoy a certain independence. Both experience and a growing body of political thought pointed to a need for some executive discretion and perhaps even a dose of inherent or prerogative power to be lodged in the office of the president. Their challenge was to invent an executive office strong enough to provide effective governance without threatening balanced republican forms of government. "The majority of the delegates brought with them no far-reaching distrust of executive power," writes Charles Thach, "but rather a sobering consciousness that, if their new plan would succeed, it was necessary for them to put forth their efforts to secure a strong, albeit safe, national executive." In effect, the question had become one of whether the Articles of Confederation had pushed too far in the direction of legislative rule. Leaders at Philadelphia thought so, but they doubted most Americans were willing to diminish much of their devotion to republican ideas.

The Convention was divided into three groups on the issue of the executive. A staunch anti-monarchy group was composed of older men, like George Mason of Virginia, Roger Sherman of Connecticut and Hugh Williamson of North Carolina. Suspicious of power, they thought the executive should be subordinate to the legislature. Moreover, they argued that the nation would not accept what was virtually a king, merely because he was an elected one.

A second group favored a strong chief executive, the more politically controversial position. James Wilson of Pennsylvania, the framer who had the greatest influence on the design of the presidency at the Convention, insisted that despotism could arise not only from a monarch, but also from the military, or the legislature. Thus, power had to be divided and balanced. Gouverneur Morris contended that a strong executive would protect the people against the potential of tyranny of the legislature.

Moderate delegates, caught between these two positions, supported some kind of executive yet they viewed the office as a potential source of danger and wanted its powers limited. One delegate pro-

Everyone presumed that George Washington . . . would become [the] first president. His deft handling of power during his command of the revolutionary forces constituted reassurance to the framers that his performance in office would be properly restrained.

posed importing a monarch to work under legislative auspices, as the British had done with William of Orange in 1689. John Rutledge wanted to follow the model of most states (including his own South Carolina) and empower Congress to choose the president.

The convention finally accepted the necessity of an executive, but a series of fundamental matters had still to be discussed. Should there be a plural or a single executive? How independent should the executive be from Congress? Who should choose the executive and for how long a term? What about reelectability? What kind of executive office would conform to republican theory? How much power should be granted the executive? A powerful executive might usurp legislative functions, yet too weak an executive would be devitalized by the strong legislature.

The British Crown provided an ever-present model to the framers. Many, wanting to avoid the example of the Confederation which had no viable executive, sought to reproduce the powers of the monarch, restraining them where excessive. The framers also had the precedent of the United States as colonies and as independent entities. Royal governors, succeeded by elected state executives in some of the states, had made the idea of a single, functioning administrator part of America's heritage.

It was New York that provided the most compelling example in post-colonial America of a single executive head of government with significant power. An important model for the United States Constitution and its separation of powers, the New York constitution of 1777 provided for a popularly-elected governor who served a three-year term and whose duties included "taking care that the laws are faithfully executed to the best of his ability." The term was renewable with no limits stipulated. John Jay, Gouverneur Morris, and Robert Livingston—all of whom questioned the political wisdom of the general public—had devised a strengthened executive in New York, not just as a check on the legislature but also as a check on the people and their role in popular democracy.

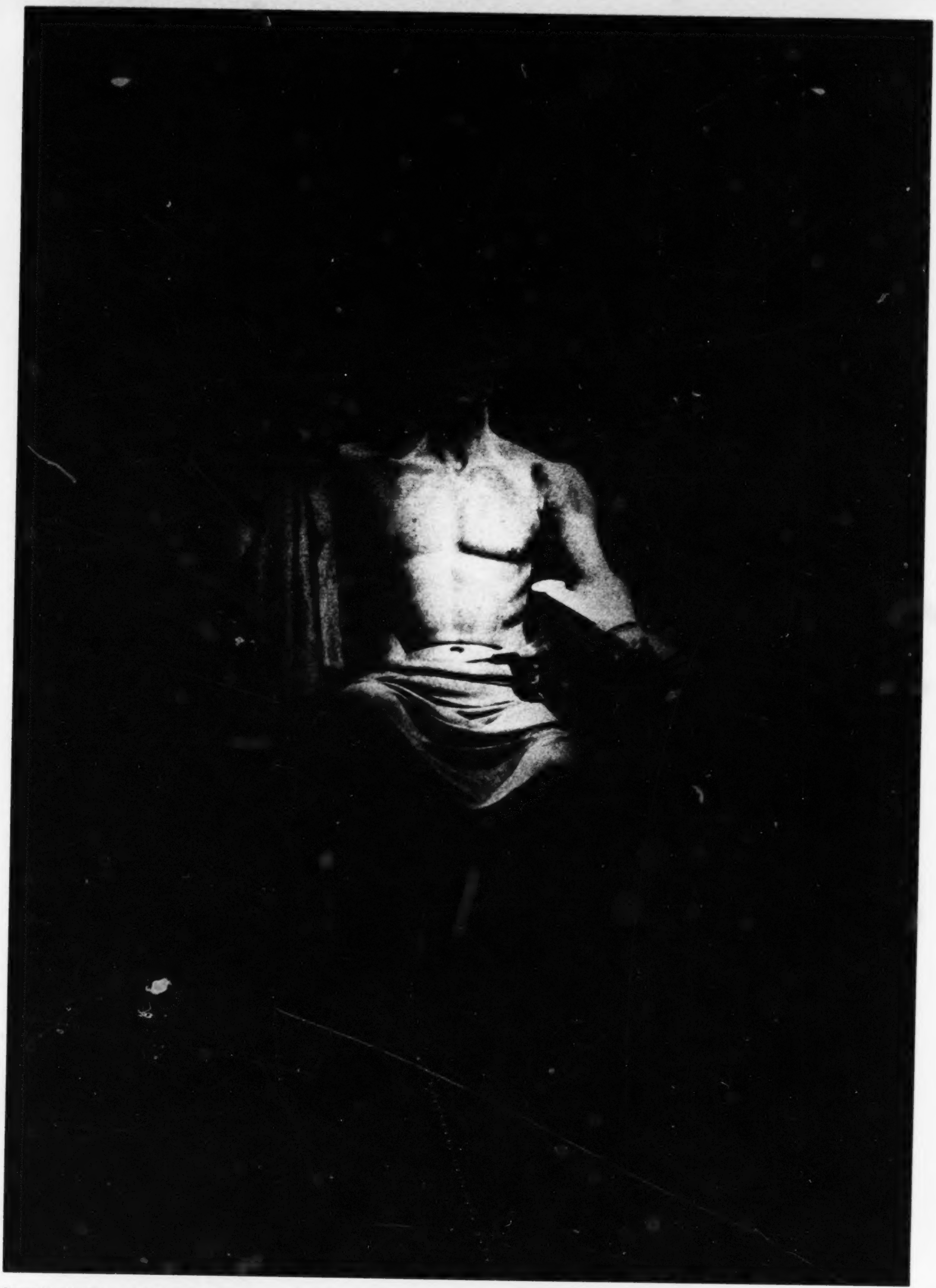
New York would have been a less valuable example without an effective executive willing and able to use his powers. Governor George Clinton made full use of his powers during his several terms. He exercised independent control over the militia, proposed legislation, threatened to terminate legislative sessions, and vetoed fifty-eight bills in the ten years prior to the Philadelphia Convention. Clinton's executive leadership plainly provided a model for the framers of the Constitution.

In setting up the Confederation government in the 1780s, Americans had virtually omitted the executive. Allowing their contempt for the British king to dictate their decisions, they created a government incapable for many reasons of performing some of its functions. By 1787, confronted with both this unsuccessful model and less driven by the emotions of the hour, the framers were willing to consider vesting a single individual with powers adequate to the office.

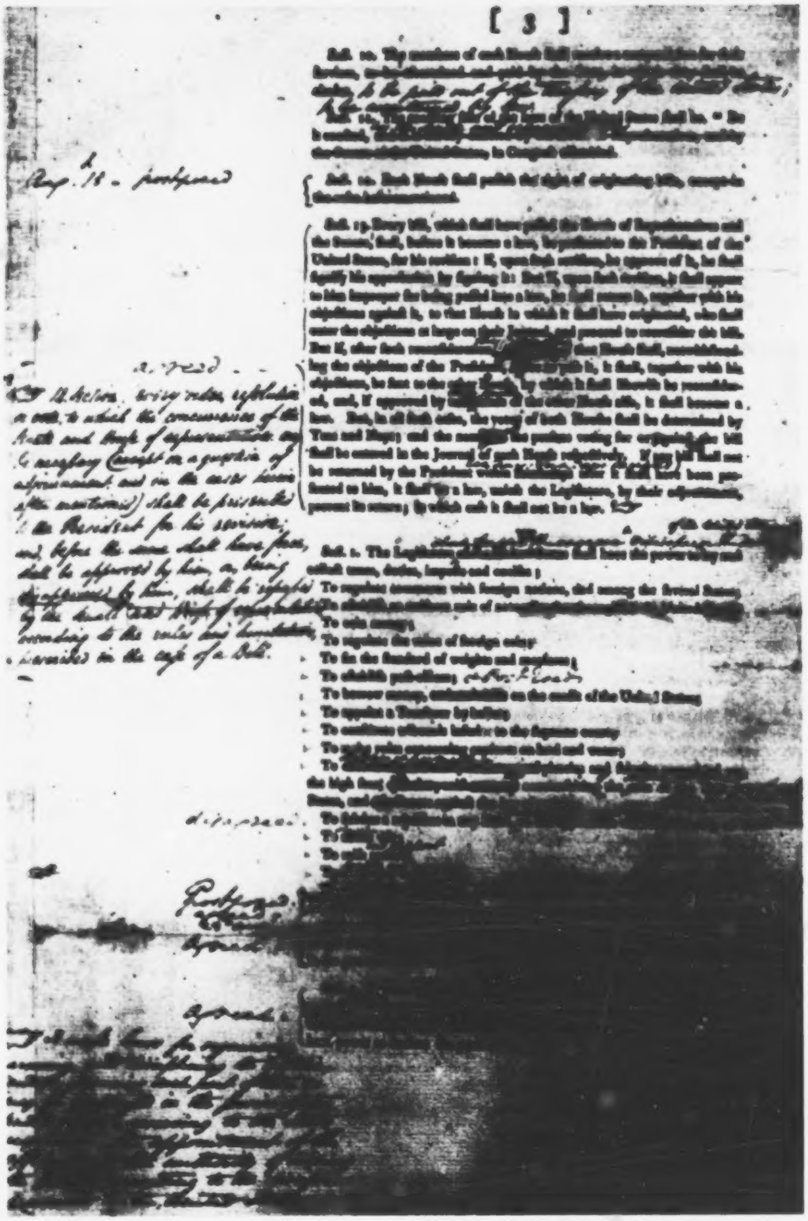
In addition, everyone presumed that George Washington, whose reputation was unequaled in the country, would become that first president. His deft handling of power during his command of the revolutionary forces constituted reassurance to the framers that his performance in office would be properly restrained.

Writings of political theorists also played a role in the thinking of the men at Philadelphia. Most of the delegates had college educations and were widely read. Although practical experience influenced the proceedings most heavily, the general ideas of the Enlightenment—as reflected especially in the writings of Locke, Montesquieu, Blackstone and the writers of the Scottish Enlightenment—were a part of the political culture on both sides of the Atlantic.

John Locke's influence was especially important. In his *Second Treatise on Government*, Locke asserted that people give up their freedom and enter political society because the state of nature lacks three things: clear settled laws, impartial judges, and the power to carry out the laws and enforce the decrees of judges. Locke outlined specific powers an executive might have: the ability to call together and to end legislative sessions, to certify legislative districts, and to act according to his own discretion when the public good required—even when laws were silent and even sometimes in opposition to the direct letter of the law. This was the doctrine of "prerogative." Locke was saying, in effect, that sometimes an executive might determine that emergency or survival warranted extralegal or illegal action. He maintained that legislatures were too large and too slow to cope with some kinds of emergencies and that executive discretion was therefore essential. Too strict or rigid an adherence to the law could sometimes do severe harm. Further, in Locke's view, "federative powers," which included conducting foreign relations, making war and peace, and entering into treaties and alliances, also required executive discretion. The King of England possessed these powers; Locke interpreted them as a necessary aspect of competent govern-



George Washington, marble statue by Horatio Greenough, 1841. National Museum of American Art. Photograph courtesy of Division of Political History, Smithsonian Institution, Washington, D.C.



Washington's copy of the Constitution, with his notes; these sections concern the president's power to veto legislation. National Archives and Records Administration.

ment.

James Madison said Montesquieu was a main source for the theory of separate powers, although several other theorists had advocated similar systems. Montesquieu, who had spent several years studying the British system, was convinced it was the soundest model for a people who wanted to preserve and nourish liberty. He believed power was fairly evenly distributed in England among King, House of Commons, and House of Lords. Montesquieu also believed the executive branch of government was better administered by one than many, the legislative branch better by many than one.

In the end, America's founding politicians moved well beyond the theorists' ideas. The examples of the Crown, colonial governments, experience with their new state governments, and Governor Clinton's performance in New York as well as General Washington's military leadership doubtless had more influence on the pragmatic political architects in Philadelphia than any strict reading of any theorist or collection of theorists. After all, they were revolutionaries who had fought and won a bloody war and they were also practical politicians representing specific regions and distinctive interests.

Article II

When the delegates in Philadelphia finished their work, Article II, section 1 of the Constitution read: "The executive power shall be vested in a president of the United States of America." This language is generally interpreted today as giving the president broad powers, including the authority to take emergency actions to protect the lives of citizens and the vital interests of the nation.

In addition, Article II, section 2 stated specifically that the president would be commander-in-chief of the army, navy and militia of the several states, when Congress called them into service. He would, like the British King, have the power to grant reprieves and pardons for offenses against the United States. This section also gave the president the authority to conduct foreign affairs: to make treaties and appoint ambassadors (albeit with the consent of the Senate). Further, again with the consent of the Senate, the president was to appoint other executive officials as well as the justices of the Supreme Court. (No mention was made about a president's powers to remove appointed executive branch officials. Presidents would win considerable discretion in this area, but not without prolonged fights with Congress and litigation in the federal courts.)

Presidents were also expected to play a role in the legislative process. The Constitution stipulated that they provide Congress information on the state of the union and recommend to its two houses such measures as they deemed necessary. As was the case in Massachusetts (but not in most states), a president would also have a qualified veto to prevent Congress from overstepping its boundaries and to enable him to influence the actual course of legislation. Congress could, however, overrule the veto by a two-thirds vote of both houses.

The president would provide for continuous administration of national programs, seeing that the laws were faithfully executed. Little did these early Americans realize how many laws would pass and how often Congress would delegate broad discretion to the executive branch.

The Constitution also made the president head of state by designating him to receive ambassadors and other foreign dignitaries. Defenders of the Constitution implied this was common sense and far more convenient than calling Congress into session to perform this chore every time visitors came. Yet this ceremonial or symbolic responsibility in effect turned the president into an exceedingly important spokesperson and symbol-in-chief for the nation.

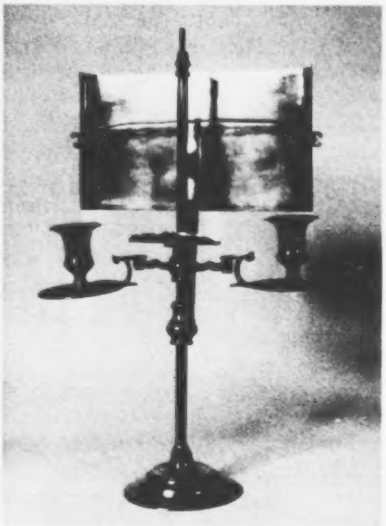
The considerable responsibilities assigned to the president engendered heated debate during the tense political battles preceding the ratification of the Constitution. The scope of his powers and the fact that the incumbent would have a four-year term and would remain eligible to stand for reelection for an unlimited number of additional terms led opponents to fear this office. Supporters maintained that though this new president would have important responsibilities, the executive would be for the most part subordinate to Congress. The Constitution enabled the president to exercise swift independent action only under exceptional circumstances.

The president would also be subject to impeachment. In one of his many outbursts at the Philadelphia convention, Gouverneur Morris demanded that the new executive not be impeachable. In response, the venerable Benjamin Franklin observed: "Well, he'd either be impeachable or he'd be assassinated." Morris looked at that great source of wisdom and experience and said at once: "My opinion has changed."

The method of selecting this chief executive occupied a great deal of time at the Constitutional Convention. Several delegates, as mentioned earlier, believed the executive should be chosen by Congress, following the example of most of the states. Others objected, however, saying that procedure would make the executive overly dependent on Congress. The delegates also considered selection by the Senate, by state governors, by the people and by state legislators. There were objections to every proposal.

Eventually, a compromise plan provided for the now famous "electoral college." A president would be elected by this body to which each state might appoint, in any way its state legislature prescribed, as many members as the total of its representatives and senators in Congress. These electors would exercise their own judgment in selecting a virtuous and prudent man to serve as president. The framers had plainly invented an idealized selection process that stressed virtue and underestimated the inevitability of conflict and party competition.

George Washington's candelabra. Division of Political History, Smithsonian Institution, Washington, D.C.



President Washington

The Constitution, as drafted and ratified, was a bold and ingenious document. Yet it did not itself guarantee that the presidency would work and that Americans would enjoy both representative *and* effective government. Much would depend on how George Washington interpreted the Constitution and how his compatriots would respond to his executive leadership.

For more than eight years, Washington had served his country as commander-in-chief of the Revolutionary Army. He had been granted extraordinary powers and had exercised them wisely. With the war won he resigned and returned, a national hero, to his Mount Vernon farm. During the war he had rebuked officers who had plotted to make him king. "Everyone knew him to be above suspicion and without overweening ambition," historian Marcus Cunliffe writes. "Everyone knew too that with ratification of the new Constitution it would be unthinkable to name any man but him as America's first true president."

Washington reluctantly accepted this new honor. He was fifty-seven years old and his health was not good. He worried about the poten-

"There is scarcely any part of my conduct which may not hereafter be drawn into precedent."
—George Washington

tially crushing burdens and obligations of the office; he told friends he was not qualified. Seeking to escape, he asked in vain if he had not already served his country long and well enough. But he was one of the only persons known, respected and trusted in all the states. Further, he had been a prime mover in bringing about the constitutional changes that had created the new executive. The first election for president was held in January 1789. His choice by the electoral college was unanimous.

Washington knew that he walked "on untrodden ground." "There is scarcely any action the motive of which may not be subjected to a double interpretation," he said. "There is scarcely any part of my conduct which may not hereafter be drawn into precedent." "[My] movements to the chair of Government," he wrote Acting Secretary of War Henry Knox in April 1789, "will be accompanied by feelings not unlike those of a culprit who is going to the place of his execution: so unwilling am I, in the evening of a life nearly consumed in public cares, to quit a peaceful abode for an Ocean of difficulties, without that competency of political skill, abilities and inclination which is necessary to manage the helm." A man of enormous pride, self-esteem and achievement, Washington knew his limitations. He knew he was not an orator, philosopher, constitutional theorist or political organizer.

On the other hand he was, and had been for nearly a decade, a national hero, the recipient of lavish praise. Washington not only accepted the deference graciously, he used it as a means of legitimizing both his new office and the new national government he had labored so long to bring into being. No matter how ably Alexander Hamilton and others had explained the Constitution, and the provisions relating to the chief executive, it was now up to Washington to carry out the promise of the office, establishing precedents at every turn. He understood that written constitutions do not implement themselves, that a functioning constitution includes traditions, practices, and interpretations which fill out the written document. Washington may not have been a philosopher, but he had mature political values about the purposes and appropriate processes of the Constitution. Thus, he was committed to the rule of law. Although he was somewhat of a skeptic about the doctrine of separated powers he recognized the primacy of Congress in domestic policymaking. He regularly declined to use his veto power even when Congress sent him legislation he disliked. And he held fast to the "Federalist" view that the nation's power and responsibilities must be respected by the states.

As noted, the founders decided to grant the chief executive the additional responsibilities of receiving ambassadors and other foreign dignitaries, making the president head of state and chief symbolic leader as well. President Washington acted out superbly the head-of-state and symbolic functions Americans now regularly expect of presidents. As a morale-builder and national spokesman, he unified the nation, encouraging the integration of disparate states and regions. His reverence for the Constitution and faith in constitutionalism, a crucial American value, set standards for his successors.

President Washington knew his immediate responsibility was as an administrator, and he concentrated efforts on stabilizing the structure of the Republic's new government. Fortunately for Washington, the newly structured two-house Congress did not attempt to regain the dominant role the legislature had played during the Confederation. Speaker of the House James Madison, however, would sometimes contend that the president could not exercise even powers assigned to him by the Constitution without approval of Congress. Secretary of the Treasury Hamilton, Madison's friend, disagreed and insisted that executive power was generally vested in the president. Congress concurred in Hamilton's view and readily conceded to Washington the right to choose his own officials as well as to nominate judges and diplomats. However, unlike modern day presidents, Washington sought scrupulously not to impose his policy views on Congress, and Congress, in turn, allowed him considerable freedom to implement the laws and policies of the new republic.

Washington, for example, assumed the responsibility of creating the cabinet. While he did not regard his department secretaries as a team or council that would act collectively, he did look to his department heads as assistants and advisors. At first there were no regular meetings. He let them run their own departments, reserving his right to make all final decisions. In an effort to promote national unity, he appointed Thomas Jefferson, an Anti-Federalist, as Secretary of State, and Alexander Hamilton, a consummate Federalist, as Secretary of the Treasury. He avoided making the executive branch an arm of any one party even though he was himself a staunch Federalist. Washington served as a balance between the Jeffersonian and Hamilton groups—neither side could do without him if it was to be heard.

Washington's actions as commander-in-chief laid claim to broad

SOUVENIR OF THE 150th ANNIVERSARY
GEORGE WASHINGTON'S
INAUGURATION

Collection of Karal Ann Marling.

authority. In 1794 Washington called out the militia from Virginia, Maryland, Pennsylvania and New Jersey and, at least initially, took to the field himself as commander of 13,000 troops headed for western Pennsylvania where "Whiskey Rebels" had refused to pay national excise taxes.

In April of 1793, President Washington issued the Proclamation of Neutrality that stated America was at peace with both Great Britain and France and urged Americans not to get involved in the conflict between those two feuding nations. This decision involved complex and delicate questions both about presidential authority and about foreign policy. Washington consulted his cabinet and acted with determination.

Presidential prerogative as commander-in-chief, it soon became clear, would naturally extend into areas of foreign policy. Congress generally left major decisions of making and implementing foreign policy to the president. It was his authority to "make" treaties (meaning to negotiate them), to submit them to the Senate, and if the Senate consented, to make the final decision whether to ratify them on behalf of the nation. This procedure has become standard. In 1792, when it looked as if America might go to war with Britain, Congress recognized that the challenge required quick, firm action of a kind the deliberative national legislature itself could not take. It therefore granted Washington the additional power of conducting diplomatic negotiations.

Washington saw his task as consolidating the government, to bring coherence to the particularistic policies the several states had earlier tried to pursue. It fell to him to organize a permanent national government, recruit, nominate or appoint its officials and reconcile the diverse, competing aspirations the citizens had for their government. In doing so, Washington helped establish the presidency as an effective branch of government.

As one of his last major gifts to the nation. President Washington voluntarily left office at the end of his second term. Some contemporaries thought he would stay until his death. Washington believed, however, that the American experiment needed to witness the orderly transfer of power from one president to an elected successor. Only then would we complete the demonstration that a people could rule itself according to its own laws. His decision after two terms to retire from this new center of power and prestige in the nation set a precedent that was followed without formal instruction for more than 144 years and then, after one departure, it was mandated by the Twenty-second Amendment to the Constitution.

Conclusion

The invention and establishment of the American executive took place over a twenty-year period, roughly between 1775 and 1796. The excesses and deficiencies of legislative government caused people to reconsider the executive institutions they had earlier rejected, and to create a chief executive with adequate authority to do the job.

Still, our fundamental ambivalence toward executive power remains. Today we have an even greater recognition of the need for occasional executive discretion and prerogative in crises. During the course of normal business, however, we prefer that the president be bound by instructions from Congress and the letter of the law.

More and more, presidents have

George Washington, Thomas Jefferson and Alexander Hamilton, mural by Constantin Brumidi in the U.S. Capitol. Architect of the Capitol collection, Library of Congress.

been forced to bypass deliberations with the Congress and to become popular or plebiscitary national leaders—rallying the people to their programs. In the absence of effective parties or sympathetic leadership in Congress, many of our presidents continue to enlarge their office. Part of this practice is due to the transformation of the role of the United States in global affairs. Part is also due to our changing economy and the rise of the "Administrative" and "Regulatory State." Not everyone is pleased by this development. Some students of the presidency wish for more self-restraint by presidents or seek additional checks and balances.

The vast growth of the country and its economic reach throughout the globe have had a profound influence on the office of the president. The national executive exercises the indispensable statecraft responsibilities circumstances periodically demand in every society. In doing so, it surely fulfills one of the important goals of the Constitution's framers.

The dynamics of American democracy and the American economy increasingly revolve around the presidency. This result was not exactly intended. Yet the permanently preeminent presidency is the product of forces that continue to roll and events that cannot be undone. Unique, dangerous, yet necessary, the creation of the American presidency was a brilliant gamble and it has served us reasonably well.

The enduring challenge for us at the two-hundred-year mark is to encourage the presidential leadership we need yet strengthen alternative constitutional processes that will ensure responsible and accountable democratic leadership. We need to be wary about giving the presidency additional political advantages or powers. We are also well-advised to heed the counsel of the late Clinton Rossiter when he wrote that we should be "alert to abuses of those [powers] he already holds, cognizant that the present balance of the Constitution is not a cause for unlimited self-congratulation."

Suggested additional reading:

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Ketcham, Ralph. *Presidents Above Party: The First American Presidency, 1784-1829* (1984).

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Thomas E. Cronin wrote this while serving as Visiting Professor of Politics, Princeton University (1985-6). He is McHugh Distinguished Professor of American Institutions and Leadership at The Colorado College. His writings include *The State of the Presidency* (1980) and *Rethinking The Presidency* (1982).

A Parley

The Electoral College: A Paradigm of American Democracy

by JUDITH A. BEST

There is probably no American institution more worthy of our study during the Bicentennial celebration of our Constitution than the electoral college; as Martin Diamond said, it is a paradigm of the American democracy. And yet it is also the most misunderstood and maligned of our governing institutions.

On first consideration the electoral college appears to be undemocratic because the president is officially chosen by separate sets of electors rather than by the people. Technically, the people vote for presidential electors for their state; the Constitution grants each state as many electors as it has representatives in both houses of Congress. The Constitution itself does not prescribe how a state's electors will be chosen, but leaves that decision to the individual state legislatures. In the early years of the republic, a variety of methods were employed, but by 1832, all but two of the states had adopted popular elections and the federal unit rule, which awards all of a state's electoral votes to the winner of a state-wide plurality.

Many argue for the abolition of the electoral college, and it is true that the office of the elector is an anachronism. The system as we know it evolved in response to growing populism and to the development of the political parties with their nominating conventions. Now, under the two-party system and the popular vote unit rule, the candidates for the office of elector are selected by state party officials and pledged in advance of the general election to vote for their party's nominee. The casting of the electoral votes has become a pro forma ritual. The office of elector could be abolished and the electoral votes could be cast automatically without affecting the system. The electors are mere ciphers; it is the electoral votes under the federal unit rule that are essential.

The electoral college is a paradigm of the American democracy because it is based on popular votes aggregated state by state: thus it is both democratic and federal. This outcome is fitting because our Constitution created a democratic federal republic. We are not, never have been and were not intended to be, a simple democracy because a simple democracy is a form of tyranny—a majority tyranny. A simple democracy places all power, unlimited, unchecked power, in the hands of an arithmetical majority. The founders fully understood majority tyranny, and they devoted their every effort to prevent it because the goal of just government is the common good—the good of all, not simply the good of the majority.

Reasonable Majorities

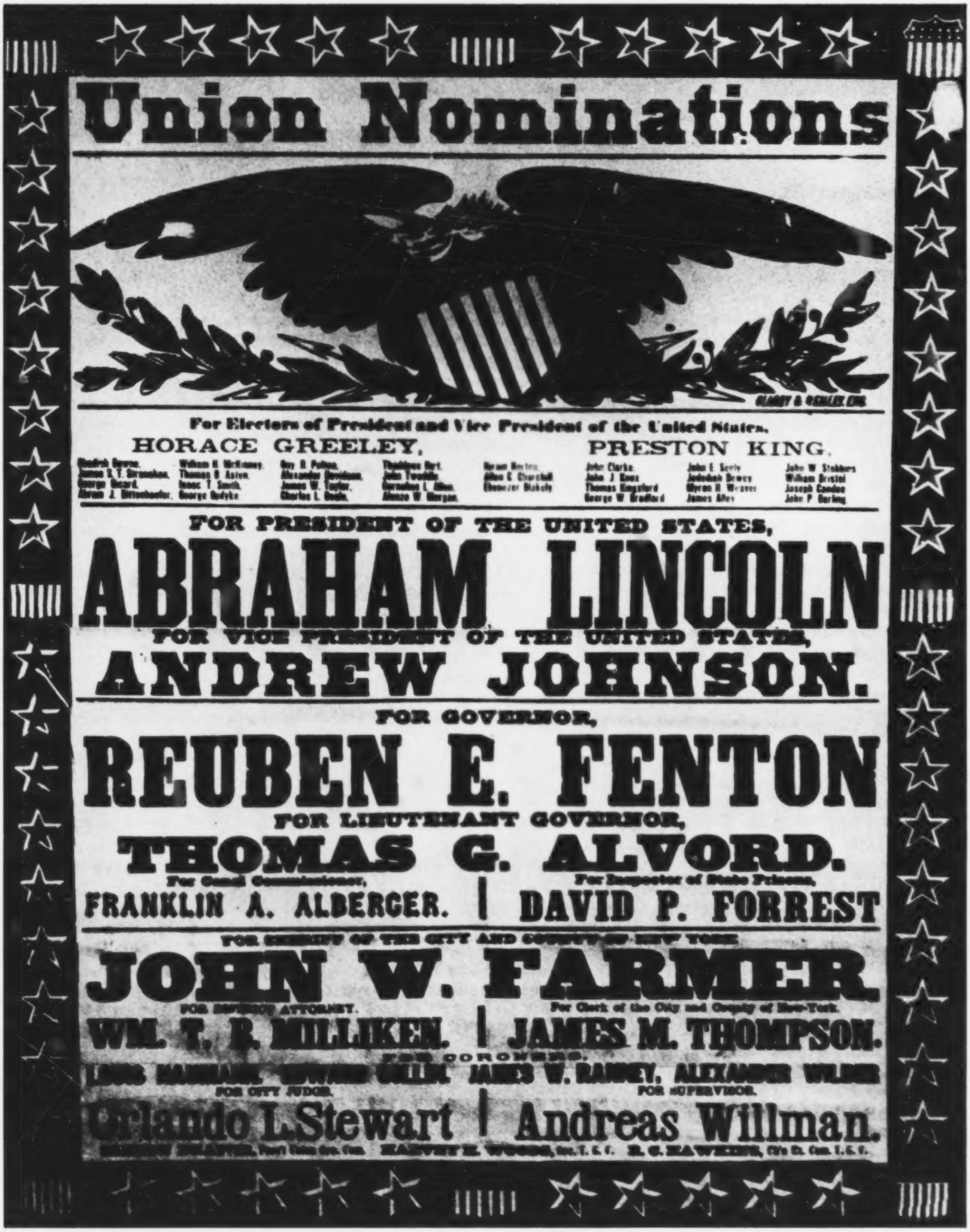
Since the government the founders created was to be a democratic one, it was, of course, to be ruled by a majority. But the founders were quite particular about the kind of majority that was to rule, and they definitely wanted more than an arithmetical majority. As Jefferson put it, the will of the majority must prevail, "but that will to be rightful must be reasonable." The founders wanted majority rule *with minority consent*. Reasonable majorities can gain the consent of the minority not only because their policies are moderate, but also because they are constituted in a way that allows the minority to win something some of the time. Thus, majorities must be constructed so that in some places, on some occasions and on some issues each minority may be part of a majority coalition. It would be irrational for a permanently locked-out minority to consent to majority rule.

The founders believed that a nation composed of many different competing minority factions would be less likely to develop a huge homogeneous or monolithic faction. But probability is not certainty, and the stakes were high—the stakes were liberty. Even today when the population is nearly sixty times greater and the economy is many times more diverse than in 1789, it is still possible to conceive of the formation of at least two majority factions: whites and/or Christians.

Our founders knew that the nation would not be safe from majority tyranny unless they used the diversity engendered by the large republic to form the kind of majorities they wanted—reasonable majorities. Their policy was to use "opposite and rival interests" to check each other. To this end, they used a number of devices (the separation of powers is one example) including the *federal* principle of dividing national power by states. Each state contains a different or slightly different combination of interests and this not only makes them suitable rivals, it also provides more opportunities for minorities to be part of a districted majority coalition and thus win something. The founders used the federal principle as the basis of *all* elections for national officers, and for ratification of the Constitution itself as well as all future amendments to it. Because the popular votes for president are aggregated on a state-by-state basis, the electoral vote system incorporates the presidency into the federal system.

Moderate Candidates

The rules of any game determine not only how the game is to be played but who can play it well. The



Union Nominations

CLARRY & REILLEY ENG.

For Electors of President and Vice President of the United States.

HORACE GREELEY, PRESTON KING.

Hendrick Bowne. James S. T. Stranahan. George Bucard. Abram J. Dittenhoefer. William H. McKinney. Thomas B. Asten. Isaac T. Smith. George Opdyke. Roy B. Pelton. Alexander Davidson. James W. Taylor. Charles L. Beals. Thaddeus Hurl. John Teedale. Cornelius L. Allen. Alonzo W. Morgan. Hiram Hector. Allen C. Churchill. Ebenezer Blakely. John Clarke. John J. Knox. Thomas Kingsford. George W. Bradford. John E. Seely. Jedediah Dewey. Myron H. Weaver. James Alley. John W. Stebbins. William Bristol. Joseph Candee. John P. Darling.

FOR PRESIDENT OF THE UNITED STATES,

ABRAHAM LINCOLN

FOR VICE PRESIDENT OF THE UNITED STATES,

ANDREW JOHNSON.

FOR GOVERNOR,

REUBEN E. FENTON

FOR LIEUTENANT GOVERNOR,

THOMAS G. ALVORD.

For Canal Commissioner, **FRANKLIN A. ALBERGER.** | For Inspector of State Prisons, **DAVID P. FORREST**

FOR SHERIFF OF THE CITY AND COUNTY OF NEW YORK.

JOHN W. FARMER.

FOR DISTRICT ATTORNEY. **WM. T. B. MILLIKEN.** | For Clerk of the City and County of New-York. **JAMES M. THOMPSON.**

FOR CORONERS.

LOUIS NAUMANN, EDWARD COLLIN, JAMES W. RANNEY, ALEXANDER WILDER

FOR CITY JUDGE. **Orlando L. Stewart** | FOR SUPERVISOR. **Andreas Willman.**

[illegible] DRAPER, Pres't Union Gen. Com. HARVEY H. WOODS, Sec. U. L. C. R. C. HAWKINS, Ch'n St. Com. U. L. C.

Poster for the 1864 election, showing the names of the electors for Lincoln and Johnson, engraving by Clarry & Reilly. Original poster is in the Lincoln Museum. Library of Congress.

> *The electoral college is a paradigm of the American democracy because it is based on popular votes aggregated state by state: thus it is both democratic and federal. . . . We are not, never have been and were not intended to be, a simple democracy because a simple democracy is a form of tyranny—a majority tyranny.*

rules of the electoral vote contest favor politically and ideologically moderate candidates who have a broad, cross-sectional base of support. Under the federal unit rule, if a candidate wins a state with 51 percent of the popular vote (or even a plurality), he wins 100 percent of the state's electoral vote. A candidate who wins a state with 85 percent of the popular vote still wins only 100 percent of the state's electoral vote. This fact creates the incentive to widen and flatten out one's coalition. The payoff is greater if one wins many states by even small margins than it is if one wins just a few states by landslides. The rules of the contest make the *distribution of popular votes* as important as their number. These rules make a sectional strategy or a geographical concentration of support, say in the populous Eastern megalopolis, a formula for defeat. A candidate who adopted a sectional strategy might win a majority of the popular votes, but he would lose the election because he wouldn't win enough states.

What holds true for sectional candidacies also holds true for ideologically extremist, single-issue, or third-party candidates. They cannot combine their votes across state lines and thus are unlikely to win any states at all. The only time they can win any state or states is when their followers cluster together within a given state or a few states, but a few states are not enough to win the presidency. As a result, the electoral college system has undercut any tendencies to organize parties or candidate strategies on sectional, class, religious, racial or ideological lines. It forces these factions to compromise at the state level and in a wide variety of ways with many differing groups within the several states. Successful candidates must create broad coalitions. Coalition-building requires consultation, negotiation, accommodation and compromise. The more often it is done, the more moderate and the more inclusive the result.

Because the federal unit rule gives all of a state's electoral votes to the winner of the state-wide popular plurality, the federal unit rule has a magnifying effect. In the 1976 election, Jimmy Carter won 50.5 percent of the national popular vote for a margin of 2.1 percent over Gerald Ford. When these popular votes were aggregated, under the federal unit rule, into electoral votes, Carter won 297 or 55 percent. This magnifying effect reinforces the victory of the popular vote winner, and it has done so time and again in every election but one, the election of 1888. In that election, Cleveland ran a sectional campaign, beating Harrison in the popular vote by a negligible 0.8 percent, but losing to Harrison in the electoral vote. In terms of popular votes, this election was so close as to be almost a draw. In terms of electoral votes, Harrison had broader support.

This magnifier effect has two highly desirable results. First, it converts popular pluralities into electoral majorities thus avoiding run-off or contingency elections. We have not had one since the electoral vote system evolved. (The contingency election of John Quincy Adams, in 1824, occurred when half of the states were not operating under the popular vote unit rule system.) Second, it forces candidates and parties to create broad national coalitions in this continental nation.

Balance

The critics of this system make three main charges against it: the possibility of faithless electors stealing an election; the possibility of a runner-up president; the "unfairness" of the federal unit rule which favors some interests over others because it demands more than arithmetical majorities. The first two are bogus issues. The faithless elector is almost non-existent (only approximately 10 out of over 17,000 electoral votes cast in our history), and can be easily handled by responsible party selection of candidates for electors or by abolishing the office of elector, but not the electoral votes.

A runner-up president is possible, but it is very improbable (unless a candidate pursues a sectional strategy) because of the magnifier effect that converts even the closest popular vote contests into electoral vote victories for the popular vote winner. In 1880, Garfield defeated Hancock by a mere 9,457 popular votes or 0.1 percent, yet he won 57.9 percent of the electoral vote. Sectional candidacies are divisive and can even be a formula for civil war. The minimal risk of a runner-up president may not be too high a price to pay for a system that penalizes sectional candidates and seeks a president who, like Congress, represents the nation in its diversity. Indeed, the critics' own plan for a direct (undistricted) election allows for a 40 percent run-off rule. If no candidate received 40 percent of the popular vote, there would be a run-off election. The willingness of electoral college opponents to accept a 40 percent president makes their concern about a runner-up president somewhat suspect.

The real issue is the fact that the electoral college system is not neutral, that it favors certain kinds of coalitions and harms others. But *no electoral system is neutral*; every electoral system favors certain groups and discriminates against

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others. The system called direct popular election has its biases as well. It favors sectional candidates, contingency elections, a multi-party system, ideologically extremist and single issue candidates, and by no means least, an imperial presidency. It would create a president who could claim to speak more clearly and directly for the people than the Congress which speaks only for coalitions of federally districted majorities. The electoral college system, on the other hand, has biases in favor of the winner of a cross-sectional popular plurality, a single election, the two-party system and ideologically moderate candidates and parties. A comparison of these two systems indicates that it is the electoral vote process that corresponds to and compliments the other parts of our districted governmental solar system.

Because the electoral college is a paradigm of the American democracy, an attack on it is at the same time an attack on the whole system. If the electoral vote system is unfair, if numbers of voters are the only test for legitimacy, then the Senate of the United States is unfair. A state with half a million people has the same representation as a state with fifteen million people. The whole Congress is then unfair for its districted constituencies prevent the same kinds of groups from combining their votes across district lines. In fact, the majority party is almost always over-represented in each house of Congress, and on occasion control of our legislative branches has fallen to the party that "lost" the popular vote when it is aggregated on an all-national basis.

If the arithmetical principle is the only correct principle, then we ought to scrap the whole Constitution and create a new one. But this principle is *not* correct because it is based on the fallacious assumption that the arithmetical majority are the people. At its heart, the rule of the arithmetical majority is nothing more than the rule of the stronger. It is the principle of majority tyranny. Numbers alone are not enough for legitimacy because they do not suffice to maintain liberty. Equality is a very high value, but so also is liberty. The electoral college is a paradigm of the system that balances both.

Judith A. Best is Distinguished Teaching Professor of political science at the State University of New York College at Cortland. Her most recent book is *National Representation for the District of Columbia* (1984).

The Electoral College: Archaic, Uncertain, Unfair

by LAWRENCE D. LONGLEY

The American electoral college is a curious political institution. Obscure and even unknown to the average citizen, it nevertheless serves as a crucial mechanism for transforming popular votes cast for president into electoral votes which actually elect the president. If the electoral college operated only as a neutral and sure means for counting and aggregating votes, it would likely be the subject of little controversy. The electoral college, however, is neither certain in its operations nor neutral in its effects. It can—and has—deadlocked, forcing a resort to extraordinarily awkward contingency procedures. Even when it operates relatively smoothly, it does not just tabulate popular votes in the form of electoral votes. Rather, it is an institution that works with noteworthy inequality—it favors some interests and hurts others. In short, the electoral college operates as a flawed means of determining the presidency. Its functions at best are neither sure nor smooth and at worst contain the potential for constitutional crisis. Yet it continues to exist as the constitutional mechanism for electing the people's president.

The Flaws of the Contemporary Electoral College

The shortcomings of the contemporary electoral college are many, but five major flaws stand out. These are the faithless elector, the winner-take-all system, the constant two electoral votes, the contingency election procedure, and the uncertainty of the winner winning.

The Faithless Elector

The first of these flaws or problems of the contemporary college arises out of the fact that the electoral college today is not the assembly of wise and learned elders as assumed by its creators, but is rather little more than a state-by-state collection of unknown individuals selected often because of their loyalty and support for their party. Neither in the quality of the electors nor in law is there any assurance that the electors will vote as expected. State laws requiring electors to vote as they have pledged are practically unenforceable and almost certainly unconstitutional. The language of the Constitution directs that "the electors shall vote"— which suggests that they have discretion as to how they may cast their votes. As a result, personal pledges along with party and candidate loyalty can be seen as the only basis of electoral voting consistent with the will of a state's electorate.

The problem of the "faithless elector" is neither theoretical nor unimportant. Republican elector Dr. Lloyd W. Baily of North Carolina decided to vote for Wallace after the 1968 election rather than for his pledged candidate (Nixon), as did Republican elector Roger MacBride of Virginia, who likewise deserted Nixon in 1972 to vote for Libertarian Party candidate John Hospers. Similar defections from voter expectations also occurred in 1948, 1956, 1960, and 1976, or in other words, in six of the ten most recent presidential elections. Even more important is that the likelihood of such deviations occurring on a multiple basis would be greatly heightened should an electoral vote majority rest on only one or two votes—a very real possibility in 1976 as in other recent elections.

In fact, when one looks at the election returns for our most recent close election, 1976, one can observe that if about 5,560 votes had switched from Carter to Ford in Ohio, Carter would have lost that state and had only 272 electoral votes, two more than the absolute minimum needed of 270. In that case, two or three individual electors seeking personal recognition or attention to a pet cause could withhold—or threaten to withhold—their electoral votes, and thus make the election outcome very uncertain.

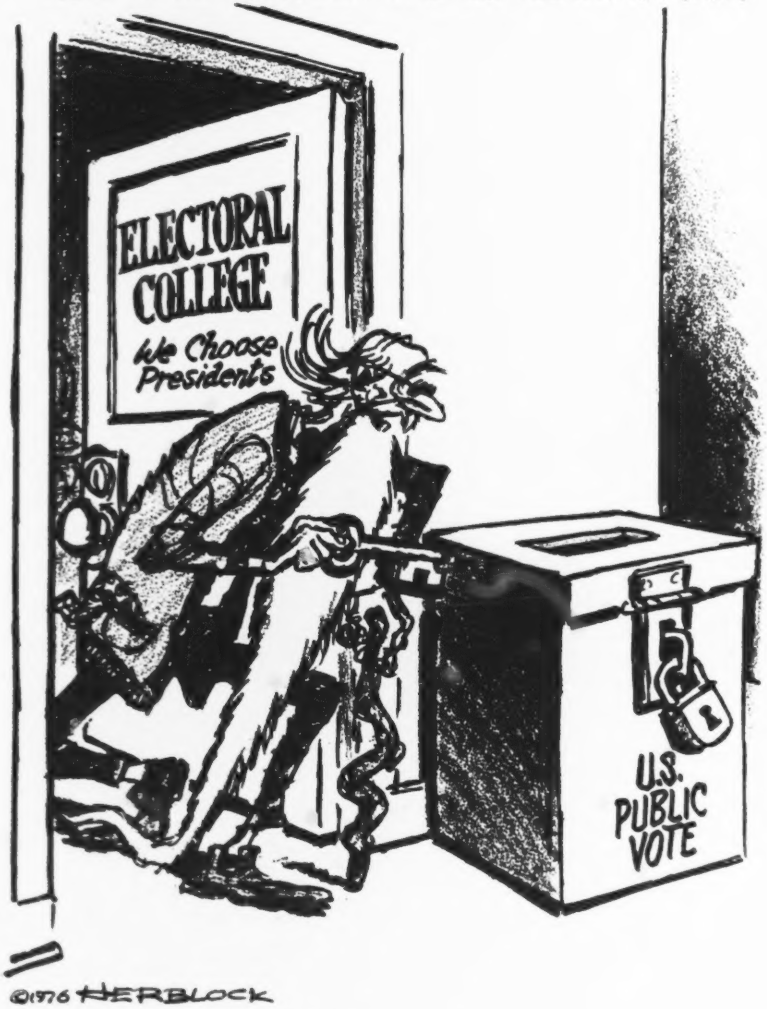
The Winner-Take-All System

The second problem of the contemporary electoral college system lies in the almost universal custom (the sole exception being the state of Maine) of granting all of a state's electoral votes to the winner of a state's popular vote plurality (not even a majority). This extra-constitutional practice, gradually adopted by all states during the nineteenth century as a means of enhancing state power, can lead to interesting results, such as in Arkansas in 1968 where Humphrey and Nixon together split slightly over 60 percent of the popular vote, while Wallace, with less than 39 percent, received 100 percent of the state's electoral votes. Even more significant, however, is the fact that the winner-take-all determination of state electors tends to magnify tremendously the relative voting power of residents of the larger states. Each of their voters may, by his vote, decide not just one vote, but how 36 or 47 electoral votes are cast—if electors are faithful.

As a result, the electoral college has a major impact on candidate strategy—as shown by the concern of Carter and Ford strategists, in the final weeks of the very close and uncertain 1976 campaign, about the nine big electoral vote states with 245 of the 270 electoral votes necessary to win. The vote in seven of these nine states was, in fact, exceedingly close, with both candidates receiving at least a 48 percent share.

The electoral college does not treat voters alike—a thousand voters in Scranton, Pennsylvania are far more important strategically than a similar number of voters in Wilmington, Delaware. This inequity also places a premium on the support of key political leaders in large electoral vote states—as could be observed in the 1976 election when Jimmy Carter desperately sought the favors of mayors Rizzo of Philadelphia and Daley of Chicago, political leaders with a major role in determining the outcome in Pennsylvania and Illinois. The electoral college treats politicians as well as voters unequally—those in large states are vigorously courted.

The electoral college has also provided third-party candidates the opportunity to exercise magnified political influence in the election of the president when they can gather votes in large, closely balanced states. In 1976, third-party candidate Eugene McCarthy, with less than 1 percent of the popular vote, came close to tilting the election through his strength in close pivotal states. In four states (Iowa, Maine, Oklahoma, and Oregon) totaling 26 electoral votes, McCarthy's candidacy may have swung those states to Ford. Even more significantly,



"NOW TO GO THROUGH THE SUGGESTION BOX"

From Herblock on All Fronts *(New American Library, 1980).*

had McCarthy been on the New York ballot, it is likely Ford would have carried that state with its 41 electoral voters, and with it the election—despite Carter's national vote majority.

The Constant Two Electoral Votes

A third feature of the electoral college system lies in the apportionment of electoral votes among the states. The constitutional formula is simple: one vote per state per senator and representative. Another distortion from equality appears here because of "the constant two" electoral votes, regardless of population, which correspond to the senators. Because of this, inhabitants of the very small states are advantaged to the extent that they "control" three electoral votes (one for each senator and one for the representative), while their population might otherwise entitle them to but one or two votes. This is weighting by states, not by population. The importance of this feature is greatly outweighed by the previously mentioned winner-take-all system but it is yet another distorting factor in the election of the president. These structural features of the electoral college ensure that it can never be a neutral counting device and that it inherently contains a variety of biases dependent solely upon the state in which voters cast their ballots. The contemporary electoral college is not just an archaic mechanism for counting the votes for president; it is also an institution that aggregates popular votes in an inherently imperfect manner.

The Contingency Election Procedure

The fourth feature of the contemporary electoral college system is the most complex—and probably also the most dangerous in terms of the stability of the political system. The contingency election procedure outlined in the Constitution provides that if no candidate receives an absolute majority of the electoral vote—in recent years 270—the House of Representatives chooses the president from among the top three candidates. Two questions need to be asked: Is such an electoral college deadlock likely to occur in terms of contemporary politics? And would the consequences likely be disastrous? A simple answer to both questions is yes.

Taking some recent examples, it has been shown that, in 1960, a switch of fewer than 9,000 popular votes from Kennedy to Nixon in Illinois and Missouri would have prevented either man from receiving an electoral college majority. Similarly, in 1968, a 53,000 vote shift in New Jersey, Missouri, and New Hampshire would have resulted in an electoral college deadlock, with Nixon receiving 269 votes—one short of a majority. Finally, in the 1976 election, if slightly fewer than 11,950 popular votes in Delaware and Ohio had shifted from Carter to Ford, Ford would have carried these two states. The result of the 1976 election would then have been an exact tie in electoral votes—269-269. The presidency would have been decided *not* on election night, but through deals or switches at the electoral college meetings on December 13, or the later uncertainties of the House of Representa-

The electoral college is potentially a threat to the certainty of our elections and the legitimacy of our presidency.

tives.

What specifically might happen in the case of an apparent electoral college non-majority or deadlock? A first possibility, of course, is that a faithless elector or two, pledged to one candidate or another, might switch at the time of the actual meetings of the electoral college so as to create a majority for one of the candidates. Such an action might resolve the crisis, although the president's mandate would then be based on a thin reed of legitimacy.

If, however, no deals or actions at the time of the mid-December meetings of the electoral college were successful in forming a majority, then the action would shift to the House of Representatives, meeting at noon on January 6, only 14 days before the constitutionally scheduled inauguration of the new president.

The House of Representatives contingency procedure which would now be followed is an awkward relic of the compromises of the writing of the Constitution. Serious problems of equity exist, certainly, in following the constitutionally-proscribed one-vote-per-state procedure. Beyond this problem of fairness lurks an even more serious problem—what if the House itself should deadlock and be unable to agree on a president?

In a two-candidate race, this is unlikely to be a real problem; however, in a three-candidate contest, such as 1968, there might well be enormous difficulties in getting a majority of states behind one candidate, as House members agonized over choosing between partisan labels and support for the candidate (especially Wallace) who had carried their district. The result, in 1968, might well have been no immediate majority forthcoming of 26 states and political uncertainty and chaos as the nation approached Inauguration Day uncertain as to who was to be president.

The Uncertainty Of The Winner Winning

Besides the four aspects of the electoral college system so far discussed: "the faithless elector," "the winner-take-all system," "the constant two votes per state," and "the contingency election procedure," one last aspect should be described. Under the present system, there is no assurance that the winner of the popular vote will win the election. This problem is a fundamental one—can an American president operate effectively in our democracy if he has received fewer votes than the loser? I suggest that the effect upon the legitimacy of a contemporary presidency would be disastrous if a president were elected by the electoral college after losing in the popular vote—yet this *can* and *has* happened two or three times, the most recent indisputable case (the election of 1960 being indeterminable) was the election of 1888, when the 100,000 popular vote plurality of Grover Cleveland was turned into a losing 42 percent of the electoral vote.

Was there a real possibility of such a divided verdict in our last close election, 1976? An analysis of the election shows that if 9,245 votes had shifted to Ford in Ohio and Hawaii, Ford would have been elected president with 270 electoral votes, the absolute minimum, despite Carter's 51 percent of the popular vote and margin of 1.7 million votes. One hesitates to contemplate the consequences had a non-elected president, such as Ford, been inaugurated for four more years despite having been rejected by a majority of the American voters in his only presidential election.

Conclusion

The electoral college is potentially a threat to the certainty of our elections and the legitimacy of our presidency. But even beyond these considerations, the electoral college inherently and by its very nature is a distorted counting device for turning popular votes into electoral votes. It can never be a faithful reflection of the popular will, and it will always unfairly stand between the citizen and the people's president.

These defects of the contemporary electoral college cannot be dealt with by patchwork reforms that have been sometimes proposed, such as making the body an automatic counting device of state electoral votes. The distorted and unwieldy counting device of the electoral college itself must be abolished, and the votes of the American people—wherever cast—counted directly and equally in determining who shall be president of the United States.

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Wallace S. Sayre and Judith H. Parris, *Voting for President: The Electoral College and the American Political System* (1972).

Lawrence D. Longley is associate professor of government at Lawrence University, and the author both of *The Politics of Electoral College Reform* (1975) and *The People's President* (1981). He himself served as a presidential elector-nominee in the presidential election of 1972.

DOCUMENTS

On Behalf of Religious Liberty: James Madison's *Memorial and Remonstrance*

by ROBERT S. ALLEY

History binds James Madison inextricably to the Constitution's First Amendment and its religion clause. The classic statement of his position on religion and the state is found in *A Memorial and Remonstrance*, written in the spring of 1785. Madison's later correspondence makes it clear that he considered the *Memorial* to be his definitive argument for freedom of conscience.

The *Memorial* was Madison's contribution to a debate over two proposals in the 1784 Virginia legislature. One bill would incorporate the Episcopal Church in the state; the other, "The General Assessment Bill," sought to raise funds "for the support of Christian teachers" in order "to correct the morals of men, restrain their vices and preserve the peace of society." Both measures had the strong endorsement of Patrick Henry.

The Virginia debate over religious liberty had its roots in a clash of ideas and wills that began to emerge in the colony in the 1740s. Virginia, like the other colonies had inherited the concept of an established religion from English practice. Because the earliest colonists—Puritans and Separtists—had sought freedom of religious expression, no common pattern of establishment emerged. Massachusetts had created a theocratic structure with the rule of the "saints"; other colonies tended to adopt systems that subordinated religious institutions to temporal power. With the striking exception of Roger Williams' tenure in Rhode Island, the universal practice in the 1600s was establishment, but by 1700, an enlarged variety of Protestant denominations demanded, even in the most restrictive colonies, a degree of toleration. In the case of Virginia, the Church of England was the established religion. By the 1740s, however, the heavy population of Presbyterians in the western mountain areas of that state had led officials to develop a more accepting policy relating to that denomination. By the 1760s, Baptists had moved into the colony, many insisting upon total religious freedom. Refusing to obtain licenses to preach from the colonial authorities, Baptist clergy were beaten and jailed.

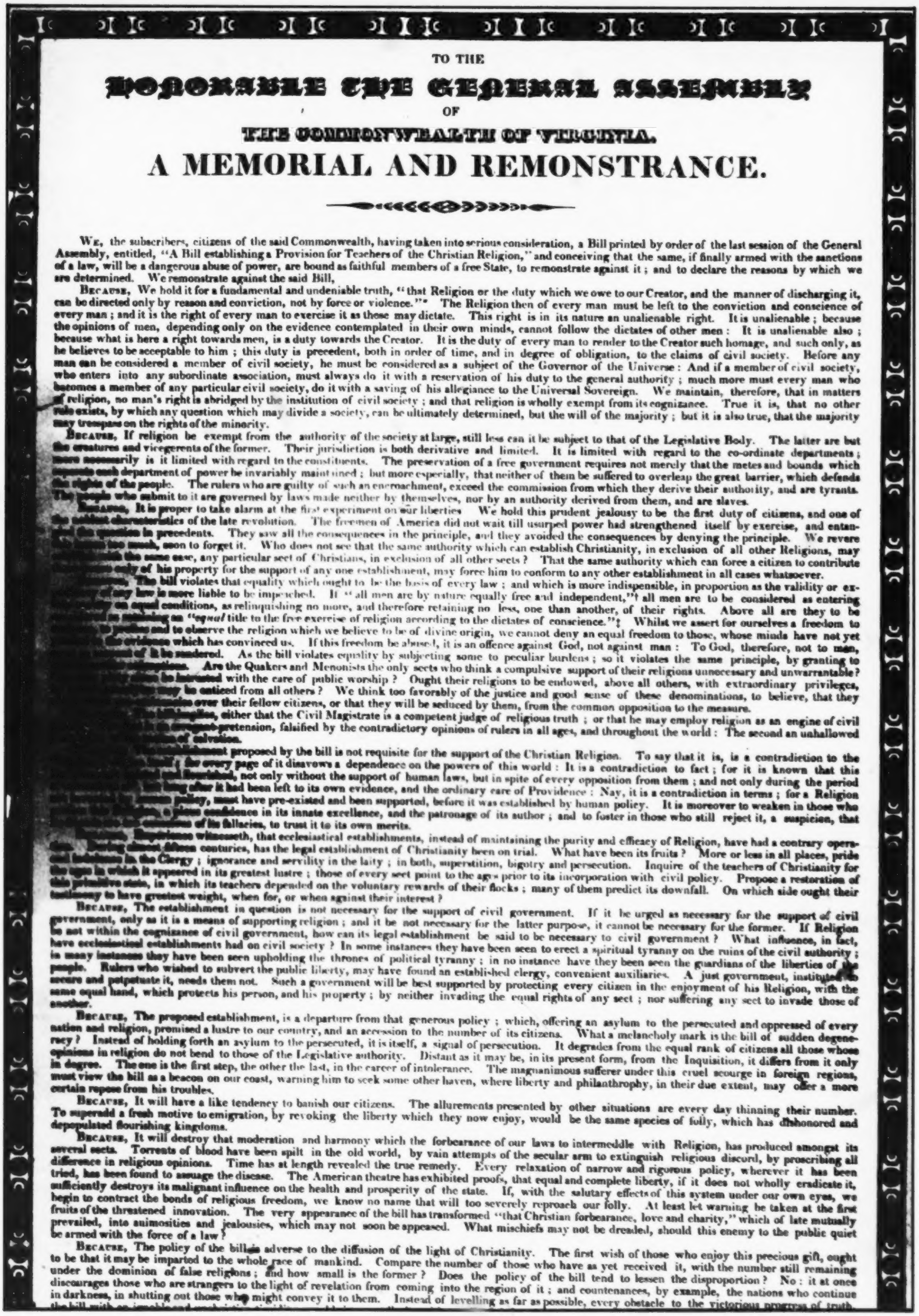
Responding to these events, a young James Madison in January 1774 wrote to a friend of "that diabolical hell conceived principle of persecution," noting "there are at this [time?] in the adjacent County not less than 5 or 6 well meaning men in [jail] for publishing their religious Sentiment." Madison observed that he was "without common patience" on the subject and begged his friend "to pity me and pray for Liberty of Conscience."

Within a short time, Madison found occasion to act on his concerns. In 1776 he served on a committee with George Mason to develop a Virginia declaration of rights. In large part Mason wrote the final document but Madison accomplished one critical change when he convinced Mason to replace the term "toleration in the exercise of religion" with the now familiar phrase "the free exercise of religion." While Madison later wrote a generous interpretation of that incident, stating that Mason "had inadvertently adopted the word 'toleration'," in fact Madison advanced a radical departure from tradition, anticipating the Jeffersonian notion of religious freedom as a "natural right of mankind."

The introduction of the two measures in the Virginia General Assembly in 1784 came from a general concern over the decline of all the churches in Virginia. With Patrick Henry's backing (he was now Governor) the Bill seemed destined to pass by a small majority. Through adroit political action by Madison and his supporters, action on the Assessment bill was delayed until the fall of 1785.

When the Assessment bill reached the public in broadsides, Baptist and Presbyterian groups flooded the Assembly with petitions and memorials signed by thousands of citizens. George Nicholas and George Mason, seeing the swell of public opinion, urged Madison to write a memorial on the subject and "commit it to paper." Madison agreed and the *Memorial* was the result. Madison probably considered his authorship a potential liability in the debate he anticipated in the House of Delegates later in the year. So when his document was distributed for signatures it appeared anonymously, leading some to conclude that Mason might have penned it. Madison's letter to Jefferson in August, 1785 identified himself as the source of the *Memorial*: "I drew up the remonstrance herewith enclosed," a fact that became common knowledge by 1786.

When the Assembly returned to work in the fall of 1785, a great number of memorials and petitions from dissenting religious groups, signed by a massive number of citizens, awaited the body. So dramatically had the mood changed in the Assembly that the Assessment Bill never reached the House floor. The reversal of sentiment proved startling enough that Madison made bold to introduce Jefferson's "Revised Code" for the state. It included an Act for Establishing Religious Freedom, reported to the House on December 14, 1785. On January 16, 1786 the House passed it. Upon agreement



TO THE

HONORABLE THE GENERAL ASSEMBLY

OF

THE COMMONWEALTH OF VIRGINIA.

A MEMORIAL AND REMONSTRANCE.

WE, the subscribers, citizens of the said Commonwealth, having taken into serious consideration, a Bill printed by order of the last session of the General Assembly, entitled, "A Bill establishing a Provision for Teachers of the Christian Religion," and conceiving that the same, if finally armed with the sanctions of a law, will be a dangerous abuse of power, are bound as faithful members of a free State, to remonstrate against it; and to declare the reasons by which we are determined. We remonstrate against the said Bill,

BECAUSE, We hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence."* The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable; because the opinions of men, depending only on the evidence contemplated in their own minds, cannot follow the dictates of other men: It is unalienable also; because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him; this duty is precedent, both in order of time, and in degree of obligation, to the claims of civil society. Before any man can be considered a member of civil society, he must be considered as a subject of the Governor of the Universe: And if a member of civil society, who enters into any subordinate association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular civil society, do it with a saving of his allegiance to the Universal Sovereign. We maintain, therefore, that in matters of religion, no man's right is abridged by the institution of civil society; and that religion is wholly exempt from its cognizance. True it is, that no other rule exists, by which any question which may divide a society, can be ultimately determined, but the will of the majority; but it is also true, that the majority may trespass on the rights of the minority.

BECAUSE, If religion be exempt from the authority of the society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former. Their jurisdiction is both derivative and limited. It is limited with regard to the co-ordinate departments; more necessarily is it limited with regard to the constituents. The preservation of a free government requires not merely that the metes and bounds which separate each department of power be invariably maintained; but more especially, that neither of them be suffered to overleap the great barrier, which defends the rights of the people. The rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are tyrants. The people who submit to it are governed by laws made neither by themselves, nor by an authority derived from them, and are slaves.

BECAUSE, It is proper to take alarm at the first experiment on our liberties We hold this prudent jealousy to be the first duty of citizens, and one of the noblest characteristics of the late revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much, soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may [illegible] with the same ease, any particular sect of Christians, in exclusion of all other sects? That the same authority which can force a citizen to contribute [illegible] only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever.

[illegible] The bill violates that equality which ought to be the basis of every law; and which is more indispensible, in proportion as the validity or ex[illegible] of any law is more liable to be impeached. If "all men are by nature equally free and independent,"† all men are to be considered as entering [illegible] on equal conditions, as relinquishing no more, and therefore retaining no less, one than another, of their rights. Above all are they to be [illegible] as retaining an "*equal* title to the free exercise of religion according to the dictates of conscience."‡ Whilst we assert for ourselves a freedom to [illegible] to profess and to observe the religion which we believe to be of divine origin, we cannot deny an equal freedom to those, whose minds have not yet [illegible] the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man: To God, therefore, not to man, [illegible] account of it be rendered. As the bill violates equality by subjecting some to peculiar burdens; so it violates the same principle, by granting to [illegible] exemptions. Are the Quakers and Menonists the only sects who think a compulsive support of their religions unnecessary and unwarrantable? [illegible] be intrusted with the care of public worship? Ought their religions to be endowed, above all others, with extraordinary privileges, [illegible] may be enticed from all others? We think too favorably of the justice and good sense of these denominations, to believe, that they [illegible] over their fellow citizens, or that they will be seduced by them, from the common opposition to the measure.

[illegible] The bill implies, either that the Civil Magistrate is a competent judge of religious truth; or that he may employ religion as an engine of civil [illegible] an arrogant pretension, falsified by the contradictory opinions of rulers in all ages, and throughout the world: The second an unhallowed [illegible] of salvation.

[illegible] establishment proposed by the bill is not requisite for the support of the Christian Religion. To say that it is, is a contradiction to the [illegible] itself; for every page of it disavows a dependence on the powers of this world: It is a contradiction to fact; for it is known that this [illegible] and flourished, not only without the support of human laws, but in spite of every opposition from them; and not only during the period [illegible] but long after it had been left to its own evidence, and the ordinary care of Providence: Nay, it is a contradiction in terms; for a Religion [illegible] policy, must have pre-existed and been supported, before it was established by human policy. It is moreover to weaken in those who [illegible] a pious confidence in its innate excellence, and the patronage of its author; and to foster in those who still reject it, a suspicion, that [illegible] of its fallacies, to trust it to its own merits.

[illegible] Experience witnesseth, that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. [illegible] fifteen centuries, has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution. Inquire of the teachers of Christianity for the ages in which it appeared in its greatest lustre; those of every sect point to the ages prior to its incorporation with civil policy. Propose a restoration of this primitive state, in which its teachers depended on the voluntary rewards of their flocks; many of them predict its downfall. On which side ought their testimony to have greatest weight, when for, or when against their interest?

BECAUSE, The establishment in question is not necessary for the support of civil government. If it be urged as necessary for the support of civil government, only as it is a means of supporting religion; and it be not necessary for the latter purpose, it cannot be necessary for the former. If Religion be not within the cognizance of civil government, how can its legal establishment be said to be necessary to civil government? What influence, in fact, have ecclesiastical establishments had on civil society? In some instances they have been seen to erect a spiritual tyranny on the ruins of the civil authority; in many instances they have been seen upholding the thrones of political tyranny; in no instance have they been seen the guardians of the liberties of the people. Rulers who wished to subvert the public liberty, may have found an established clergy, convenient auxiliaries. A just government, instituted to secure and perpetuate it, needs them not. Such a government will be best supported by protecting every citizen in the enjoyment of his Religion, with the same equal hand, which protects his person, and his property; by neither invading the equal rights of any sect; nor suffering any sect to invade those of another.

BECAUSE, The proposed establishment, is a departure from that generous policy; which, offering an asylum to the persecuted and oppressed of every nation and religion, promised a lustre to our country, and an accession to the number of its citizens. What a melancholy mark is the bill of sudden degeneracy? Instead of holding forth an asylum to the persecuted, it is itself, a signal of persecution. It degrades from the equal rank of citizens all those whose opinions in religion do not bend to those of the Legislative authority. Distant as it may be, in its present form, from the Inquisition, it differs from it only in degree. The one is the first step, the other the last, in the career of intolerance. The magnanimous sufferer under this cruel scourge in foreign regions, must view the bill as a beacon on our coast, warning him to seek some other haven, where liberty and philanthrophy, in their due extent, may offer a more certain repose from his troubles.

BECAUSE, It will have a like tendency to banish our citizens. The allurements presented by other situations are every day thinning their number. To superadd a fresh motive to emigration, by revoking the liberty which they now enjoy, would be the same species of folly, which has dishonored and depopulated flourishing kingdoms.

BECAUSE, It will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects. Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish religious discord, by proscribing all difference in religious opinions. Time has at length revealed the true remedy. Every relaxation of narrow and rigorous policy, wherever it has been tried, has been found to assuage the disease. The American theatre has exhibited proofs, that equal and complete liberty, if it does not wholly eradicate it, sufficiently destroys its malignant influence on the health and prosperity of the state. If, with the salutary effects of this system under our own eyes, we begin to contract the bonds of religious freedom, we know no name that will too severely reproach our folly. At least let warning be taken at the first fruits of the threatened innovation. The very appearance of the bill has transformed "that Christian forbearance, love and charity," which of late mutually prevailed, into animosities and jealousies, which may not soon be appeased. What mischiefs may not be dreaded, should this enemy to the public quiet be armed with the force of a law?

BECAUSE, The policy of the bill is adverse to the diffusion of the light of Christianity. The first wish of those who enjoy this precious gift, ought to be that it may be imparted to the whole race of mankind. Compare the number of those who have as yet received it, with the number still remaining under the dominion of false religions; and how small is the former? Does the policy of the bill tend to lessen the disproportion? No: it at once discourages those who are strangers to the light of revelation from coming into the region of it; and countenances, by example, the nations who continue in darkness, in shutting out those who might convey it to them. Instead of levelling as far as possible, every obstacle to the victorious progress of truth,

Madison's Memorial and Remonstrance. Library of Congress.

from the Senate, the Speaker of the House signed the bill into law on January 19. Jefferson wrote Madison in December of that year that the Act had been received with "infinite approbation in Europe" and he noted "it is comfortable to see the standard of reason at length prevail." Consistent with the Declaration of Rights and the *Memorial*, Jefferson's "Act" stated:

> *That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.*

The *Memorial and Remonstrance* both affirmed the principle of religious freedom and helped to defeat the Assessment Bill. It memorialized the General Assembly, offering fifteen "remonstrances" against the proposed Assessment bill.

In his introduction to the list of remonstrances, Madison explained that the signers of the petition took action because they believed the Assessment Bill would constitute a "dangerous abuse of power." The remonstrances that follow this declaration comprised a list of reasons for this judgment. In the first remonstrance, Madison made three points: that religion can only be directed by conviction and reason; that "Civil Society" has no role to play with respect to religion, and that permitting the majority to rule absolutely can result in the destruction of rights of the minority. In the second remonstrance, he contended that if the legislature passed the bill, it would be exceeding its lawful authority.

TO THE HONORABLE THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF VIRGINIA A MEMORIAL AND REMONSTRANCE

We the subscribers, citizens of the said Commonwealth, having taken into serious consideration, a Bill printed by order of the last Session of General Assembly, entitled "A Bill establishing a provision for Teachers of the Christian Religion," and conceiving that the same if finally armed with the sanctions of a law, will be a dangerous abuse of power, are bound as faithful members of a free State to remonstrate against it, and to declare the reasons by which we are determined. We remonstrate against the said Bill,

1. Because we hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." [Article XVI, Virginia Declaration of Rights] The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance. True it is, that no other rule exists by which any question which may divide a Society can be ultimately determined, but the will of the majority; but it is also true that the majority may trespass on the rights of the minority.

2. Because if Religion be exempt from

> *the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former. Their jurisdiction is both derivative and limited: it is limited with regard to the co-ordinate departments, more necessarily is it limited with regard to the constituents. The preservation of a free Government requires not merely, that the metes and bounds which separate each department of power be invariably maintained; but more especially that neither of them be suffered to overleap the great Barrier which defends the rights of the people. The Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants. The People who submit to it are governed by laws made neither by themselves not by an authority derived from them, and are slaves.*

In the third argument, which contains in the first sentence Madison's most often quoted phrase, he warned against allowing *any* government interference with human rights, a lesson learned, he said, in the recent Revolution. An authority that taxes for the support of Christianity, may "with the same ease" later choose to establish a single Christian sect.

> *3. Because it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealously to be the first duty of Citizens, and one of the noblest characteristics of the late Revolution. The free men of America did not wait til usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in conclusion of all other Sects? that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?*

At this point Madison argued that individuals possess equal natural rights to their religious beliefs and he refined earlier arguments made by persons such as Roger Williams, as he insisted that coercion in religion is an offense against God.

> *4. Because the Bill violates that equality which ought to be the basis of every law. . . . If "all men are by nature equally free and independent," all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an "equal title to the free exercise of Religion according to the dictates of Conscience." [Virginia Declaration of Rights. This is the phrase created by Madison in 1776.] Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man: To God, therefore, not to man, must an account of it be rendered. As the Bill violates equality by subjecting some to peculiar burdens, so it violates the same principle, by granting to others peculiar exemptions. . . .*

Madison addressed the twofold issue of establishment and free exercise in remonstrance five. He provided here both a strong argument for the protection of the state from religion, and he labeled as a "perversion" of religion its use to achieve political ends.

> *5. Because the Bill implies either that the Civil Magistrate is a competent Judge of Religious Truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: the second an unhallowed perversion of the means of salvation.*

Madison was seeking signatures from Baptists and Presbyterians. The sixth item appealed to their concerns by making the Christian argument for religious freedom. He contended that Christianity does not require state support to flourish and that seeking it demeans its divine nature. Once again one is reminded of Roger Williams. Madison continued this line of argument in remonstrance twelve.

> *6. Because the establishment proposed by the Bill is not requisite for the support of the Christian Religion. To say that it is, is a contradiction to the Christian Religion itself, for every page of it disavows a dependence on the powers of this world: it is a contradiction to fact; for it is known that this Religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them, and not only during the period of miraculous aid, but long after it had been left to its own evidence and the ordinary care of Providence. Nay, it is a contradiction in terms; for a Religion not invested by human policy, must have pre-existed and been supported, before it was established by human policy. It is moreover to weaken in those who profess this Religion a pious confidence in its innate excellence and the patronage of its Author; and to foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies to trust it to its own merits.*

In remonstrance seven Madison argued that state support historically has damaged the Christian cause.

> *7. Because experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy, ignorance and servility in the laity, in both, superstition, bigotry and persecution. Enquire of the Teachers of Christianity for the ages in which it appeared in its greatest lustre; those of every sect, point to the ages prior to its incorporation with Civil policy. Propose a restoration of this primitive State in which its Teachers depended on the voluntary rewards of their flocks, many of them predict a downfall. On which Side ought their testimony to have greatest weight, when for or when against their interest?*

Contrary to some modern interpreters, Madison was not only concerned over interference by the state into church affairs, he was equally disturbed over the prospect of religious institutions working their will on the civil government. If religion does not require state assistance, Madison asserted, good government does not need assistance from an established religion.

> *8. Because the establishment in question is not necessary for the support of Civil Government. If it be urged as necessary for the support of Civil Government only as it is a means of supporting Religion, and it be not necessary for the latter purpose, it cannot be necessary for the former. If Religion be not within the cognizance of Civil Government how can its legal establishment be necessary to Civil Government? What influence in fact have ecclesiastical establishments had on Civil Society? In some instances they have been seen to erect a spiritual tyranny on the ruins of the Civil authority; in many instances they have been seen upholding the thrones of political tyranny: in no instance have they been seen the guardians of the liberties of the people. Rulers who wished to subvert the public liberty, may have found an established Clergy convenient auxiliaries. A just Government instituted to secure & perpetuate it needs them not. Such a Government will be best supported by protecting every Citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another.*

Madison next pointed out that the "generous policy" of freedom from religious establishment in the nation offered asylum to persecuted persons abroad, promising a "lustre" to our country. To tax for support of religion would drive potential immigrants to other states, and encourage native Virginians to leave.

> *9. Because the proposed establishment is a departure from that generous policy, which, offering an Asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country, and an accession to the number of its citizens. What a melancholy mark is the Bill of sudden degeneracy? Instead of holding forth an Asylum to the persecuted, it is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be in its present form from the Inquisition, it differs from it only in degree. The one is the first step, the other the last in the career of intolerance. The magnanimous sufferer under this cruel scourge in foreign Regions, must view the Bill as a Beacon on our Coast, warning him to seek some other haven, where liberty and philanthropy in their due extent, may offer a more certain repose from his Troubles.*
>
> *10. Because it will have a like tendency to banish our Citizens. The allurements presented by other situations are every day thinning their number. To superadd a fresh motive to emigration by revoking the liberty which they now enjoy, would be the same species of folly which has dishonoured and depopulated fluorishing kingdoms.*

Washington referred to the destruction of harmony among religious sects, Madison's next point, when he wrote that he wished the Assessment Bill had never been introduced. Only religious freedom and equality among religions assures domestic peace, wrote Madison.

> *11. Because it will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion has produced among its several sects. Torrents of blood have been spilt in the old world, by vain attempts of the secular arm, to extinguish Religious discord, by proscribing all difference in Religious opinion. Time has at length revealed the true remedy. Every relaxation of narrow and rigorous policy, wherever it has been tried, has been found to assuage the disease. The American Theatre has exhibited proofs that equal and compleat liberty, if it does not wholly eradicate it, sufficiently destroys its malignant influence on the health and prosperity of the State. If with the salutary effects of this system under our own eyes, we begin to contract the bounds of Religious freedom, we know no name that will too severely reproach our folly. At least let warning be taken at the first fruits of the threatened innovation. The very appearance of the Bill has transformed "that Christian forbearance, love and charity," [Virginia Declaration of Rights] which of late mutually prevailed, into animosities and jealousies, which may not soon be appeased. What mischiefs may not be dreaded, should this enemy to the public quiet be armed with the force of law?*

Appealing at this point to the missionary zeal of the dissenters, Madison insisted that making Virginia a Christian state would discourage non-Christians from migrating. This, in turn, would hinder the spread of the gospel.

> *12. Because the policy of the Bill is adverse to the diffusion of the light of Christianity. The first wish of those who enjoy the precious gift ought to be that it may be imparted to the whole race of mankind. Compare the number of those who have as yet received it with the number still remaining under the dominion of false Religions; and how small is the former! Does the policy of the Bill tend to lessen the disproportion? No; it at once discourages those who are strangers to the light of revelation from coming into the Religion of it; and countenances by example the nations who continue in darkness, in shutting out those who might convey it to them. Instead of Levelling as far as possible, every obstacle to the victorious progress of Truth, the Bill with an ignoble and unchristian timidity would circumscribe it with a wall of defence against*

> *the encroachments of error.*

The Assessment Bill is unwise, Madison argued, because so many Virginians will find it "obnoxious" that it will be unenforceable.

> *13. Because attempts to enforce by legal sanctions, acts obnoxious to so great a proportion of Citizens, tend to enervate the laws in general, and to slacken the bands of Society. If it will be difficult to execute any law which is not generally deemed necessary or salutary, what must be the case, where it is deemed invalid and dangerous? And what may be the effect of so striking an example of impotency in the Government, on its general authority?*

Madison was even willing to argue that the majority do not favor this bill, a risky digression given his contention earlier that the majority should not be allowed to decide in matters of natural rights. Nevertheless, he was dealing with an Assembly that took public opinion quite seriously and he undoubtedly was banking on overwhelming popular opposition to assessment. He was correct.

> *14. Because a measure of such singular magnitude and delicacy ought not to be imposed, without the clearest evidence that it is called for by a majority of citizens, and no satisfactory method is yet proposed by which the voice of the majority in this case may be determined, or its influence secured. "The people of the respective counties are indeed requested to signify their opinion respecting the adoption of the Bill to the next Session of Assembly." [From a resolution by opponents of Assessment passed by the General Assembly in October, 1784, that staved off enactment of the Assessment Bill.] But the representation must be made equal, before the voice either of the Representatives or of the Counties will be that of the people. Our hope is that neither of the former will, after due consideration, espouse the dangerous principle of the Bill. Should the event disappoint us, it will still leave us in full confidence, that a fair appeal to the letter will reverse the sentence against our liberties.*

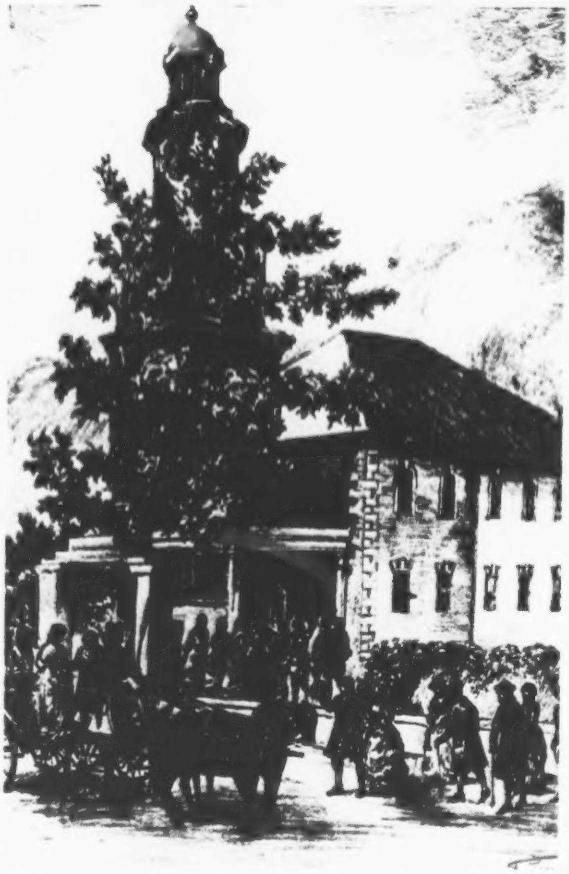
Returning to his basic themes, Madison concluded with a ringing defense of natural rights, warning the Virginia Assembly that it has no authority to "sweep away all our fundamental rights." If it can establish a religion, it could then, if it wished, eliminate trial by jury. Madison reminds us that religious freedom is, in its origin, "the gift of nature," and once more affirmed that, in his view of deity, such freedom of conscience is the only policy consistent with that deity. He argued not from dogma, but from reason and natural rights. By so doing he established a portrait of a creator consistent with such rights.

> *15. Because finally, "the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience" [Virginia Declaration of Rights] is held by the same tenure with all our other rights. If we recur to its origin, it is equally the gift of nature; if we weigh its importance, it cannot be less dear to us; if we consult the "Declaration of those rights which pertain to the good people of Virginia, as the basis and foundation of Government," it is enumerated with equal solemnity, or rather studied emphasis. Either then, we must say that the Will of the Legislature is the only measure of their authority; and that in the plenitude of this authority, they may sweep away all our fundamental rights; or, that they are bound to leave this particular right untouched and sacred: Either we must say that they may controul the freedom of the press, may abolish the Trial by Jury, may swallow up the Executive and Judiciary Powers of the State; nay that they may despoil us of our very right of suffrage, and erect themselves into an independent and hereditary Assembly or, we must say, that they have no authority to enact into law the Bill under consideration. We the Subscribers say, that the General Assembly of this Commonwealth have no such authority. And that no effort may be omitted on our part against so dangerous an usurpation, we oppose to it, this remonstrance; earnestly praying, as we are in duty bound, that the Supreme Lawgiver of the Universe, by illuminating those to whom it is addressed, may on the one hand, turn their Councils from every*

> *act which would affront his holy prerogative, or violate the trust committed to them: and on the other, guide them into every measure which may be worthy of his [blessing, may re]dound to their own praise, and may establish more firmly the liberties, the prosperity and the happiness of the Commonwealth.*

The growing number of Protestant sects in the colonies, combined with the variety of established churches, probably made inevitable the practical solution of church/state separation in the First Amendment. But if that were the sum of it, then an emerging majority in a later generation could justify a "practical" return to state support of churches under new circumstances. The genius of Madison and Jefferson laid down that "wall of separation" in the context of a principle best described by Jefferson in his *Bill for Establishing Religious Freedom*. Of the freedom of conscience he wrote: "The rights hereby asserted are of the natural rights of mankind, and . . . if any act shall be hereafter passed to repeal the present, or narrow its operation, such act will be an infringement of natural rights."

As a member of the first Congress under the new Constitution, James Madison received appointment to the select committee on constitutional amendments. After intense debate over procedure, the committee proposed a "bill of rights" for consideration by the House of Representatives. On August 15, in floor debate Madison remarked to his colleagues that he understood the meaning of the first clause of the religion bill—"No religion shall be established by Law, nor shall the equal rights of conscience be infringed"—to be "that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." After debate the wording of the phrase was altered, on motion by Fisher Ames of Massachusetts, to read, "Congress shall make no laws establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." A conference committee, with Madison as a member, produced the form in which the amendment was adopted by both Houses: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," employing Madison's phrase, "free exercise," which he had added to the Virginia Declaration of Rights in 1776. Madison would have preferred to extend the guarantees of free conscience, free speech, free press and trial by jury to the states. He reasoned that "it was equally necessary that [these rights] be secured against the state governments." His failure to achieve extension of protection of these rights to the states had no effect upon Madison's full and vigorous support of the First Amendment as adopted. Until his death in 1836 Madison believed that the nation supported his commitment to total and complete separation of church and state. To be sure, not all the founding fathers were in agreement with Madison, but his influence on the subject loomed large. By 1833, all the states had developed bills of rights that reflected the Madisonian view. Modern interpretations of the First Amendment must consider Madison's eloquent presentation of his principles regarding a free conscience in a secular state, not only because of his primary role in Congress in 1789, but also because his insights have currency for the continuing discussion of this constitutional question.



Old Christ Church, Alexandria, VA. Library of Congress.

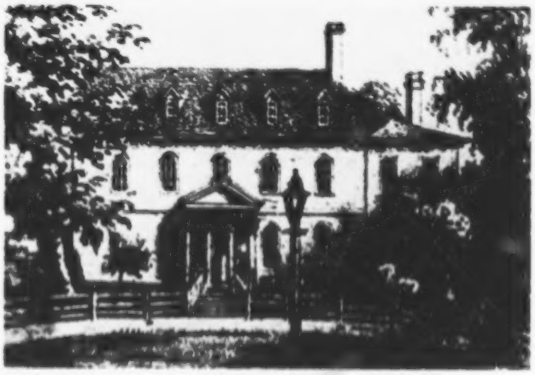
The text for the *Memorial* is to be found in the Library of Congress; it is reprinted in *The Papers of James Madison*, volume 8, Robert A. Rutland and William M. E. Rachal, eds. (University of Chicago Press, 1973).

Robert S. Alley is professor of humanities at the University of Richmond. His most recent book is *James Madison on Religious Liberty* (1985).

For the Classroom

MARYLAND AND THE U.S. CONSTITUTION

The following materials for teachers and students were excerpted from an elementary school educational packet developed by the Office for the Bicentennial of the U.S. Constitution, Maryland State Archives. The unit was written for the fourth grade, to show students that Maryland played an important role in the creation and adoption of the United States Constitution, and to help them understand the meaning of the Constitution. A high school unit will be available shortly. For further information, contact: Gregory A. Stiverson, Maryland Office for the Bicentennial of the U.S. Constitution, Maryland State Archives, Box 828, Annapolis, MD 21404; (301) 269-3914.



Mann's Tavern, site of the 1786 Annapolis Convention, in 1858, when it was called the City Hotel. Detail from a lithograph by Edward Sachse. Maryland Office for the Bicentennial of the U.S. Constitution, Maryland State Archives.

Teacher Materials

Crafts, Recipes, Games, and Songs

Children learning about the Constitution will enjoy participating in activities that would have been familiar to Maryland children in the 1780s. To get children in the mood for eighteenth-century play, you might have them make crownless tricorn hats out of black or brown construction paper.

CRAFT ACTIVITY

Pomander Balls: For each pomander ball: 1 orange, whole cloves, powdered orris root (from the druggist), ground cinnamon, a piece of narrow ribbon. Stick whole cloves firmly into skin of orange. Work over the entire surface to avoid too much tension in one spot. Insert cloves closely with heads touching. Finish each ball within a day, before the skin starts to shrink and harden. Disregard small tears in the skin; large ones can be sewn together. Place spice mixture in large bowl; add fruits and turn until well coated. Leave balls in mixture, stirring once each day until they begin to lose the weight of the juice. To hang, thread a large-eyed needle with narrow velvet ribbon and run through the fruit about an inch from the top. *"Like It Was" Bicentennial Games 'n Fun*

GAMES

Games of the Constitution period were those that required little or no equipment. We've included several.

Inside Games

Bird, Beast, or Fish: Leader is in the front of the room and points to one player, naming one of the three categories. Player must name a member of that category before leader counts to 10. Names of animals, birds, or fish cannot be repeated. If player cannot name one within the time it takes the leader to count to 10, he/she must pay a forfeit or drop out of the game. (Other categories may be added.) *"Like It Was" Bicentennial Games 'n Fun.*

Tonque Twisters: Try these!

- Eleven elephants elegantly equipped stopped Eleanor's equipage.
- Neddy Noople nipped his neighbor's nutmegs.
- Sam Slick sawed six slim, slippery, slender sticks.

AND NOW . . . read this rapidly but correctly:

- Esau Wood sawed wood. Esau Wood would saw wood! Oh, the wood Wood sawed! One day Esau Wood saw a saw saw wood as no other wood-saw Wood saw could saw wood. In fact, of all the wood-saws Wood ever saw saw wood Wood never saw a wood-saw that would saw wood as the wood-saw Wood saw saw wood would saw wood, and I never saw a wood-saw that would saw wood as the wood-saw Wood saw until I saw Esau Wood saw wood with the wood-saw that Wood saw saw wood. *"Like It Was" Bicentennial Games 'n Fun*

Outside Games

Obstacle Race: An obstacle course is set up or determined (as, under, over and around playground equipment). The player who successfully passes all objects and reaches the finish line first wins. *"Like It Was" Bicentennial Games 'n Fun*

Hop, Skip, and Jump: The winner is the one who can, by a hop, skip, and a jump, cover the greatest distance from a given starting point. A running start is permissible, but the hop must start on a line. *"Like It Was" Bicentennial Games 'n Fun*

There: A circle of players is formed, about 50 feet in diameter. One player stands in the center blindfolded. A referee designates which player on the outside circle should proceed slowly toward the center person. The object of the "stalker" is to touch the center person before she/he can be detected. If the center person points to the stalker, the referee indicates "right!," and the stalker must sit in that spot. The referee then points to another stalker who advances. This continues until a stalker reaches the center person; if no one reaches him/her, the closest person to the center after everyone has had a turn is declared winner. *"Like It Was" Bicentennial Games 'n Fun*

Student Materials

MARYLAND AND THE CONSTITUTION

by Gregory A. Stiverson and Beverly Davis Valcovic

1

Have you ever wondered why our country doesn't have a king or a queen, or princes or princesses? Have you ever wondered why a letter you mail gets to someone even if the person lives far away? Have you ever wondered why your mom and dad may vote and you may not?

2

The answers are found in the United States Constitution. The Constitution tells our government how to work. It sets the rules, and tells our lawmakers what kind of laws they may or may not write. The Constitution says we must have a president instead of a king. It also sets up post offices to move the mail all over the country. It says who may vote in elections. The Constitution does much more. We may not stop to think about it, but the Constitution is important to each of us every day. Because of the Constitution, we live in a free country with laws that protect us.

3

Our Constitution is very old. It was written almost 200 years ago. That was the time when Benjamin Franklin, Paul Revere, and George Washington lived. In fact, George Washington and Benjamin Franklin helped write the Constitution.

4

We should all know more about the Constitution. Learning about the Constitution is very interesting if you live in Maryland. Maryland was one of the first states, and Marylanders helped write the Constitution. So, the story of the Constitution is a part of our own history here in Maryland.

5

The story of the Constitution begins when Maryland and the other states were still owned by England. They had many problems. In 1776, the colonies agreed to the Declaration of Independence. It said that the colonies would no longer be part of England. Instead, they would be thirteen free states.

6

England did not want the colonies to be free states. They sent soldiers to America, and the long Revolutionary War began. The thirteen colonies knew that they would have to work together if they wanted to win the war with England. So they formed a government.

7

After the Revolutionary War was won, however, the country was in danger of falling apart. The states could not cooperate, and the weak central government could not force them to work together.

8

Maryland and Virginia were the first two states to meet to talk about their problems. In 1785 men from the two states went to Mount Vernon, the home of George Washington. They talked about who should use the Potomac River and Chesapeake Bay. They agreed that both states should be able to use these waterways. The agreement worked out at this meeting was called the Mount Vernon Compact. It was the first time that two states had worked together to solve a problem.

9

The Mount Vernon Conference led to another meeting the next year. All the states were asked to come to this meeting. It was held in Annapolis in September 1786. The Annapolis Convention was poorly attended. Only five states sent men to it. Even Maryland did not attend.

10

The few people who went to the Annapolis Convention agreed that the government had to be changed. The central government was too weak to handle the problems facing the states. Some people did not even think the government could defend the country if there were a war.

11

The most important thing that happened at the Annapolis Convention was that the men decided to hold another meeting the next year. This meeting was held in Philadelphia, and all thirteen states attended. The Philadelphia Convention lasted for four months. Instead of changing the government, the members of the convention decided that the country needed a new one. They wrote the Constitution. It created a strong central government.

12

The new Constitution had to be approved by nine of the states. Six states approved it very quickly. Other states were afraid that the new central government would be too powerful.

13

The Maryland vote on the Constitution took place at a

[illegible]

651

meeting held in Annapolis in April 1788. Most Marylanders wanted a strong central government. They approved the Constitution by a vote of 63 to 11 on April 28, 1788.

14

Two other states quickly followed Maryland in voting for the Constitution. The United States had a new government. George Washington was sworn in as the first president of this new, strong government in 1789.

15

Today we have lived for nearly 200 years under the government created by the Constitution. It has served our country well in times of peace and in times of war. It has given us a government that has worked in the times of horse-drawn wagons and sailing ships, and in the space age. It has helped make us the strongest and richest country on earth. The Constitution gives us rights and freedoms that other people in the world do not enjoy.

16

Marylanders helped write the Constitution, and Maryland was the important seventh state to approve it. When we think about the Constitution and how important it is to us today, we can remember with pride the part our state played in the founding of our country.

Write Your Own Constitution

Now that you have learned about the Constitution of the United States, help the other people in your room write one for your class.

A Constitution is a set of rules. The rules say what you may or may not do. A Constitution for your class will tell what the students may and may not do. It will also tell what the teacher may and may not do. Everyone needs to work together to write a good Constitution. You will know if your Constitution is a good one because your classroom will work smoothly and the class members and the teacher will be happy with the rules you have made.

When someone suggests a rule, everyone needs to vote to decide if it should go in the Constitution. If more than half of the class votes "yes," the rule goes into the Constitution. If more than half of the class votes "no," the rule does not go in the Constitution.

Below is a list of some things that your class might want to make rules for. You can probably think of many others.

1. Is homework necessary in your classroom? How much would help you learn well?
2. Do you need a dress code that tells you what kind of clothes you must wear to school? If so, what should that dress code be?
3. Do you want to bring toys or games to school to use during recess and free time? How will you decide when they may be used? Will the class vote or will every person decide for him/herself?
4. Would it help your class if people got rewards for good work and good behavior? What will the rewards be? Who will give the rewards?
5. Does it help you when your work is given a grade? What kind of a grading system would help you most?
6. The men who wrote the Constitution decided that women should not vote. Should girls be able to vote in class elections? Should boys? Should people with blue eyes? Will the teacher have a vote?
7. The Constitution makes the president the head of our government. He/she can be removed if he/she does not do a good job. The teacher is the head of your class. Do the students in your class want to vote to decide if the teacher is doing a good job? If the class decides she/he is not, what would you do then? Would you choose another teacher? How would you do that?
8. The Constitution says that the police may not search your house unless a judge says it is all right. Does your class want your teacher or principal to search your desk or locker without your permission? Should you be allowed to get into someone else's desk without their permission?
9. Should a student who does not follow your Constitution be punished? If so, what kind of punishment would help that student be a better citizen?
10. Think of some other things in your classroom or on your playground that would be good to have in your Constitution.

MARYLAND AND THE CONSTITUTION
Comprehension Check

In the following questions, the numbers in parentheses tell you which paragraph to use to find the answer.

A. Fill in the blanks:
   1. The ______________________________ (2) tells our government how to work.
   2. Maryland and Virginia met at ______________________________ (8) to solve problems.

B. Choose the right answer:
   1. The most important thing that happened at the Annapolis Convention was (11)
      ___a. the Revolutionary War was won.
      ___b. ships were allowed to sail on the Chesapeake Bay.
      ___c. they decided to have a convention in Philadelphia.
   2. What tells us that we must have a president and not a king? (2)
      ___a. the Constitution
      ___b. the post office
      ___c. our lawmakers

C. Find a word that means:
   1. to take care of (2) ______________
   2. work together (7) ______________
   3. to go to an event (9) ______________
   4. an agreement (8) ______________
   5. a meeting (10) ______________

D. Write the answers to these questions. Remember to put your answer in a complete sentence.
   1. How old is our Constitution? (3)______________________________
   2. What was decided at the Annapolis Convention? (11)
   3. What problem did the states have after the Revolutionary War? (7)
   4. Has the United States Constitution worked well for us? Tell how you know. (15) ______________

E. Put a 1 beside the thing that happened first. Put a 2 beside the thing that happened next. Put a 3 beside the thing that happened last.
   _____ Mount Vernon Compact.
   _____ Revolutionary War
   _____ United States Constitution

F. Look up the following words in the dictionary and write their meanings.
   defend______________________________
   colonies______________________________

G. Write a four-line poem or carefully draw a picture about freedom. Think about what freedom means before you begin to write.

ANSWERS

Comprehension Check: Constitution; Mt. Vernon; c; a; protect; cooperate; attend; compact; convention; almost 200 years; decided to hold the Philadelphia Convention; cound not cooperate; accept any answer which can be supported; 2-1-3

Book Review

Gamilton I Dzhefferson (Hamilton and Jefferson)

by Vladimir Olegovich Pechatnov

(Published in the Soviet Union, 1983)

Reviewed by William T. Shinn, Jr.

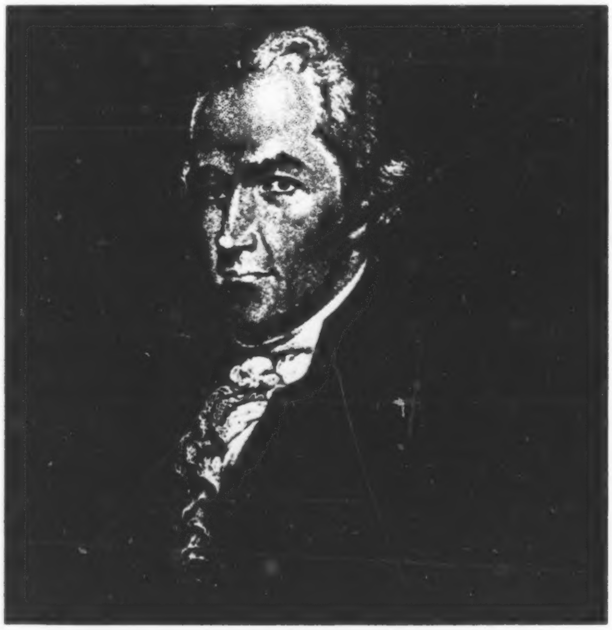
There would not be anything remarkable about this book if it were not by a Soviet historian and published in the USSR. It is a well-researched piece of scholarship, written in an elegant Russian which somehow manages to avoid the usual obeisance to Marxist-Leninist stereotypes.

For a half a century, it was *de rigueur* for every work of what passed as "scholarship" in the USSR to have a long, tortured introduction that sought to conjure up an appropriate ideological framework. The bibliography always began with a section entitled "guiding literature," which consisted of writings by Lenin, Stalin, Marx and, occasionally, Engels. What makes this book stand out is the absence of this hokum. Naturally the orientation is economic determinism but most of the citations are of Beard rather than Lenin who (will wonders never cease?) is not even listed in the bibliography.

As foreshadowed by the title, the author adheres to the thesis that Hamilton and Jefferson represented opposite strains in early American history. In describing their respective points of view he does not shy away from discussing concepts such as personal freedoms, individual rights, limited government, and the relationship between the state and the individual.

While Pechatnov is clearly on top of his subject, he is not immune from an occasional lapse, such as placing the "Boston Tea Party" in New York and calling it the "New York Tea Party." He questions the theory that young Hamilton joined the revolutionaries out of "youthful ardor," calling it superficial and arguing that Hamilton's decision was carefully calculated to win him fame and fortune. The author cites various authorities to support the assertion that the competition between France and England was essential for the Revolution's success. On the other hand, the role played by Catherine the Great has been exaggerated in the author's view. He shows convincingly that the Russian Naval visits, far from being intended to show sympathy for the revolutionaries, were dictated by "Realpolitik" as a means of pressuring the English. The Declaration of Armed Neutrality established a common interest with St. Petersburg, but the offer by our first envoy at the Russian capital to join was rejected on the grounds that we had insufficient means of making a military contribution.

Pechatnov's treatment of *The Federalist* papers is of special interest. Using the results of western computor analysis to establish authorship, he claims that Hamilton's contribution has more of an authoritarian flavor than that of Madison. He cites Hamilton in No. 9 as dealing with class struggle by advocating a firm union to serve as a barrier against internal fractions and uprisings. He asserts that Hamilton wanted a standing army to maintain order and keep "the poor in their place." He has a similar quote from No. 16, arguing that a federal union can maintain order better than the individual states. He observes that Shays' Rebellion is mentioned quite often in the papers, whose authors seek to mollify the "haves" by assuring against a repetition if the strong central government is established. Going on to Madison's No. 10, the author claims that it was intended as a respone to Hamilton. Instead of haves and have-nots, Madison postulates that the new republic will have multiple factions, and thus safeguard minority rights. In No. 23, Madison continued to counterattack, according to Pechatnov arguing that governments had a natural tendency to accumulate power and therefore had to be restrained. In sum, no less than twelve of the papers written by Hamilton dealt with this question and laid the basis for "strong presidential power" according to the author.



Alexander Hamilton

Finally, Pechatnov sees in the papers attributed to Hamilton the seeds of an aggressive foreign policy—manifest destiny, an "historic mission to save the honor of humanity" and to "replace Europe in the role of world hegemony seeker (*gegomonist*)." Quoting from the eleventh paper, he concludes that Hamilton expected a strong and united federal union to hold sway over the western hemisphere and eventually the rest of the world as well.

Yet, in spite of the author's criticism and use of selected quotations to assert that at its very inception the United States had leaders who looked to the possibility of a world system on the American model, the writing stops short from being tendentious.

The 329-page volume is handsomely bound and formatted with taste. The price of only 1 ruble, 80 kopeks (about $2.50), could not cover more than a small fraction of the publishing cost. All in all, this book is encouraging evidence that the Soviets have serious scholars on America who can once again make honest contributions and thereby further the long, slow process of understanding each other better from the study of our respective heritages.

William T. Shinn, Jr., is a foreign service officer who specializes in Soviet affairs.

Bicentennial Gazette

THE NATIONAL ENDOWMENT FOR THE HUMANITIES
Special Initiative for the Bicentennial of the United States

NEH Bicentennial Younger Scholars Program (February, 1986)

NEH announced the first awards for Bicentennial Younger Scholars in February, 1986. Sixty-six awards went to high school and college students in 28 states and the District of Columbia. Each student has spent nine weeks during the summer doing research and writing papers on the Constitution. Two hundred and sixty-three students had applied for the awards. High school students received $1,800 and college students $2,200; each award included $400 for the faculty adviser. Additional information may be obtained from the Bicentennial Office, Room 504, National Endowment for the Humanities, 1100 Pennsylvania Avenue, N.W., Washington, D.C. 20506. The names of the grantees follow:

ARIZONA
Hlosek, Andrea J.
Prescott High School
Prescott, Arizona
History of Search and Seizure

CALIFORNIA
Glueck, Jeffrey S.
Newport Harbor High School
Newport Beach, California
Church-State Separation: Madison and 18th Century Thinkers

Newman, Darlene S.
Benjamin Franklin High School
Los Angeles, California
Evolution and Development of Judicial Review

Stokely, Jennifer L.
Claremont High School
Claremont, California
The Constitution in Space

COLORADO
Pfeiff, Laurie Lynn
The Colorado College
Colorado Springs, Colorado
The Formulation and Wilsonian Alternation of the American Presidency

CONNECTICUT
Kass, Sarah
Yale University
New Haven, Connecticut
Religion and the Constitution

Macht, Timothy A.
Yale University
New Haven, Connecticut
The Constitutionality of Mandatory Drug Testing

DISTRICT OF COLUMBIA
Klubes, Benjamin B.
The George Washington University
Washington, D.C.
The First Federal Congress and the Constitution: The National Bank Bill as a Case Study in Interpretation

FLORIDA
Riley, Michelle T.
Coral Gables High School
Coral Gables, Florida
Free Blacks in Florida and the Dred Scott Decision

Kian, David L.
University of Florida
Gainesville, Florida
Judicial Review, Federalism, and the Formation of the American Republic

HAWAII
Chee, Ryan M.
Mid-Pacific Institute
Mililani, Hawaii
Meaning, Intent, and Application of the Eighth Amendment of the Constitution

IDAHO
Casner, Nick A.
Boise State University
Boise, Idaho
Rejected Amendments

ILLINOIS
Deardorff, Anne M.
Steinmetz High School
Chicago, Illinois
Liberty and Power in the Writing of the Constitution

Prawiec, Deborah I.
Loyola University, Chicago
Chicago, Illinois
Judicial Review and the Intentions of the Framers

Snyder, Colleen M.
MacMurray College
Jacksonville, Illinois
Judicial Review: Origins and Intentions

INDIANA
Moore, Kent J.
Anderson College
Anderson, Indiana
The Presidency: What Does the Constitution Mean?

Speranza, Laura J.
St. Mary's College
Notre Dame, Indiana
James Wilson—His Legal Theory and its Influence on the Formation of the Constitution

IOWA
Brandt, Lori F.
Oskaloosa Senior High School
Oskaloosa, Iowa
Locke's Influence on the Constitution

LOUISIANA
Clark, Philip S.
Louisiana State University
Baton Rouge, Louisiana
The Anti-Federalist Critique of the American Founding

MARYLAND
Kao, Michelle M.
Winston Churchill High School
Potomac, Maryland
Separation of Powers: A Critical Study of Montesquieu's Influence on the U.S. Constitution

McCarthy, Thomas J.
T. S. Wootton High School
Gaithersburg, Maryland
The U.S. Constitution as a Precedent in Latin America

MASSACHUSETTS
Alexander, Daniel L.
Lexington High School
Lexington, Massachusetts
The Accountability Provisions of Article I: Historical Origins

Dailey, Jonathan C.
Mount Greylock Regional High School
Williamstown, Massachusetts
Substantive Meaning and Intent of the Constitutional Provision Guaranteeing Freedom of Expression and its Relationship to National Security

Lippard, Joshua J.
Buckingham Browne & Nichols School
Cambridge, Massachusetts
Was the First Bank Constitutional?: A Question of Strict Versus Loose Interpretation

McGlone, Michelle M.
Brockton High School
Brockton, Massachusetts
The Massachusetts Constitutional Ratification and Its Impact on the Nation

Allison, Robert J.
Harvard University Extension
Cambridge, Massachusetts
The Founding Fathers and Slavery

DiMeglio, Linda A.
Harvard University
Cambridge, Massachusetts
The Electoral College and American Democracy

Mooney, Richard J.
Harvard University
Cambridge, Massachusetts
Democracy and Freedom in American Constitutional History

Steinhoff, Anthony J.
Brandeis University
Waltham, Massachusetts
Congressional Development and Colonial Society

MICHIGAN
Katz, David J.
University of Michigan
Ann Arbor, Michigan
How the Taney Supreme Court Dealt With Economic and Technological Change

MINNESOTA
Casey, Jeanne E.
St. Louis Park High School
St. Louis Park, Minnesota
A Changing Constitution, A Shifting Balance of Power

Koepke, Kevin M.
Carleton College
Northfield, Minnesota
A Reconsideration of Rousseau in Regard to Contemporary Obscenity

Steele, Karen M.
St. Olaf College
Northfield, Minnesota
The Constitution and Autonomy

MISSOURI

Lander, Brad S.
Parkway North High School
St. Louis, Missouri
Roman Influence on the United States Constitution

Renkins, Catherine E.
Southeast Missouri State University
Cape Girardeau, Missouri
Bridging the Gap Between Founders' Philosophy and Popular Support

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University of Nebraska at Omaha
Omaha, Nebraska
The Shifting Perspectives of E. S. Corwin on Judicial Review

NEW JERSEY

Browne, Nina M.
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Ridgewood, New Jersey
Sexual Bias in the U.S. Constitution

Mansfield, Kelly A.
Kent Place School
Morristown, New Jersey
Slavery in the Constitution

Balleisen, Edward J.
Princeton University
Princeton, New Jersey
The Constitution's Way of Protecting Rights

Phelon, Eileen M.
Princeton University
Princeton, New Jersey
The Shaping of the Men Who Shaped the Nation: The Influence of the Scottish Enlightenment on Princeton

NEW YORK

Dreitzer, Richard I.
Canarsie High School
Brooklyn, New York
Judicial Review and the Marshall Court: Its Origins and the Roots of its Development

Illig, Robert C.
Pittsford Sutherland High School
Rochester, New York
Constitutionality of "Presidential" Wars

Klafter, Andrew B.
Brighton High School
Rochester, New York
The Substantive Meaning of the First Amendment Regarding Religion in Public Schools

Lin, Edmund Y.
Clarkstown High School North
New City, New York
Alexander Hamilton and the Constitution

Neira, Christian
Trinity School
New York, New York
Virtue and Self-Interest in the Fight Over Ratification in NYC Newspapers, 1787–1788

Rubin, Anne S.
Scarsdale High School
Scarsdale, New York
McCarthyism and The Bill of Rights in Scarsdale, New York

Leo, Leonard A.
Cornell University
Ithaca, New York
The Free Exercise and Establishment of Religion Clauses of the Constitution: A Study of Intent

Yormick, Jon P.
Canisius College
Buffalo, New York
Charles Pinckney: The Forgotten Father of the Constitution

NORTH CAROLINA

Finch, Keith R.
Davidson College
Davidson, North Carolina
Jefferson and Madison: The Partnership

Parker, Jonathan H.
University of North Carolina, Chapel Hill
Chapel Hill, North Carolina
The State Legislative Interpretation of the Establishment Clause of the First Amendment to the Constitution

OHIO

Saltzman, David H.
Beachwood High School
Beachwood, Ohio
Judicial Review and the Constitutional Crisis of the 1930s

OKLAHOMA

Wiemer, Julie E.
University of Tulsa
Tulsa, Oklahoma
An Anti-Federalist Understanding of the Constitution

OREGON

Wesselman, Amy L.
Glencoe High School
Hillsboro, Oregon
The Consequences of Abdicating or Abusing the Power of Self-Government as Provided for in the U.S. Constitution

PENNSYLVANIA

Altermatt, Emily S.
Chambersburg High School
Chambersburg, Pennsylvania
John Dickinson and the Federal Constitution

Morgan, Kimberly D.
The Baldwin School
Villanova, Pennsylvania
The Fourteenth Amendment: Its Intent, Meaning and History

Giunta, Linda M.
Ursinus College
Collegeville, Pennsylvania
The Legal Status of Women: An Erratic Development

Heisey, Daniel J.
Dickinson College
Mechanicsburg, Pennsylvania
The Roman Roots of John Dickinson's Constitutionalism

Uleman, Jennifer K.
Swarthmore College
Swarthmore, Pennsylvania
Competing Conceptions of Human Nature and Their Implications for Constitutional Interpretation

SOUTH CAROLINA

Vereen, Gwendolyn R.
University of South Carolina
Coastal Carolina College
Conway, South Carolina
Alexander Hamilton's Understanding of the Constitution

TENNESSEE

Cornelius, Craig A.
Bryan College
Dayton, Tennessee
A Study of the Formation and Original Intent of First Amendment Religion Clauses

Wiegand, Joseph M.
University of the South
Sewanee, Tennessee
The American Constitution, the House, and the People

TEXAS

Smithey, Shannon K.
Southern Methodist University in Great Britain
Saint Hilda's College at Oxford
Dallas, Texas
Privacy as a Constitutional Issue

WISCONSIN

DiMeglio, Richard P.
Platteville High School
Platteville, Wisconsin
The Vice-Presidency and the Twenty-fifth Amendment: Constitutional and Contemporary Perspectives

Grudzina, Grant E.
Ripon College
Ripon, Wisconsin
Alexander Hamilton, Separation of Powers & Judicial Review

Haug, Dawn C.
Beloit College
Beloit, Wisconsin
The Influence of Virginia's Religious Dissenters on the Writing of the First Amendment

Lehfeldt, Elizabeth A.
Lawrence University
Appleton, Wisconsin
The Constitutional Convention and Congressional Bicameralism

NEH Grants for Individual Fellowships

(November 1985)

George A. Billias
Clark University
Worcester, MA
The Influence of American Constitutionalism Abroad

Stanley C. Brubaker
Colgate University
Hamilton, NY
The Constitution of Self-Government

John W. Danford
University of Houston Central Campus
Houston, TX
Hume's Republicanism and the Origins of the Constitution

Robert Eden
Dalhousie University
Nova Scotia, Canada
Is a Constitutionalist Political Realignment Possible?

Jesse R. Fears
Indiana University
Bloomington, IN
The Legacy of Classical Liberty

Paul Finkelman
SUNY Res. Fdn./Binghamton
Binghamton, NY
Fugitive Slaves and the American Constitution: A History of the Fugitive Slave Laws

Morton Keller
Brandeis University
Waltham, MA
The Pluralist State: Public Life in Early Twentieth-Century America

Stephen A. Marini
Wellesley College
Wellesley, MA
Evangelical Origins of American Constitutionalism

Richard K. Matthews
Ursinus College
Collegeville, PA
If Men Were Angels: James Madison and the Politics of Fear

John M. Murrin
Princeton University
Princeton, NJ
The Right to Trial by Jury in Colonial and Revolutionary America

Robert A. Rutland
University of Virginia
Charlottesville, VA
Understanding the First Amendment: What the Framers Intended and Where We Are Today

G. Alan Tarr
Rutgers University, Camden
Camden, NJ
State Constitutions and American Constitutionalism

RESEARCH TRAVEL GRANTS
(May, 1985)

David R. Johnson
University of Texas
San Antonio, TX 78285
Civil Liberties in the Formative Years of Federal Law Enforcement

John Kloos
Chicago, IL
Moral Theories of Benjamin Rush

NEH Research Grants
(February, 1985; February, 1986)

UNIVERSITY OF CHICAGO
Chicago, IL 60637
Project Director: Morris Philipson
Award: $124,206

To support the publication of *The Founders' Constitution*, a collection of documents designed to illuminate the founders' conception and interpretation of the Constitution.

HISTORIC DEERFIELD, INC.
Deerfield, MA 01342
Project Director: Robert J. Wilson, III
Award: $10,000

To support a conference on Shays' Rebellion.

JAMES MADISON.

NEH 1986 Bicentennial Seminars for Law Professors

Purpose of the Program

The Bicentennial Seminars provide law school professors a unique opportunity to study the historical and philosophical origins and meanings of the U.S. Constitution. Each seminar is codirected by a senior law professor and a senior professor of political science or history. The seminars are designed for law professors who have had little or no previous training in constitutional history or American political thought. Each seminar deals with the debates and arguments of the founders through discussion of the most significant primary sources and the best secondary articles. Seminar participants also consider the significance of these debates and arguments for contemporary issues of constitutional law. Through reading, writing, reflection and discussion—formal and informal—with the directors and with other law professors, seminar participants deepen their knowledge and enhance their ability to understand and impart the significance of the historical and philosophical roots and principles of the Constitution.

On the Continued Relevance of the Constitution

June 16 through July 2, 1986

The seminar examined such primary sources as Farrand's *Records of the Federal Convention of 1787*, Elliot's *Debates in the State Ratifying Convention, The Federalist, The Complete Anti-Federalist*, and key Supreme Court opinions of John Marshall.

Lino Graglia, University of Texas Law School at Austin
Ralph Rossum, Claremont Graduate School,
Department of Government
Department of Political Science
Claremont McKenna College
Claremont, California 91711

The Founders' Constitution

June 23 through July 11, 1986

The seminar was concerned with the intention of the founders of the American constitutional system. Major emphasis was placed on the study of the most significant eighteenth- and early nineteenth-century primary sources—political, philosophical, and legal.

Philip Kurland, University of Chicago Law School
Ralph Lerner, The College, University of Chicago
University of Chicago
1116 East 59th Street
Chicago, Illinois 60637

Origins of American Constitutionalism

July 24 through August 8, 1986

The seminar explored intellectual antecedents of the Constitution, colonial and revolutionary history preceding the Declaration of Independence, the Philadelphia Convention, ratification, and the framing of the Bill of Rights.

Walter Dellinger, Duke University Law School
Richard E. Morgan, Bowdoin College, Department of Government
Department of Government
Bowdoin College
Brunswick, Maine 04011

NEH Media Grants (February, 1985; August, 1985; February, 1986)

AMAGIN, INC.
P.O. Box 379
McKean, PA 16426-0379
(814) 476-1105
Project Director: John Huster
Award: $32,000

To support the scripting of two television documentaries, each examining the life and ideas of an important political philosopher with emphasis on ideas that underlie the Constitution and Bill of Rights.

AMERICA STUDIES CENTER
426 C St., N.E.
Washington, D. C. 20003
(202) 547-9409
Project Director: Marc Lipsitz
Award: $27,800

To script 88 three-minute radio programs to be aired daily during the Bicentennial of the Constitutional Convention, May 25 through September 17, 1987. The programs will consist of "news reports" from the convention floor.

CARLETON COLLEGE
Northfield, MN 55057
(507) 663-4303
Project Director: Michael Zuckert
Award: $90,000

To produce a series of six half-hour radio programs, entitled "Mr. Adams and Mr. Jefferson: A Dramatization for the Radio," based on the lifelong correspondence between the two men.

CLASTER TELEVISION PRODUCTIONS
200 E. Joppa Rd., suite 400
Towson, MD 21204
(301) 825-4576
Project Director: Sally Bell
Award: $15,000

To plan a one-hour television documentary on the U.S. Court of Appeals case, *Trachtman* v. *Anker*, as the basis for the study of three jurisprudence issues: the legal process and the rights of children under the law; the First Amendment and its historic tradition; and the social forces, ethical questions, and psychological theories interacting with the legal process.

D.E.A.F. MEDIA, INC.
4560 Horton St.
Emeryville, CA 94608
(415) 653-2722
Project Director: Susan Rutherford
Award: $104,846

To produce one 30-minute television program designed to introduce the Declaration of Independence and the Constitution to deaf children, and to a general children's audience, ages eight to twelve.

DELAWARE HERITAGE COMMISSION
Carvel State Office Building
820 N. French St.
Wilmington, DE 19801
Project Director: Claudia Bushman
Award: $10,500

To plan and script a 60-minute film, a dramatic character study of John Dickinson, which will take place partly at the Dickinson mansion.

METROPOLITAN PITTSBURGH PUBLIC BROADCASTING
4802 Fifth Ave.
Pittsburgh, PA 15213
(412) 622-1340
Project Director: Danforth Fales
Award: $700,000

To produce a series of nine one-hour documentary programs, called *Visions of the Constitution*, focusing on contemporary constitutional issues.

NATIONAL RADIO THEATRE OF CHICAGO
600 N. McClurg Court, suite 502-A
Chicago, IL 60611
(312) 751-1625
Project Director: Yuri Rasovsky
Award: $239,335

To produce thirteen 30-minute radio programs examining the events, personalities, and issues that arose at the U.S. Constitutional Convention.

NEW IMAGES PRODUCTIONS, INC.
919 Euclid Ave.
Berkeley, CA 94708
Project Director: Avon Kirkland
Award: $198,788

To support the scripting of a four-hour mini-series of docudramas based on *Simple Justice*, Richard Kluger's history of the landmark U.S. Supreme Court decision *Brown* v. *Board of Education*, 1954.

PAST AMERICA, INC.
12100 N.E. 16th Ave.
Miami, FL 33161
(305) 893-1202
Project Director: Bernard Weisberger
Award: $30,000

To script one 60-minute docudrama on the 1944 Supreme Court case, *Korematsu* v. *United States*, as part of a proposed series on significant Supreme Court cases.

PAST AMERICA, INC.
12100 N.E. 16th Ave.
Miami, FL 33161
(305) 893-1202
Project Director: Robert S. Morgan
Award: $525,000

To support production of "John Punch and the Servants of Colonial Virginia," a 90-minute drama which is the fourth program in the series "A House Divided: A History of Slavery In America." The program examines the origins of slavery in Virginia through the case of John Punch.

PRODUCTION INSTITUTE OF AMERICA
Baton Rouge, LA 70808
Project Director: John S. Baker
Award: $30,000

To support a Bicentennial documentary

WGBY-TV
44 Hampden St.
Springfield, MA 01103
(413) 781-2801
Project Director: Robert Toplin
Award: $70,000

To support the writing of a script for a 90-minute drama about Abraham Lincoln and Fort Sumter, the pilot program in a six-part series about presidential decision-making in times of crisis.

WNET
356 W. 58th St.
New York, NY 10019
(212) 560-2870
Project Director: George Page
Award: $55,000

To script three 30-minute television programs for a young audience (14–18 years) covering James Madison's education and political apprenticeship; work on the Philadelphia Convention; and work on *The Federalist* papers and the ratification of the Constitution.

WNET
356 W. 58th St.
New York, NY 10019

(212) 560-2870
Project Director: Jac Venza
Award: $20,000

To support the re-writing of the script for a 90-minute historical drama on the role of James Madison in the Constitutional Convention.

WORLD NEWS INSTITUTE, INC.
P.O. Box 484
Great Falls, VA 22066
(703) 759-5808
Project Director: Richard Bishirjian
Award: $100,000

To produce three 30-minute pilot television discussion programs on the creation, ratification, and implementation of the Constitution, featuring scholars discussing James Madison, Thomas Jefferson, and Alexander Hamilton.

NEH Grants for Education Programs and Seminars

(August, 1985; February, 1986)

UNIVERSITY OF CALIFORNIA
Berkeley, CA 94720
Project Director: Bernard R. Gifford
Award: $149,987

To support an institute with follow-up activities on the Constitution and American law for 45 California social studies teachers.

CATHOLIC UNIVERSITY OF AMERICA
Washington, D.C. 20854
Project Director: Judith E. Greenberg
Award: $59,990

To support a four-week institute on the Constitution with follow-up for 30 elementary and middle-school teachers.

FORDHAM UNIVERSITY
Bronx, NY 10458
Project Director: Robert F. Jones
Award: $47,817

To support a summer seminar for secondary school teachers on Thomas Jefferson.

GRAND VALLEY STATE COLLEGE
Allendale, MI 49401
Project Director: Dennis S. Devlin
Award: $81,105

To support a four-week summer institute and follow-up activities for 40 Michigan secondary school social studies teachers on the Constitution and the history of Michigan.

MARYLAND PUBLIC TELEVISION
Owings Mills, MD 21117
Project Director: Sheilah Mann
Award: $145,000

To support the preparation of six instructional television programs for a television-assisted course on the Constitution.

ROCHESTER INSTITUTE OF TECHNOLOGY
Rochester, NY 14623
Project Director: David D. Murdoch
Award: $62,836

To support faculty released time, a faculty seminar, and various public events related to the teaching of a senior seminar on the Constitution.

TEMPLE UNIVERSITY
Philadelphia, PA 19122
Project Director: Daniel J. Elazar
Award: $120,868

To support a four-week institute with follow-up activities on federalism for 35 social studies teachers.

TENNESSEE STATE UNIVERSITY
Nashville, TN 37203
Project Director: Clayton C. Reeve
Award: $60,000

To support a four-week institute for 32 high school juniors on the Constitution and American culture.

NEH Grants for General Programs

(February, 1985; August, 1985; February, 1986)

AFRICAN AMERICAN MUSEUMS ASSOCIATION
Washington, D.C. 20004
Project Director: Adrienne Childs
Award: $15,000

To support the planning of a program for black museums in the United States on the history of Afro-Americans and the Constitution.

AMERICAN BAR ASSOCIATION
Chicago, IL 60611
Project Director: Robert S. Peck
Award: $60,000

To support a nationwide series of community forums and a series of newspaper articles on constitutional themes.

BOWLING GREEN STATE UNIVERSITY
Bowling Green, OH 43403
Project Director: Ellen F. Paul
Award: $48,209

To support a two-year program of public conferences, publications and videotapes on the history and philosophy of economic rights under the Constitution.

FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES
Washington, D.C. 20006
Project Director: Eugene B. Meyer
Award: $73,835

To support a two-year series of public conferences, lectures, and publications on separation of powers and economic liberties.

FRANKLIN AND MARSHALL COLLEGE
Lancaster, PA 17604
Project Director: D. Grier Stephenson, Jr.
Award: $14,937

To support a four-year lecture series and publication on the role of the modern Supreme Court.

NEW SCHOOL FOR SOCIAL RESEARCH
New York, NY 10003
Project Director: Jacob Landynski
Award: $50,000

To support a two-year program of public conferences, lectures, seminars and publications on the dialogue between American and European constitutionalists.

NEW YORK PUBLIC LIBRARY
New York, NY 10018
Project Director: Diantha D. Schull
Award: $21,004

To support planning for public programs and a major exhibition of rare books and manuscripts devoted to the intellectual antecedents of the Constitution.

NEW YORK PUBLIC LIBRARY
New York, NY 10018
Project Director: Diantha D. Schull
Award: $194,446

To support a major interpretative exhibition, programs and printed materials on the Constitution at the Research Library and the branch libraries.

ROBERT HUTCHINS CENTER FOR THE STUDY OF DEMOCRATIC INSTITUTIONS
Santa Barbara, CA 93140
Project Director: Jeffrey D. Wallin
Award: $50,048

To support programs on "Equality and liberty: theory and practice in American constitutional life."

STATE UNIVERSITY OF NEW YORK AT GENESEO RESEARCH FOUNDATION
Geneseo, NY 14454
Project Director: Martin L. Fausold
Award: $42,207

To support a series of public lectures and a conference on the presidency and the Constitution.

WESLEYAN UNIVERSITY
Middletown, CT 06457
Project Director: Bruce Fraser
Award: $14,900

To support the planning of a series of regional programs in libraries on the framing of the Constitution and 18th-century New England society.

NEH 1986 Summer Seminar for College Teachers

PAUL E. SIGMUND
Department of Politics
Princeton University
Princeton, New Jersey 08544

The Philosophical and Historical Background of the American Constitution

June 23–August 15, 1986

The seminar examined the theoretical and institutional antecedents of the U.S. Constitution. Participants first studied the classical, biblical, and legal traditions that influenced the outlook of the Founding Fathers by considering such works as Plato's *Republic* and *Laws*, Aristotle's *Ethics* and *Politics*, the Bible, Augustine's *The City of God*, Aquinas' *On the Governance of Princes*, Marsilius' *Defender of Peace*, and Magna Carta. This was followed by a study of the institutional debates in seventeenth-century England and eighteenth-century America that influenced the Founders; works by Hobbes, Locke, and Montesquieu were read. Finally, the Constitutional Convention itself and the debate on ratification was analyzed; and for this segment participants in the seminar looked closely at some of the writings of Paine and Adams, at Madison's *Notes on the Federal Convention*, at *The Federalist*, the Constitution, and the Bill of Rights. Throughout their exploration participants also relied on a number of secondary sources, including works by Solberg, Greene, Sigmund, and Wood.

Schedule of Events for the
Annapolis Convention Bicentennial
September 11-14, 1986

Thursday, September 11

11:00 am

Performance of "Annapolis Yesteryear" by the Ballet Theatre of Annapolis, Maryland Hall for the Creative Arts, for school children.

4:00-6:00pm:

Official opening of the new Maryland State Archives Building and exhibits relating to the Annapolis Convention. Featured speaker: Governor Harry Hughes; reception following the ceremonies, Maryland State Archives Building. Public invited.

Friday, September 12

Morning:

Federal Commission on the Bicentennial of the U.S. Constitution begins two days of meetings in Annapolis. Federal Commission members will visit schools, civic associations, and senior citizens' center.

10:00 am:

Former Chief Justice Warren E. Burger, Chairman of the Federal Commission, and Governor Harry Hughes officially open the Constitution Resource Room, sponsored by the Maryland Humanities Council. Constitution-related exhibits will include the 12-poster series, "The Blessings of Liberty," sponsored by Project '87

2:30-4:00pm:

Federal Commission holds public hearings, Joint Hearing Room, Legislative Services Building.

8:00 pm:

Lecture by constitutional scholar Robert Goldwin, resident scholar, American Enterprise Institute, Key Auditorium, St. John's College. Public invited.
Performance of "Annapolis Yesteryear" by Ballet Theatre of Annapolis. Maryland Hall for the Creative Arts. Open to public.

10:00pm:

Annapolis Convention Ball, hosted by Ballet Theatre of Annapolis. Ramada Inn.

Saturday, September 13

8:30am-5:00pm:

"The Annapolis Connection: Maryland and the Constitution." Day-long conference sponsored by the Maryland Humanities Council. Afternoon outreach workshops for teachers and others who wish to develop local Constitution programs. Registration limited to 200. Open to public.

7:00-10:00pm:

Evening of 18th-century music and dance with premier illumination of 18th-century transparent painting. City dock. Public welcome.

Sunday, September 14

10:00am-6:00pm:

18th-Century Fair. Costumed craftspeople, musicians, entertainers, and soapbox orators will provide entertainment and hands-on experience with crafts, games and other activities of Constitution-era Maryland. St. John's College campus. Public welcome.
"A More Perfect Union," a play specially written for the Annapolis Convention bicentennial by William K. Paynter, will be performed five times during the 18th-Century Fair by the professional troupe, New Wave of Entertainment.

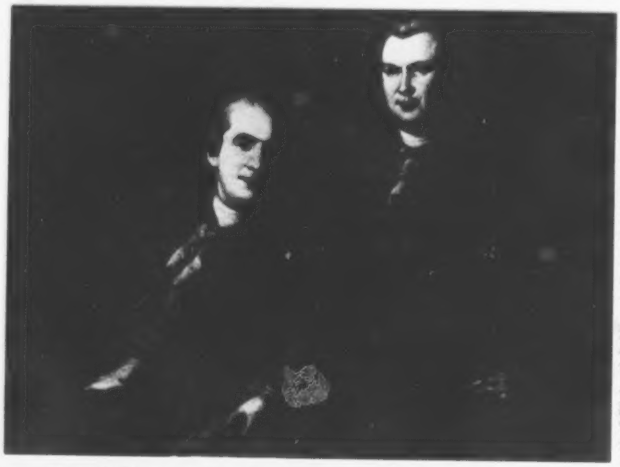
12:00-6:00pm:

Day-long military review and encampment sponsored by the U.S. Army. Ceremonial units from each of the 13 original states, recreated military units, band concerts, modular Constitution exhibit and much, much more. Ft. Meade, Maryland. Open to public.

For further information about Annapolis Convention Bicentennial events, please call (301) 269-3915 or write Dr. Gregory Stiverson, Director, Maryland Office for the Bicentennial of the U.S. Constitution, P.O. Box 828, Annapolis, MD 21404.

Around the States

"Miracle at Philadelphia" Exhibit Opens



Gouverneur Morris and Robert Morris, painting by Charles Willson Peale. Bequest of Richard Ashhurst. Pennsylvania Academy of the Fine Arts.

On September 17, 1986, a very special exhibition on the Constitutional Convention will open in Philadelphia at The Second Bank of the U.S. in Independence Park. Based upon original documents, portraits and contemporary exhibition elements, the exhibition, titled "Miracle at Philadelphia," will extend through 1987, welcoming the many visitors who will return to the site of the drafting of the Constitution for the 200th celebration of the creation of this document.

The exhibition tells the powerful human story of the Constitutional Convention—when 55 men from 12 states met in secret session in the Assembly Room of Independence Hall during the sweltering summer of 1787 and wrote the Constitution of the United States. Appropriately enough, the Exhibition will be housed one block from Independence Hall in the landmark Second Bank of the United States. Centering upon unique and treasured documents and portraits drawn from four great Philadelphia repositories and from throughout the country, the Exhibition will narrate three crucial periods before, during and after the Revolution. Chronological exhibition areas will portray the forces which culminated in the call to the Convention; the major issues argued, fought, or compromised to produce the final document; and the means by which the thirteen sovereign states were led to ratification.

Supplementing the historic materials will be sculpture, models, audiovisual presentations, computer graphics, and talks by the National Park Service staff to narrate the events, people, and ideas surrounding the Constitutional Convention. Related exhibitions, two publications by Prof. Jack P. Greene, Johns Hopkins University, and school enrichment materials will also accompany "Miracle at Philadelphia."

"Miracle at Philadelphia" opens with the British surrender at Yorktown in 1781, which plunged the fledgling new nation into a post-war tumult. This gallery examines the forces at work in the new nation: migration and immigration, how people prospered amidst the changing markets, how they voted, and how the new country faced a shortage of hard coin and escalating debt and taxes. Surrounding documents, maps, and graphics evoke both the personal plights and the exhilarating possibilities faced in these crucial years.

Alarmed by the arising problems and what seemed too often irresponsible and self-serving solutions, a network of men accustomed to thinking in national terms began to coalesce. In a second gallery filled with portraits and images, newspaper headline labels describe such issues as the impasse in Congress, the instability and irresponsibility of the states, the international turmoil. Visitors can examine personal letters of Washington, Madison, the Morrises, Jay, and others who voiced their alarm and reiterated their hopes as they moved toward a convention to reform the structure of government.

The Constitutional Convention itself, what it did and how it did it, is presented in the magnificent, barrel-vaulted main banking room, a room whose architectural grandeur reflects the grandeur of the Convention's work. Selected pages of James Madison's notes, which will be on exhibit here for the first time, will provide insight into the three major issues that the delegates had to face and the compromises involved in resolving them.

First, and most difficult, was the power struggle between large and small states for control of Congress. Manuscripts, accompanying models, and graphics illustrate the different proposals, and the pivotal role of the Connecticut delegation in negotiating the crucial compromise. This Great Compromise paved the way for forging a strong national government.

A second set of complex negotiations, exhibited by an interactive map of the country and the text of the debates, was necessary to induce different regions with vastly different social and economic systems to unite into one entity. As each section demanded incorporation of its most urgently felt needs, debate focused on the key regional interests: the North wanting the central government to regulate trade and protect its shipping; the South wanting it to maintain importation of slaves and low duties on imports. Compromises over regional economic interests proved essential to the Constitution's adoption, although the conflict over slavery had still to be finally settled.

A third section represents the Convention's great invention of an extraordinary new form of government—three interrelated branches, separated from each other and balanced in powers. In the exhibit, a contemporary mechanism inspired by 18th-century models will focus on three elements of this governmental form: the balancing of powers between the president and the Congress, the relationship between the states and the national government, and the lens of constitutional law through which the judiciary may review cases originating in both state and nation.

When these major controversies had been negotiated, it remained for some talented members selected by their fellow delegates to organize their joint decisions into a coherent written plan. The meticulous work of the Committee of Detail, powered by the scholarly organizing skills of James Wilson, will be shown by a series of drafts of the Constitution as the Committee moved closer to the final text. This resulted in the first printed, proof sheet for the Constitution of the United States, on display in this exhibit.

An exhibit presentation through computerized graphics illuminates the further condensation of the document (from 23 articles to 7) and critical changes in precise wording achieved by the Committee of Style. Visitors may watch the Preamble evolve from "We the people of the states of New Hampshire, Massachusetts, Rhode Island and the Providence Plantation . . ." to "We the People of the United States."

At a final station in the great hall visitors may view Franklin's own copy of the Constitution alongside his portrait and with his words "I wish that every member . . . would, with me . . . put his name to this instrument." Visitors wishing to sign for themselves will have an opportunity before leaving the central core of the Exhibition.

A back gallery off the hall treats visitors to two audio-visual presentations, one showing the delegates as they visited Philadelphia, and another recreating the debate on the office of the presidency. A towering statue of George Washington dominates this gallery, underscoring his encompassing influence as chair of the Convention.

The last area of the Exhibition traces the path of the Constitution as it is offered to each state for ratification. Rotating sequential pillars follow the embattled document through the required nine states, and its final grudging acceptance by those remaining. Portraits of the powerful Federalist team of Hamilton, Madison, and Jay, accompanied by their persuasive *Federalist* papers and documents, confront opposition forces in hotly contested states. These Anti-Federalist leaders demanded the immediate amendment of the Constitution to insure guarantees for individual and state rights.

The exhibit concludes with contemporary examples showing enduring constitutional issues illustrated by the headlines of today. The primary means by which the Constitution has adapted to changing times and demands—the amendment process and judicial interpretations in courts of law—are represented in this last gallery.

At the 200th year of its creation, the "Miracle at Philadelphia," the United States Constitution, remains the "supreme law of the land." It gives the rights and responsibilities to "ourselves and our posterity."

This exhibit was made possible through generous funding by the National Endowment for the Humanities and The J. Howard Pew Freedom Trust to The Friends of Independence National Historical Park, in consortium with The American Philosophical Society, the Library Company of Philadelphia, The Historical Society of Pennsylvania, and Independence National Historical Park.

Related exhibits are also planned: American Philosophical Society, *Designing A Nation: Science, Technology, and the Constitution*, May 1987–September 1987; Library Company of Philadelphia, *The Delegates' Library: Ideas that Shaped our Constitution*, May 1987–November 1987; Historical Society of Pennsylvania, *Toward A More Perfect Union: The American People and their Constitution*, June 1987–December 1987; Independence National Historical Park Visitor Center, *Promise of Permanency*, April 1987–March 1992; Old City Hall, *Magna Carta*, May 1987–December 1987.

For more information, write: INHP, 313 Walnut St., Philadelphia, PA 19106.

Hawaii Commission Created

Chief Justice Herman Lum of the Hawaii State Supreme Court has established a Bicentennial Commission with the Hawaii State Bar Association. The Commission is developing, promoting, and carrying out the Bicentennial celebration in Hawaii through 1988. April 22, 1986 marked the first of the activities; a play on John Peter Zenger and issues of free speech and free press was performed by leading community members. Vernon F.L. Char, past president of the Hawaii State Bar, chairs the Commission. Members of the Hawaii Commission include Vernon F.L. Char, Chair, Attorney, Past President, Hawaii State Bar Association; The Honorable Herbert Y.C. Choy, Senior Circuit Court Judge, Ninth Circuit; Marvin S.C. Dang, Esq., Attorney; George L. Dyer, Jr., Esq., Attorney; Assistant Professor Anne F. Lee, President, Hawaii League of Women Voters, Political Science Professor at West Oahu College; Jeffrey S. Portnoy, Esq., Attorney; The Honorable Toshimi Sodetani, representative of the Hawaii State Supreme Court; Professor John Van Dyke, Constitutional Law Professor at the William S. Richardson School of Law.

Any visitors to Hawaii who are interested in contributing to the activities, or anyone wishing further information, are urged to contact commission member Anne F. Lee, Assistant Professor Political Science, West Oahu College/University of Hawaii, 96-043 Ala Ike, Pearl City, HI 96782.

CONSTITUTION 200 Designated to Lead Bicentennial Activities in Oklahoma

In March 1986, the Oklahoma legislature officially designated CONSTITUTION 200 as "the official entity for organizing and coordinating activities in the observance and celebration of the Bicentennial of the U.S. Constitution." CONSTITUTION 200, formed from an alliance of the Tulsa Arts and Humanities Council and the Civic Learning Project of the University of Oklahoma, will encourage Bicentennial programs throughout the state through the development of local CONSTITUTION 200 chapters. Individuals, organizations and corporations may also seek affiliation with CONSTITUTION 200.

CONSTITUTION 200 has already undertaken the following activities: a series of seminars, offered through the UO's Civic Learning program during the last three years; a planning symposium; and teacher in-service sessions at the 1985 meeting of the Oklahoma Education Association. Future plans include: a project on John Adams, a major conference on the press and the First Amendment; and several exhibitions and dramatizations.

Richard Wells, Civic Learning Project, University of Oklahoma and Joseph Blackman, Tulsa Arts and Humanities Council, serve as co-chairs of CONSTITUTION 200. For more information, write: CONSTITUTION 200, The Arts and Humanities Council of Tulsa, 2210 South Main Street, Tulsa, OK 74114.

Jefferson Meetings Underway

Two major Jefferson Meetings on the Constitution are occurring in September, 1986. The Indiana Jefferson Meeting on the Constitution, sponsored by the Indiana Committee for the Humanities, is scheduled for September 9 and 10 in Indianapolis. The Tennessee Jefferson Meeting will be held in Nashville, September 19, 20, and 21. These Meetings will serve as springboards for community Jefferson Meetings to be held around Indiana and Tennessee.

The Nebraska Jefferson Meeting on the Constitution has been scheduled for February 20 and 21, 1987. Over fifty Jefferson Meetings are currently being planned around the country. For information about Meetings being planned, contact The Jefferson Foundation, 1529 18th St., N.W., Washington, D.C. 20036; 202-234-3688. (See ***this Constitution***, spring 1986, no. 10, page 46 for more information on The Jefferson Meeting on the Constitution.)

Unus Ex Multis: Maryland and the Ratification of the U.S. Constitution

Washington College, Chestertown, Maryland, and Celebrate Maryland, Inc., the statewide citizens' group promoting the study of Maryland history, mounted a major research conference on Maryland in the constitutional era on June 25-27, 1986, entitled "*Unus Ex Multis.*" The Conference brought together some of the foremost scholars on the constitutional period to examine Maryland's role in forming the new nation. A second conference, "Maryland in the Republic," planned for June 1988, will offer a forum for sharing the new research inspired by this meeting. The keynote address, "The Revolutionary Generation: Models of Leadership," was given by Henry Steele Commager, Amherst College.

The following papers were presented at the sessions:

"A Just Equilibrium: Constitutional Thought of Colonial Marylanders (c. 1750) in the Tuesday Club of Annapolis," by Elaine G. Breslaw, Morgan State University;
"Acceptance of a National Framework: Changing Maryland Attitudes, 1776-1789," by L. Tomlin Stevens, St. Mary's College of Maryland;
"The American Revolution and Economic Change in Charles County," by Jean Lee, Institute of Early American History and Culture;
"The Unification of the American Economy and the Movement for a National Constitution," by Mary Schweitzer, Villanova University;
"Remarks on the Annapolis Convention," by Jane McWilliams, Maryland State Archives
"A New Society: Post-Revolutionary Maryland in Transition," by Robert Fallaw, Washington College;
"Archaelogy and the Historical Landscape: Annapolis in the 1780s" (slide illustrated), by Anne Yentsch, The College of William and Mary;
"William Smith, D.D.: Politics, Education, and Architecture" (slide illustrated), by Robert Janson-LaPalme, Washington College;
"A Case Study in Constitutional Reform: Maryland's Response to the Commercial Crisis," by Mervyn Whealy, Towson State University;
"From Factions to Party: The Maryland Legislative Experience in the New Nation," by Edward C. Papenfuse, Maryland State Archives;
"Federalism in Baltimore," by Gary L. Browne, University of Maryland, Baltimore County;
"A Study in Disarray: Samuel Chase and Maryland Antifederalism," by James Haw, Indiana/Purdue Universities-Fort Wayne;
"Perfecting the Constitution: William Paca and the Movement for a Bill of Rights" by Gregory A. Stiverson, Maryland State Archives;

For further information, write: Celebrate Maryland, Inc., 230 Regester Avenue, Baltimore, MD 21212; (301)377-0985.

California Commission Members Named

All five of the members of the California Bicentennial Commission on the United States Constitution and Bill of Rights have been appointed. They are: Jane A. Crosby, Chair, South Pasadena, CA; Coanne Cubette, Fountain Valley, CA; Arnold S. Gendel, Richmond, CA; Margarite P. Justice, Los Angeles, CA; and Jack N. Rakove, Stanford, CA. Jeffery D. Allen is the executive director, and the offices are located at 1455 Crenshaw Boulevard, suite 200, Torrance, CA 90501. Telephone: (213) 328-1787.

Montpelier to Open in 1987

The National Trust for Historic Preservation has announced that Montpelier, the home of James Madison, will open to the public on March 16, 1987, Madison's birthday. A formal opening of the newly-renovated gardens will take place on April 26, 1987. From May 15 to May 30, Montpelier will house the exhibit, "A Share of Honour," celebrating women's role in Virginia's history; the exhibition coincides with Dolley Madison's birthday on May 20. On September 17, 1987, the date of the Bicentennial of the adoption of the Constitution, to which Madison made so great a contribution, Montpelier will host a celebration cosponsored with James Madison University. On that day and the following, Montpelier will host a crafts fair.

The National Trust acquired Montpelier in 1984 from the du Pont family. Located in central Virginia, the estate comprises a main house with 52 rooms, 42 tenant dwellings, 30 barns and sheds, a two-acred walled formal garden, and a private railroad station. The original Madison house was greatly enlarged by the du Ponts. Montpelier is open to the public for tours on Saturdays from 9 to 4. For additional information, contact: Jacqueline L. Quillen, Montpelier, P.O. Box 67, Montpelier Station, VA 22957; (703) 672-2728.

PUBLICATIONS

ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION NOW AVAILABLE

The four-volume *Encyclopedia of the American Constitution*, edited by Leonard W. Levy, Kenneth L. Karst and Dennis J. Mahoney, can now be purchased at the special price of $270. After January 1, 1987, the price will be $320. The *Encyclopedia* contains approximately 220 original articles by 262 distinguished historians, judges, lawyers, political scientists and others. (See ***this Constitution***, no. 2, for details.) To order, write Macmillan Publishing Company, 866 Third Ave., New York, NY 10022, or call (212) 702-7963. Add $6 for shipping.

SALUTE TO THE CONSTITUTION

With the support of World Book, Inc., the American Bar Association's Special Committee on Youth Education for Citizenship (YEFC) is publishing a newsletter, *Salute to the Constitution*. The newsletter, which will appear three times in 1986 and three times in 1987, is designed to help plan school and community activities built around the Bicentennial for young people. The YEFC is also planning a national mock trial program with other law-related education groups and is sponsoring a writing competition with the National Commission on the Bicentennial and *USA Today*.

The ABA also publishes *UPDATE on Law-Related Education*, a magazine published three times a year for people teaching youngsters about the law. A packet of past issues with Constitution-related materials is available for $10.50. For further information, contact: Minna Novick, ABA-YEFC, 750 N. Lake Shore Drive, Chicago, IL 60611; (312) 988-5738.

MARYLAND BICENTENNIAL OFFICE DISTRIBUTES PLAY TO COMMEMORATE ANNAPOLIS CONVENTION

William K. Paynter has written *A More Perfect Union: A Play About the Annapolis Convention*, prepared under the direction of Annapolis' Mayor Richard Hillman's Commemorative Committee. Based upon the work of Shirley V. Baltz, the play portrays the events of September 14, 1786, when a dozen commissioners from five states were completing their four-day meeting in Annapolis. The meeting concluded with the adoption of a resolution calling for a convention of all the states in Philadelphia to recommend changes to the form of the federal government. The Maryland Bicentennial Office is encouraging every school in Maryland to produce *A More Perfect Union* and is providing free copies of the play and advertising handbills. For more information, contact: The Maryland Office for the Bicentennial of the Constitution of the United States, State Archives, Box 828, Annapolis, MD 21404; (301) 269-3914.

State and Municipal Bicentennial Commissions

Supplement as of May 27, 1986

(The initial listing of commissions appeared in issue no. 10, ***this Constitution****; the first supplement appeared in issue no. 11.)*

ALASKA

Alaska Bicentennial Commission
Governor's Office
State Capitol
P.O. Box A
Juneau, AL 99811

CALIFORNIA

Jane Crosby, Chair
California Bicentennial Commission on the United States Constitution and Bill of Rights
Jeffrey D. Allen, Exec. Dir.
1455 Crenshaw Boulevard, Suite 200
Torrance, CA 90501
(213) 328-1787

COLORADO**

The Colorado Commission on the Bicentennial of the Constitution
Esther Marie Capps, Prog. Coor.
7951 East Maplewood Avenue
Suite 327
Englewood, CO 80111
(303) 694-2377

HAWAII

Vernon F.L. Char, Chair
Hawaii Bicentennial Commission
c/o Anne F. Lee
Political Science Department
West Oahu College
University of Hawaii
96-043 Ala Ike
Pearl City, HI 96782

INDIANA

Indiana Commission on the Bicentennial of the U.S. Constitution
206 State House
Indianapolis, IN 46204

IOWA

State Commission on the Bicentennial of the U.S. Constitution
c/o Iowa State Historical Department
East 12th & Grand Avenue
Des Moines, IA 50319

LOUISIANA**

Louisiana Bicentennial Commission
Noele LeBlanc
P.O. Box 94361
Baton Rouge, LA 70804
(504) 925-3800

MINNESOTA**

Bicentennial of the Constitution Commission (Minnesota)
Michael Moriarity
Continuing Education for State Court Personnel
State Court Administration
40 North Milton Street, #200
St. Paul, MN 55104
(612) 296-6508

MISSOURI**

Hon. Albert Rendlen, Chair
The U.S. Constitution Bicentennial Commission of Missouri
P.O. Box 150
Jefferson City, MO 65102
(314) 751-2654

NEW HAMPSHIRE**

Hon. Russell C. Chase, Chair
New Hampshire Bicentennial Commission for the U.S. Constitution
Middleton Road
Wolfeboro, NH 03894
(603) 569-1827

NORTH CAROLINA**
Lt. Gov. Robert B. Jordan, III, Chair
North Carolina Commission on the Bicentennial of the United States Constitution
The Jordan House
532 North Wilmington Street
Raleigh, NC 27604
(919) 733-2050

OKLAHOMA*
Joseph A. Blackman, Co-Chair
Richard Wells, Co-Chair
CONSTITUTION 200
The Arts and Humanities Council of Tulsa
2210 South Main Street
Tulsa, OK 74114

PENNSYLVANIA**
The Honorable Samuel J. Roberts, Chair
Commonwealth of Pennsylvania Commission of the Bicentennial of the United States Constitution
Courthouse—Room 5, East Wing
Erie, PA 16501
(814) 456-2006
Secretariat:
Craig Eisendrath
Pennsylvania Humanities Council
401 N. Broad Street
Philadelphia, PA 19108
(215) 925-1005

**No commission; existing agency officially designated to oversee the state commemoration.*

***Updated listing*

Federal Bicentennial Agenda

Commission on the Bicentennial of The United States Constitution Announces Plans

The Commission on the Bicentennial of the United States Constitution has voted to participate on September 17, 1987, in events in Philadelphia marking the 200th anniversary of the signing of the Constitution. The action came as the Commission concluded two days of meetings in Washington on April 14, 1986.

The Commission, chaired by former Chief Justice of the United States Warren E. Burger, declared that while many communities will have special events to commemorate the 200th birthday of the Constitution, Philadelphia should be where national attention is focused since that is where the actual signing took place on September 17, 1787.

The Commission also agreed to take part in Maryland's celebration of the 200th anniversary of the Annapolis Convention. The September 1986 Commission meeting will be held in Annapolis, site of the historic Annapolis Convention almost 200 years ago.

At the April meeting, the Commission voted to recognize the following projects:

- The American Legion high school oratorical contest;
- "Blessings of Liberty" poster display, sponsored by Project '87, a joint effort of the American Historical Association and the American Political Science Association—a series of a dozen posters with Constitutional themes;
- Constitutional exhibits and a teaching kit entitled "The Constitution: Evolution of a Government," sponsored by the National Archives—using reproduction of 40 documents from the National Archives as a classroom teaching aid;
- A series of Constitutional slide presentations for use at America's National Parks, and a series of historic documents as part of the "Miracle at Philadelphia" exhibit at the Independence National Historical Park, sponsored by the National Park Service;
- Magna Carta in America, a traveling exhibit of the Lincoln Cathedral Exemplar of Magna Carta and related material, entitled "Liberty under the Law: Magna Carta to the Constitution";
- A national teaching curriculum and competition for primary, middle, and secondary school students designed to commemorate the Bicentennial of the Constitution and revitalize educational programs on the Constitution, sponsored by the Center for Civic Education, Calabasas, California.

On April 30, 1986, the Commission announced that it would sponsor, with the American Bar Association and *USA TODAY* newspaper, a *National Bicentennial Writing Competition for High School Students*. The topic is:

The Constitution: How Does the Separation of Powers Help Make It Work?

Students in grades 9-12 for the 1986-87 school year, or ages 14-18 not enrolled in college, may enter. The deadline will be Spring, 1987. A specific date will be set later.

Each essay should be 750-1,500 words; typed, double-spaced or printed legibly on 8 1/2" by 11" paper; 1" margins.

The national winner will receive a prize of $10,000.

State, D.C., and Territory first place winners will receive $1,000, plus an all-expense-paid, round trip to Washington for the winner and his or her teacher or other guest in September 1987, to meet with the President of the United States, the Chief Justice of the United States, and leaders of Congress.

Second place winners will receive $500, and third place winners $250.

A selected student bibliography is available from:

The Commission on the Bicentennial of the U.S. Constitution, 734 Jackson Place, N.W., Washington, D.C. 20503; *ATTN:* Richard Dargan, Assistant Director of Educational Programs.

Courtesy Historical Society of Pennsylvania

Project '87 Announces

The James Madison Fellowship Program

Project '87 invites history, government and civics junior and senior high school teachers to compete for the James Madison Fellowship Program. The Fellowship program prepares participants to lead programs in their communities for the Bicentennial of the United States Constitution.

Teachers selected as James Madison Fellows will participate in the three-week conference devoted to references, resources and strategies for education on the Constitution. There will be two conferences in summer 1987. The conferences will be held at leading research universities and represent a collaboration among history, political science, law and education faculty. Fellows will be prepared to plan their own public programs on the Constitution involving their students in 1987–1988.

○ *The Award*

The James Madison Fellowship Award is $2,500. Fellows also receive support for the travel and living expenses associated with the summer conference, and funds for materials for their Bicentennial program.

○ *To Apply*

Teachers should submit a letter describing their interest in teaching about the Constitution; any special professional experience; possible programs for their school and community; and a resume. The application letter should be accompanied by a letter from the principal of the applicant's school indicating support for the teacher's participation in the James Madison program and for the subsequent conduct of a program on the U.S. Constitution.

Applications should be mailed by December 15, 1986 to:

The James Madison Fellowship Program
Project '87
1527 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Fellows will be notified of selection by February 15, 1987.

The James Madison Fellowship Program is supported by grants from the William and Flora Hewlett Foundation and the Andrew W. Mellon Foundation.

SUBSCRIPTION INFORMATION

The National Endowment for the Humanities is underwriting the publication of ***this Constitution*** as a quarterly magazine so that it may be distributed free to organizations planning programs for the Constitution's Bicentennial. The officer of the organization who is responsible for planning programs is invited to write us and ask to be placed on the free mailing list; requests should include a short statement about the program being planned. Free subscriptions begin with the next issue after receipt of the letter. Institutions wishing to receive more than one copy may do so by subscribing for additional copies at the rates below. Individuals and organizations who are not planning Bicentennial programs but who wish to receive the magazine may subscribe. Paid subscriptions received by November 1, 1986 will begin with issue no. 10 (Spring, 1986) and end with no. 13 (Winter, 1986).

Single copies (less than 10) of back issues can be purchased for $4.00 each. Each issue of the magazine will also be available for purchase at bulk rate. (Issue no. 1 is no longer available.)

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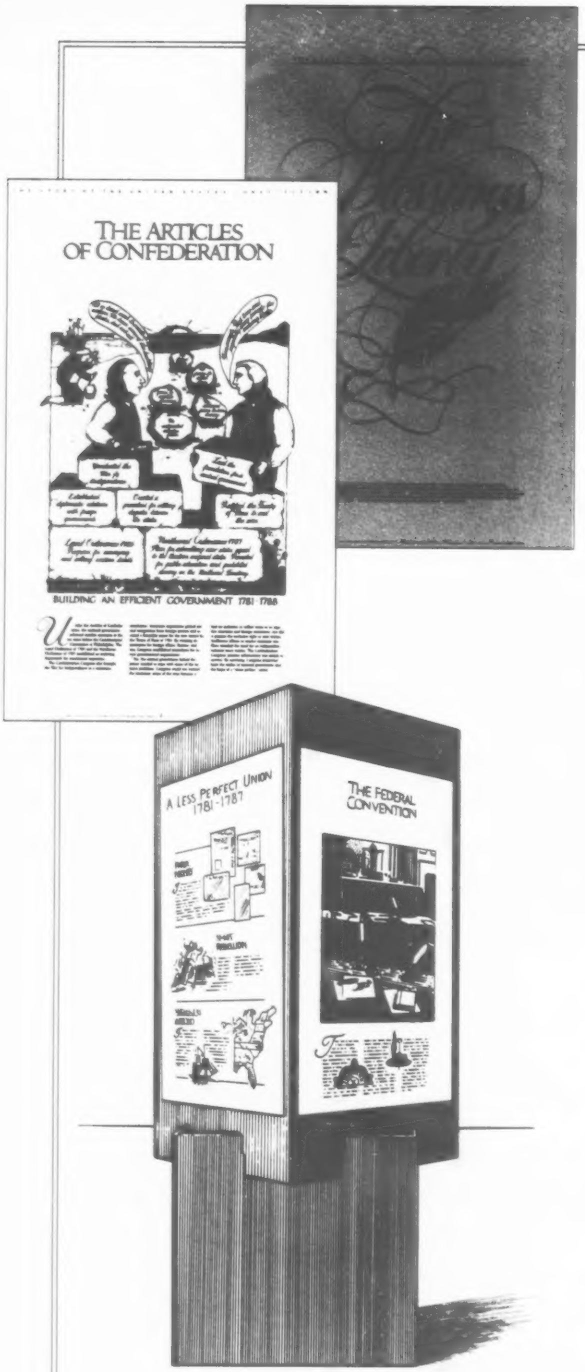
THE ARTICLES OF CONFEDERATION
BUILDING AN EFFICIENT GOVERNMENT 1781-1788
The Blessings of Liberty
A LESS PERFECT UNION 1781-1787
THE FEDERAL CONVENTION

FROM PROJECT '87…

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Celebrate THE BLESSINGS OF LIBERTY and the Bicentennial of the United States Constitution with a poster exhibit that tells the story of the American founding. The exhibit has received official recognition by the Commission on the Bicentennial of the United States Constitution.

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The poster exhibit comes with a User's Guide, which features an essay describing the events, ideas and leaders pictured in the posters, separate lessons for students in grades 4-6, 7-9, and 10-12, and other essays and bibliographies.

The posters are available unmounted or on a sturdy cardboard mounting system 6′ tall, charcoal gray, and foldable for reshipment. The poster exhibit can be displayed effectively in libraries, civic centers, businesses, schools or courthouses. *The exhibit will be available for shipment beginning October 15.*

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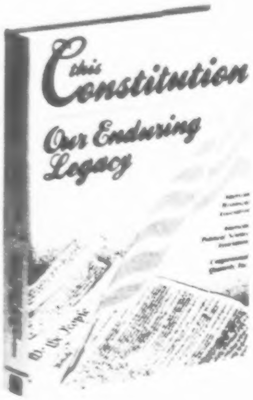

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Noted political scientist James MacGregor Burns, co-chair of *Project '87*, has written a special preface that unites the themes of the book. Contributors include:

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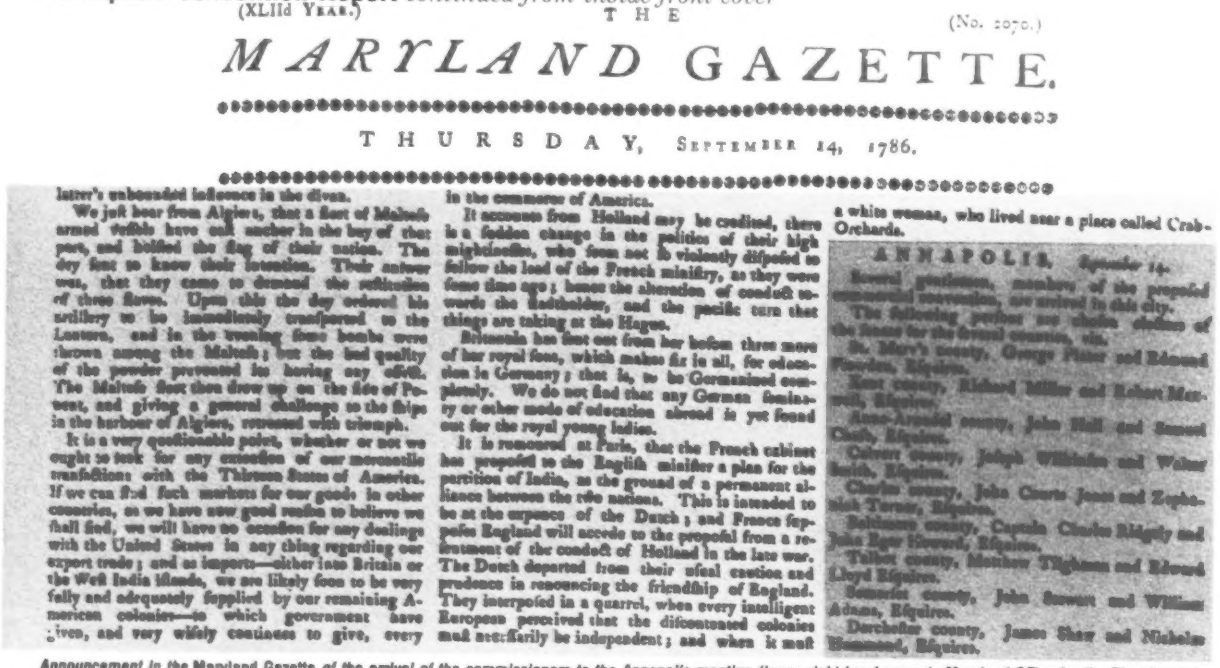
Annapolis Convention Report *continued from inside front cover*



(XLIId Year.) THE (No. 2070.)

MARYLAND GAZETTE.

THURSDAY, September 14, 1786.

latter's unbounded influence in the divan.

We juſt hear from Algiers, that a fleet of Malteſe armed veſſels have caſt anchor in the bay of that port, and hoiſted the flag of their nation. The dey ſent to know their intention. Their anſwer was, that they came to demand the reſtitution of three ſlaves. Upon this the dey ordered his artillery to be immediately tranſported to the Lantern, and in the evening ſome bombs were thrown among the Malteſe; but the bad quality of the powder prevented its having any effect. The Malteſe fleet then drew up on the ſide of Ponent, and giving a general challenge to the ſhips in the harbour of Algiers, retreated with triumph.

It is a very queſtionable point, whether or not we ought to ſeek for any extenſion of our mercantile tranſactions with the Thirteen States of America. If we can find ſuch markets for our goods in other countries, as we have now good reaſon to believe we ſhall find, we will have no occaſion for any dealings with the United States in any thing regarding our export trade; and as imports—either into Britain or the Weſt India iſlands, we are likely ſoon to be very fully and adequately ſupplied by our remaining American colonies—to which government have given, and very wiſely continues to give, every

in the commerce of America.

If accounts from Holland may be credited, there is a ſudden change in the politics of their high mightineſſes, who ſeem not ſo violently diſpoſed to follow the lead of the French miniſtry, as they were ſome time ago; hence the alteration of conduct towards the ſtadtholder, and the pacific turn that things are taking at the Hague.

Britannia has ſent out from her boſom three more of her royal ſons, which makes ſix in all, for education in Germany; that is, to be Germanized completely. We do not find that any German ſeminary or other mode of education abroad is yet found out for the royal young ladies.

It is rumoured at Paris, that the French cabinet has propoſed to the Engliſh miniſter a plan for the partition of India, as the ground of a permanent alliance between the two nations. This is intended to be at the expence of the Dutch; and France ſuppoſes England will accede to the propoſal from a reſentment of the conduct of Holland in the late war. The Dutch departed from their uſual caution and prudence in renouncing the friendſhip of England. They interpoſed in a quarrel, when every intelligent European perceived that the diſcontented colonies muſt neceſſarily be independent; and when it muſt

a white woman, who lived near a place called Crab-Orchards.

ANNAPOLIS, September 14.

Several gentlemen, members of the propoſed commercial convention, are arrived in this city.

The following perſons are choſen electors of the ſenate for the ſeveral counties, viz.

St. Mary's county, George Plater and Edmond Plowden, Eſquires.

Kent county, Richard Miller and Robert Maxwell, Eſquires.

Anne-Arundel county, John Hall and Samuel Chaſe, Eſquires.

Calvert county, Joſeph Wilkinſon and Walter Smith, Eſquires.

Charles county, John Courts Jones and Zephaniah Turner, Eſquires.

Baltimore county, Captain Charles Ridgely and John Eager Howard, Eſquires.

Talbot county, Matthew Tilghman and Edward Lloyd Eſquires.

Somerſet county, John Stewart and William Adams, Eſquires.

Dorcheſter county, James Shaw and Nicholas Hammond, Eſquires.

Announcement in the* Maryland Gazette *of the arrival of the commissioners to the Annapolis meeting (lower right hand corner). Maryland Office for the Bicentennial of the U.S. Constitution, Maryland State Archives.

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will enter so far into the general System of the foederal government, that to give it efficacy, and to obviate questions and doubts concerning its precise nature and limits, may require a correspondent adjustment of other parts of the Foederal System.

That there are important defects in the system of the Foederal Government is acknowledged by the Acts of all those States, which have concurred in the present Meeting; That the defects, upon a closer examination, may be found greater and more numerous, than even these acts imply, is at least so far probable, from the embarrassment which characterize the present State of our national affairs, foreign and domestic, as may reasonably be supposed to merit a deliberate and candid discussion, in some mode, which will unite the Sentiments and Councils of all the States. In the choice of the mode, your Commissioners are of opinion, that a Convention of Deputies from the different States, for the special and sole purpose of entering into this investigation, and digesting a plan for supplying such defects as may be discovered to exist, will be entitled to a preference from considerations, which will occur without being particularised.

Your Commissioners decline an enumeration of those national circumstances on which their opinion respecting the propriety of a future Convention, with more enlarged powers, is founded; as it would be an useless intrusion of facts and observations, most of which have been frequently the subject of public discussion, and none of which can have escaped the penetration of those to whom they would in this instance be addressed. They are however of a nature so serious, as, in the view of your Commissioners, to render the situation of the United States delicate and critical, calling for an exertion of the united virtue and wisdom of all the members of the Confederacy.

Under this impression, Your Commissioners, with the most respectful deference, beg leave to suggest their unanimous conviction that it may essentially tend to advance the interests of the union if the States, by whom they have been respectively delegated, would themselves concur, and use their endeavours to procure the concurrence of the other States, in the appointment of Commissioners, to meet at Philadelphia on the second Monday in May next, to take into consideration the situation of the United States, to devise such further provisions as shall appear to them necessary to render the constitution of the Foederal Government adequate to the exigencies of the Union; and to report such an Act for that purpose to the United States in Congress assembled, as when agreed to, by them, and afterwards confirmed by the Legislatures of every State, will effectually provide for the same.

Though your Commissioners could not with propriety address these observations and sentiments to any but the States they have the honor to represent, they have nevertheless concluded from motives of respect, to transmit copies of this Report to the United States in Congress assembled, and to the executives of the other States.

Documents Illustrative of the Formation of the Union of the American States*, 69th Cong., 1st sess., House Doc. 398 (1927), 39 *et seq.*, reprinted in Richard B. Morris, ed., *Basic Documents on the Confederation and Constitution* (1970), pp. 177-180.

Project '87

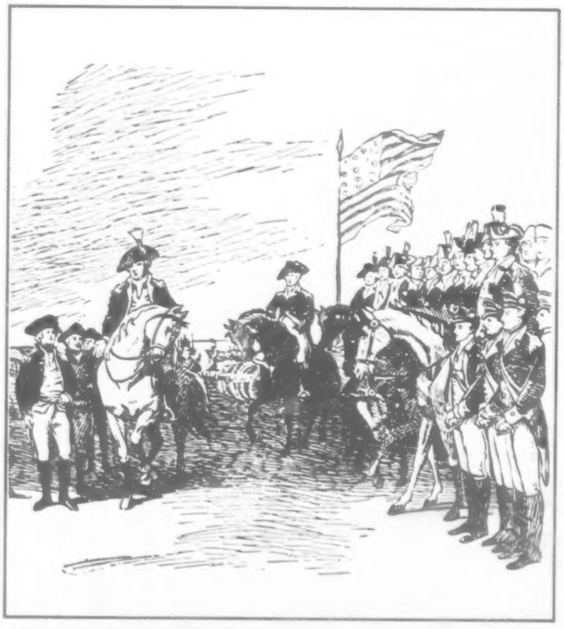
...do ordain and establish this Constitution for the United States of America.

A Bicentennial Chronicle

Winter 1986. No.13

Chronology of Bicentennial Dates from the End of the American Revolution to the Ratification of the Bill of Rights

After the Continental Congress voted in favor of independence from Great Britain on July 2, 1776, and adopted the Declaration of Independence on July 4, it took up the proposal of Richard Henry Lee for a "plan of confederation." On July 12, 1776, a congressional committee presented "Articles of Confederation and Perpetual Union," which the Congress debated for more than a year. The body adopted the Articles of Confederation on November 15, 1777, and submitted them to the thirteen states for ratification, which had to be unanimous. By March 1, 1781, all the states had given their assent. The Articles of Confederation gave limited powers to the federal government; important decisions required a super-majority of nine states. Congress could declare war and compact peace but could not levy taxes, or regulate trade between the states or between any state and a foreign country. All amendments had to be adopted without dissenting votes. In 1786, James Madison described the Articles as "nothing more than a treaty of amity and of alliance between independent and sovereign states." As attempts to amend the Articles proved fruitless, and interstate disputes over commercial matters multiplied, the weaknesses of the Articles of Confederation as a fundamental charter became apparent. The march toward a new form of government began.



September 3, 1783: Articles of Peace ending hostilities between Great Britain and the United States are signed in Paris.

November 25, 1783: British troops evacuate New York City.

December 23, 1783: George Washington resigns his commission as commander-in-chief of American forces and takes leave "of all the employments of public life."

March 25-28, 1785: MOUNT VERNON CONFERENCE. George Washington hosts a meeting at Mount Vernon of four commissioners from Maryland and four from Virginia to discuss problems relating to the navigation of the Chesapeake Bay and the Potomac River. After negotiating agreements, the commissioners recommend to their respective legislatures that annual conferences be held on commercial matters and that Pennsylvania be invited to join Maryland and Virginia to discuss linking the Chesapeake Bay and the Ohio River.

January 16, 1786: Virginia's legislature adopts a statute for religious freedom, originally drafted by Thomas Jefferson and introduced by James Madison. The measure protects Virginia's citizens against compulsion to attend or support any church and against discrimination based upon religious belief. The law serves as a model for the First Amendment to the United States Constitution.

January 21, 1786: Virginia's legislature invites all the states to a September meeting in Annapolis to discuss commercial problems.

continued on page 59

Principal Sources: Richard B. Morris, ed., *Encyclopedia of American History* (New York: Harper & Row, 1976); Samuel Eliot Morison, *The Oxford History of the American People* (New York: Oxford University Press, 1965).

...do ordain and establish

this Constitution

for the United States of America.

A Bicentennial Chronicle

No. 13 **Winter, 1986**

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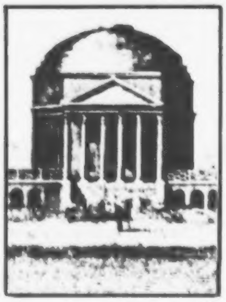

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this Constitution **is published with the assistance of a grant from the National Endowment for the Humanities as part of its special initiative on the Bicentennial of the United States Constitution. Editorial offices are located at 1527 New Hampshire Avenue, N.W., Washington, D.C. 20036. All material in this publication may be photocopied if attributed as follows: "Reprinted from *this Constitution: A Bicentennial Chronicle,* Winter, 1986, published by Project '87 of the American Historical Association and the American Political Science Association." Project '87 would appreciate notification from those who photocopy material in this issue for use in presentations to other groups.**

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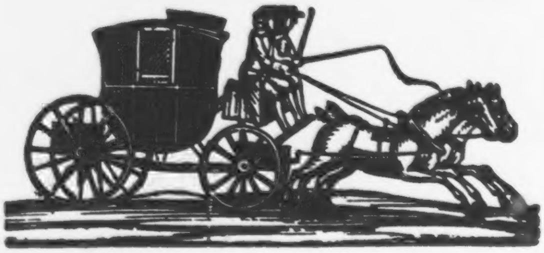

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From the Editor

In 1984, ***this Constitution*** began publication as a quarterly magazine with the support of a three-year grant from the National Endowment for the Humanities. We are pleased to announce that NEH will continue to support the publication of ***this Constitution*** through Summer 1988.

This issue of ***this Constitution*** highlights the "Enduring Constitutional Issue" of the rights of women. An earlier documentary essay by historian Linda Kerber discussed women's rights during the nation's first hundred years. Now, Earlean McCarrick, a political scientist, examines the implications of recent Supreme Court decisions on the rights of women.

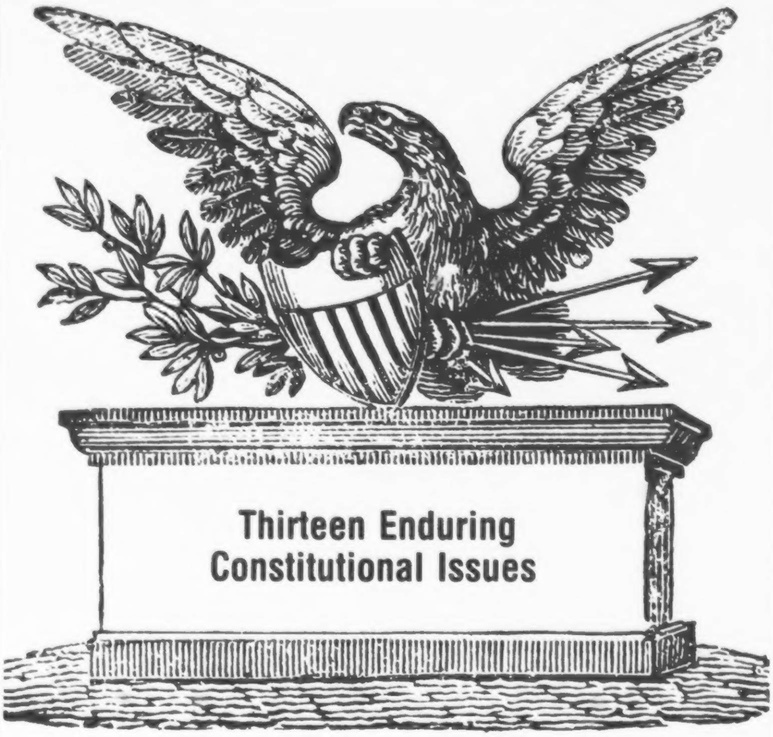
In an article on the internment of Japanese Americans during World War II, Peter Irons considers the analogous issue of classification by race under the Constitution. Irons, a political scientist and a lawyer involved in the litigation over internment, describes the origin of the internment program and the court cases emerging from it. The "For the Classroom" section presents a lesson for secondary school students about the internment of Japanese Americans in World War II.

Two feature articles focus on one of our "founding fathers" who was not at the Constitutional Convention: Thomas Jefferson. Indeed, Jefferson's ideas about liberty and government are of such profound importance to Americans that many assume Jefferson did attend the Convention. Historian Merrill Peterson surveys Thomas Jefferson's ideas about constitutions. Charles Cullen, formerly the editor of Jefferson's papers, offers a selection of Jefferson's own writings on this subject.

Jefferson believed that constitutions ought to be formally revised to keep them responsive to the needs of the people. In a special "parley," two legal scholars, Arthur S. Miller and Lino A. Graglia, debate the desireability of another method of constitutional adaptation: judicial interpretation.

This issue also includes a reprint of the popular reference offered originally by ***this Constitution*** in 1983, the "Chronology of Bicentennial Dates." The Chronology begins on the inside front cover. The "Bicentennial Gazette" includes an updated cumulative listing of scholars who have agreed to participate in Bicentennial programs, and a round-up of news about Bicentennial programs. With the Commission on the Bicentennial of the United States Constitution now undertaking the role of clearinghouse of information on Bicentennial programs, the Bicentennial Gazette of ***this Constitution*** in the next issues will focus on providing guidelines, models, and substantive resources for Bicentennial programs.

The Bicentennial Commission is organized into divisions in order to assist individuals and organizations planning Bicentennial programs or seeking information about how to participate in programs. These divisions are: Federal and International Programs, State and Local Programs, Educational Programs, Commission Plans and Project Recognition, Office of Legal Counsel and Communications. The Commission is collecting information about Bicentennial programs nationally and offers many resources for program planners. The Commission's offices can be reached through the Commission's general telephone number: (202) 653-9800 or by writing to 736 Jackson Place, Washington, D.C. 20503.



Thirteen Enduring Constitutional Issues

- National Power—Limits and Potential
- Federalism—the Balance between Nation and State
- The Judiciary—Interpreter of the Constitution or Shaper of Public Policy
- Civil Liberties—the Balance between Government and the Individual
- Criminal Penalties—Rights of the Accused and Protection of the Community
- Equality—its Definition as a Constitutional Value
- The Rights of Women Under the Constitution
- The Rights of Ethnic and Racial Groups Under the Constitution
- Presidential Power in Wartime and in Foreign Affairs
- The Separation of Powers and the Capacity to Govern
- Avenues of Representation
- Property Rights and Economic Policy
- Constitutional Change and Flexibility

Correction: Contrary to the information contained in our last issue, Montpelier, the home of James Madison, will not be open to the public until March 16, 1987, James Madison's birthday. After that date, it will be open seven days a week, from 9:30 a.m. to 4:30 p.m. We regret the error.—Ed.

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The Supreme Court and the Evolution of Women's Rights

by Earlean M. McCarrick

First introduced in Congress at the behest of the National Woman's Party in 1923, the Equal Rights Amendment boldly proclaimed "Men and Women shall have equal rights throughout the United States and every place subject to its jurisdiction." It never got out of the judiciary committee in either House. A more subdued version—"Equality of rights under the law shall not be denied or abridged by the United States or any state on account of sex"—cleared Congress in March 1972, with only 23 House members and 8 Senators in opposition. Roughly two-thirds of the populace—then and now—supported the ERA. State legislatures responded enthusiastically. By the end of the year, twenty-two states had ratified. Adoption seemed certain; but the euphoria of supporters was short-lived. By mid-1973, opponents were organized. The ratification process slowed; only 13 more states ratified before the expiration date, three short of the necessary 38. Four states voted to rescind. The proposed amendment died in June, 1982 when the deadline, though extended beyond the originally specified period of seven years, passed without ratification by the requisite number of states. Although reintroduced in Congress in 1983, the Equal Rights Amendment is no longer a prominent item on the nation's agenda.

Rejection of pleas for sexual equality is one of our oldest traditions, predating the Constitution itself, upheld by women as well as men. Changes in the status of women have been slow and arduous, wrought chiefly by legislation, belatedly by constitutional interpretation, rarely by constitutional amendment.

Formal constitutional amendment is deliberately difficult, requiring a two-thirds vote in both houses of Congress and ratification by three-fourths of the states. The difficulty has been surmounted only 26 times—only 16 if we exclude the first ten amendments, usually considered to be a part of the original Constitution. This small number does not, of course, mean that the Constitution has changed only 16 or 26 times. To the contrary, this eighteenth-century document serves the twentieth century primarily because it adapts to contemporary conditions by other means. In some instance, of course, the Constitution can be changed only by formal amendment; to substitute a six-year presidential term for a four-year term would necessitate a formal amendment because the Constitution is quite explicit about the length of a presidential term. For the most part, the constitutional amendment process has been reserved for changing this kind of explicit provision—thus, the Twentieth Amendment changed the presidential inauguration date from March to January.

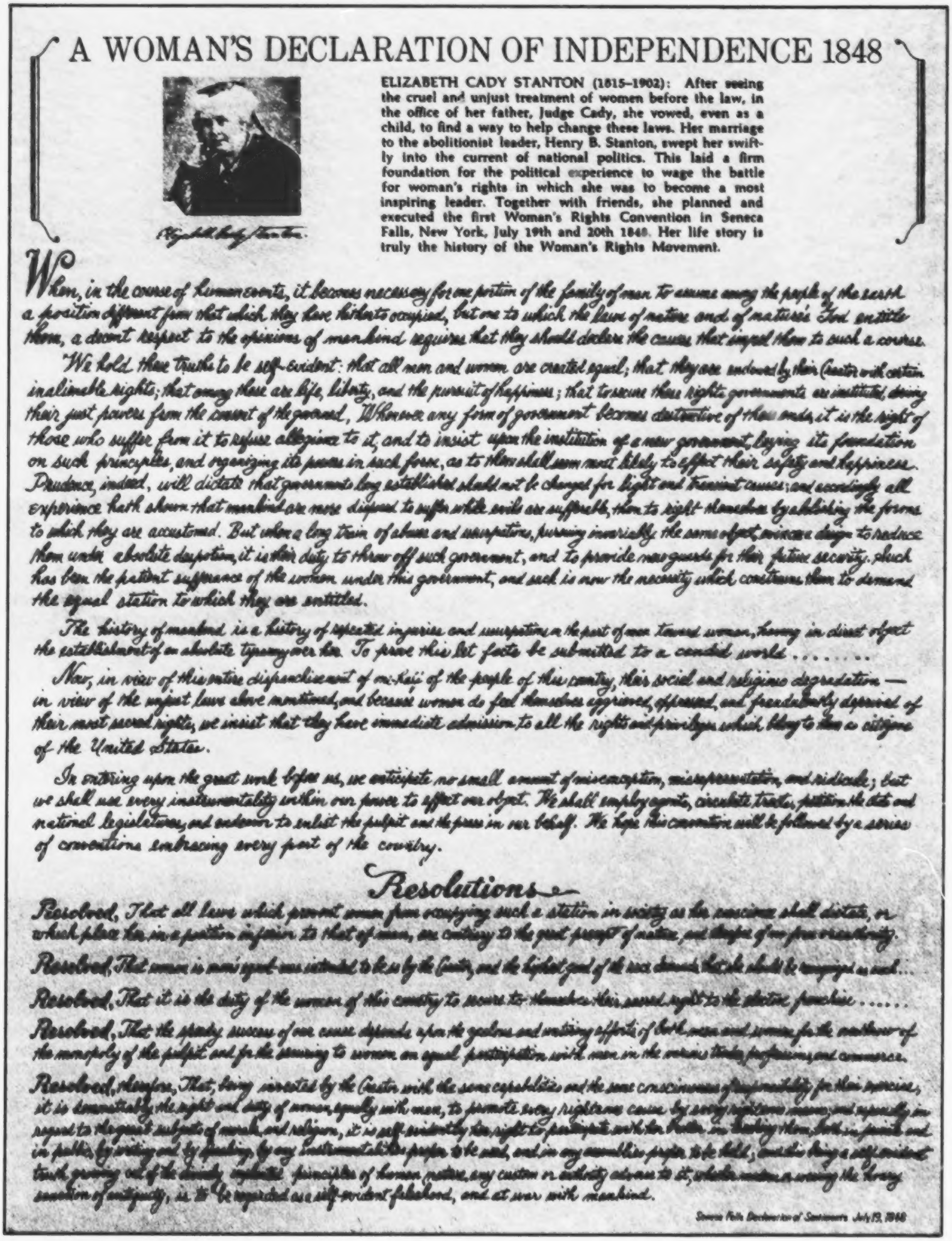
Not all important constitutional provisions are so explicit that an amendment is necessary to change their meaning. Many significant constitutional provisions are so broad that they accommodate varying interpretations. For example, from the late nineteenth century to the 1930s, the Supreme Court's interpretation of the Constitution led to the invalidation of many state and national laws regulating various aspects of the socioeconomic order such as wages and hours. In the late 1930s, the Court capitulated to popular political demands by construing the same provisions of the Constitution to permit extensive governmental regulation, thus legitimizing the New Deal and the social welfare state. Similarly, the civil rights revolution of the 1960s is partly attributable to the Court's changed construction of the Constitution—whereas it had earlier permitted legally prescribed racial segregation, for example, in the 1950s it began to forbid such official discrimination. The Court is, in Woodrow Wilson's words, "a continuing constitutional convention." It "amends" the Constitution through changed interpretation.

On the matter of sex discrimination, there is no explicit provision in the Constitution which requires distinctions on the basis of gender *or* which prevents egalitarian policy. The problem is thus, not that the Constitution discriminates against women; it is that the Constitution does not by explicit terms protect against the historic disabilities imposed upon women. There is a general provision against discrimination in the Fourteenth Amendment that the court could interpret as prohibiting all distinctions based upon sex, but it has not done so.

Common Law Roots

The legal denigration of women is a part of our common law heritage, most vividly exemplified by the ancient doctrine of "coverture" which suspended a woman's legal identity upon marriage. "Dead in the law," a married woman could not own property, make contracts, conduct her own business, enter a profession, sue or be sued. Whether married or single, eighteenth-century standards prevented women from serving on juries, voting, speaking in public, seeking public office, or acquiring the education necessary to earn a living or perform the duties of citizenship in a republic.

It was against this prescribed inferior status that Abigail Adams protested in her famous 1776 letter in which she pleaded with her husband John to "remember the la-



A WOMAN'S DECLARATION OF INDEPENDENCE 1848

Elizabeth Cady Stanton.

ELIZABETH CADY STANTON (1815–1902): After seeing the cruel and unjust treatment of women before the law, in the office of her father, Judge Cady, she vowed, even as a child, to find a way to help change these laws. Her marriage to the abolitionist leader, Henry B. Stanton, swept her swiftly into the current of national politics. This laid a firm foundation for the political experience to wage the battle for woman's rights in which she was to become a most inspiring leader. Together with friends, she planned and executed the first Woman's Rights Convention in Seneca Falls, New York, July 19th and 20th 1848. Her life story is truly the history of the Woman's Rights Movement.

When, in the course of human events, it becomes necessary for one portion of the family of man to assume among the people of the earth a position different from that which they have hitherto occupied, but one to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes that impel them to such a course.

We hold these truths to be self-evident: that all men and women are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights governments are instituted, deriving their just powers from the consent of the governed. Whenever any form of government becomes destructive of these ends, it is the right of those who suffer from it to refuse allegiance to it, and to insist upon the institution of a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and accordingly all experience hath shown that mankind are more disposed to suffer while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their duty to throw off such government, and to provide new guards for their future security. Such has been the patient sufferance of the women under this government, and such is now the necessity which constrains them to demand the equal station to which they are entitled.

The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her. To prove this let facts be submitted to a candid world.......

Now, in view of this entire disfranchisement of one-half of the people of this country, their social and religious degradation — in view of the unjust laws above mentioned, and because women do feel themselves aggrieved, oppressed, and fraudulently deprived of their most sacred rights, we insist that they have immediate admission to all the rights and privileges which belong to them as citizens of the United States.

In entering upon the great work before us, we anticipate no small amount of misconception, misrepresentation, and ridicule; but we shall use every instrumentality within our power to effect our object. We shall employ agents, circulate tracts, petition the State and national Legislatures, and endeavor to enlist the pulpit and the press in our behalf. We hope this convention will be followed by a series of conventions embracing every part of the country.

Resolutions

Resolved, That all laws which prevent woman from occupying such a station in society as her conscience shall dictate, or which place her in a position inferior to that of man, are contrary to the great precept of nature, and therefore of no force or authority.

Resolved, That woman is man's equal—was intended to be so by the Creator, and the highest good of the race demands that she should be recognized as such...

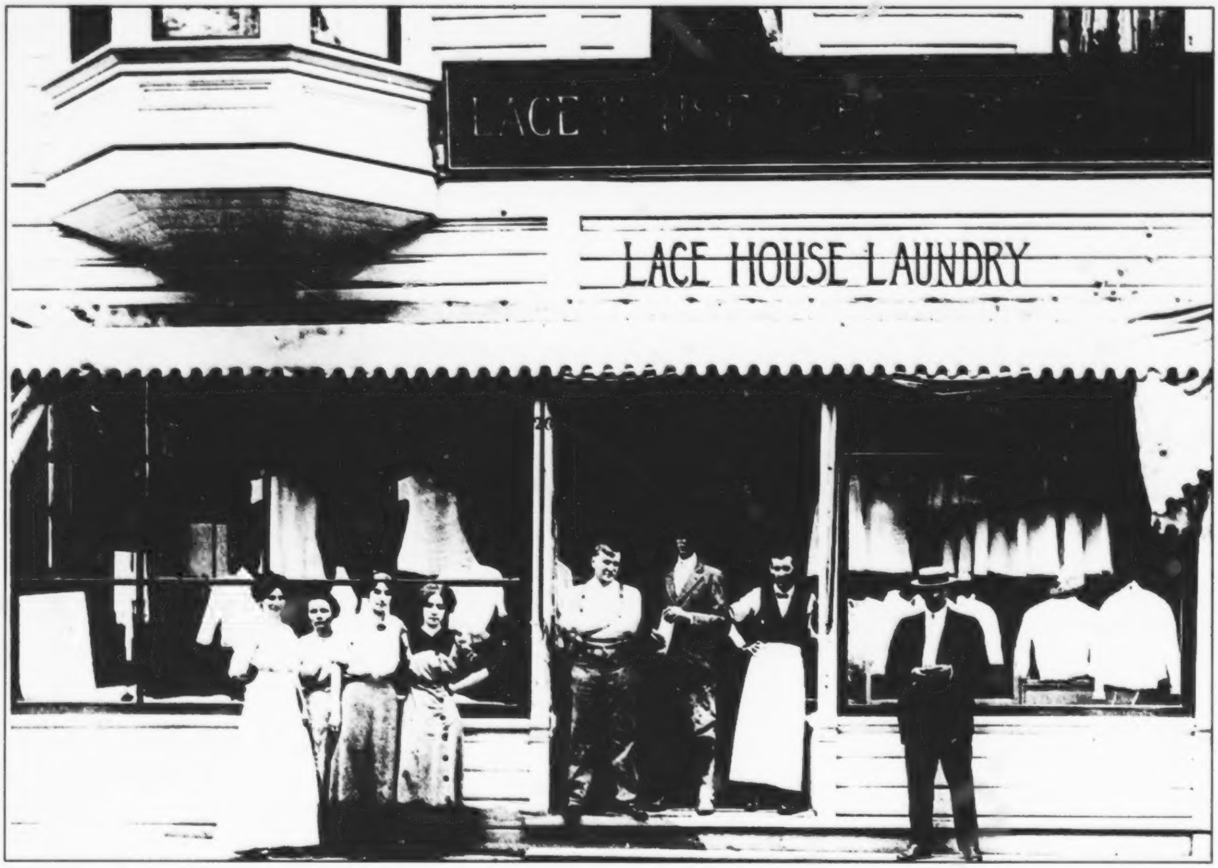
Resolved, That it is the duty of the women of this country to secure to themselves their sacred right to the elective franchise......

Resolved, That the speedy success of our cause depends upon the zealous and untiring efforts of both men and women for the overthrow of the monopoly of the pulpit, and for the securing to women an equal participation with men in the various trades, professions, and commerce.

Resolved, therefore, That, being invested by the Creator with the same capabilities and the same consciousness of responsibility for their exercise, it is demonstrably the right and duty of woman, equally with man, to promote every righteous cause by every righteous means; and especially in regard to the great subjects of morals and religion, it is self-evidently her right to participate with her brother in teaching them, both in private and in public, by writing and by speaking, by any instrumentalities proper to be used, and in any assemblies proper to be held; and this being a self-evident truth, growing out of the divinely implanted principles of human nature, any custom or authority adverse to it, whether modern or wearing the hoary sanction of antiquity, is to be regarded as a self-evident falsehood, and at war with mankind.

Seneca Falls Declaration of Sentiments July 19, 1848

Seneca Falls Declaration of Sentiments, July 19, 1848.



The laundry of Curt Muller, the plaintiff in **Muller v. Oregon.** *This 1908 landmark Supreme Court case upheld laws regulating hours of work for women. Courtesy of the Supreme Court Historical Society.*

dies" in the "new code of laws." It was to protest the persistence of the denial of rights and to demand removal of gender as a barrier to individual participation in the social, economic, cultural, religious, and political life of nineteenth-century America that feminists gathered at Seneca Falls, New York, in 1848.

Nineteenth-century state legislatures responded grudgingly to the demands of feminists. Still, by the end of the century, state laws granted married women many of the same rights of single women to own property, to control their earnings, to enter into contracts, and to sue and be sued. No state legislature, however, guaranteed to women the same legal status that men enjoyed.

During the reform fervor of the immediate post-Civil War era, feminists targeted Congress as the instrument for the redress of their grievances. Taking advantage of the momentum toward constitutional change they argued for protection against sex discrimination in the new amendments prohibiting racial discrimination. Congress refused.

Turning to the Supreme Court in the early 1870s, feminists were rebuffed again. The Court declined to apply to women the new Fourteenth Amendment requirement of "equal protection of the law." Specifically, the Court held that the right to practice law and the right to vote were not "privileges and immunities" of national citizenship protected against state denial. The Supreme Court opinions so narrowly construed the rights protected against state deprivation that it seemed clear that the states could continue to make distinctions based on gender without fear that the Court or the Constitution would deny them the power to do so.

The Nineteenth Amendment

Faced with an unsympathetic Court, women turned away from the judiciary and the existing Constitution as vehicles for change. Convinced that nothing short of access to the political process would enable them to eradicate unjust laws, activist women began to focus their energies upon acquiring the right to vote.

Suffrage, of course, had long been an item on the feminist agenda—political equality was among the demands made by the women at Seneca Falls in 1848; a woman suffrage amendment had been introduced in Congress six months before the introduction of the Fifteenth Amendment prohibiting race as a barrier to voting. The right to vote took on a new urgency, however, with the formation of two major organizations in 1869. The National Woman Suffrage Association (NWSA) pushed for an amendment to the national Constitution. The American Woman Suffrage Association (AWSA) opted for a state-by-state approach.

By 1878, the "Anthony Amendment," which prohibited the states

There is no explicit provision in the Constitution which requires distinctions on the basis of gender or which prevents egalitarian policy. The problem is that the Constitution does not by explicit terms protect against the historic disabilities imposed upon women.

from denying the right to vote on the basis of sex, had gained the allegiance of large numbers of women. Middle and upper class women with the leisure to devote to public affairs became its particular champions, making it a serious issue on the public policy agenda. By the 1890s, when the two suffrage organizations merged to form the National American Woman Suffrage Association (NAWSA), the idea of women voting—at least if those women were educated and middle-class—was no longer alien. But the movement suffered from ideological and organizational disarray. Reflecting the middle- and upper-class conservatism, biases and bigotry of many of their leaders and members, the woman suffrage organizations largely disassociated themselves from the aspirations of the working class, the burgeoning immigrant population, and the political reform movements of their day. The Anthony Amendment continued to be introduced perfunctorily in nearly every Congress, but it was not again reported out of committee for debate on the floor of either House until 1913.

Vigor returned with the rise of the progressive movement, the arrival in 1910 of the militant Alice Paul fresh from the trenches of the woman suffrage fight in England, and the revitalization and expansion of NAWSA under the leadership of Carrie Chapman Catt. Burning with the kind of passion for justice long absent from the woman's movement, Alice Paul led her National Woman's party into the streets and into partisan politics. Using such direct action tactics as picketing, arrests, and hunger strikes, as well as the more conventional means of congressional lobbying, pressure on political parties and presidential and congressional candidates, the suffragists got the Anthony Amendment out of committee and onto the floor of both Houses for debate—and defeat—in 1914. Strengthened by the mass movement of women into the labor force and into positions of responsibility in the public and private sectors during World War I, feminists marshalled their political talents for the final assault upon the male bastions of power. With President Wilson's emphasis upon making the world "safe for democracy" as a major war aim, denial of the right to vote to one-half of America's adult population—the half that supplied the civilian war effort—became an embarrassment. By the spring of 1919, the suffragists garnered the votes of two-thirds of the House and Senate. Turning their skills to the state level where they had achieved some small success by winning a few state voting referenda, they won ratification by three-fourths of the states by 1920.

The Nineteenth Amendment was a milestone in the quest for sexual equality; 133 years after the Philadelphia Convention, disenfranchised women forced their politicians to alter the nation's fundamental law to include a second reference to gender. The first such reference in the Constitution—in the never-enforced provision of the Fourteenth Amendment that a state's representation in Congress would be reduced if it denied qualified "males" the right to vote—made it clear that the voting was a male prerogative. Without the right to vote, women could not function as full citizens. With it, they could achieve political and legal equality.

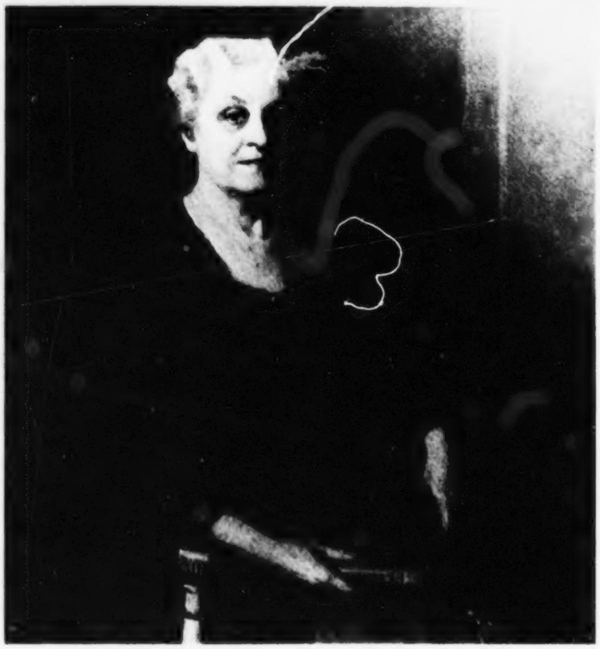
Women's potential political clout was reflected in the new deference accorded them by political parties, by presidents, and by Congress. Both major parties made room for women in their organizational hierarchy. Presidents of both parties appointed women to prominent positions. Congress passed legislation of particular concern to women such as that designed to reduce maternal and infant mortality. A woman's bureau was established in the Labor Department to protect the interests of working women.

Survival of Discrimination

The Amendment, however, directly produced little immediate change in the day-to-day lives of most women; economically, politically and legally, they continued to be man's inferior. If women entered the work force, their wages rarely exceeded half of that of men. Cultural expectations and legal restrictions conspired to keep women in lower-paid, less prestigious jobs. Some legislation designed to protect women—limitations on hours, night work, and lifting heavy objects, for example—had the unintended effect of reducing women's employment opportunities. A woman's legal right to property acquired during marriage was limited; in most jurisdictions, the husband owned what was acquired with his earnings. Civic duties, too, continued to be different for men and women. Fewer women than men served on juries either because women were by law ineligible or because gender-based qualifications made it unlikely; women defendants continued to be judged by male jurors in many states.

Survival of sexual discrimination is not a reproach to the achievements of the woman suffrage movement, nor is it surprising. The social, economic, political, and legal relevance of gender was too pervasive to be radically altered by one constitutional change. The complacency of the jazz age, of the era of the flapper, of prosperity, and of "normalcy" proved inhospitable to

Susan Brownell Anthony, *photograph by Theodore C. Marceau. National Portrait Gallery, Smithsonian Institution, Washington, D.C.*



Carrie Chapman Catt, *painting by Mary Foote. National Portrait Gallery, Smithsonian Institution, Washington, D.C.*

further attempts at change.

Former suffragists, perhaps assuming that the egalitarian battle had been won, turned their attention to other matters. The group founded by Susan B. Anthony, for example, became the League of Women Voters, an organization devoted to good government and an informed electorate. The woman's movement disintegrated. Until the 1960s, only a small group of women continued an organized effort on behalf of sexual equality. The Equal Rights Amendment was introduced in every Congress; sometimes it was favorably reported by a committee to the floor of one House, occasionally it was accepted by a majority of the Senate although not by the two-thirds required to propose a constitutional amendment, but for the most part it was ignored. In the 1940s, as women entered the work force in unprecedented numbers in response to the needs of World War II, legislation was introduced to mandate equal pay for equal work, but the proposal failed.

The Supreme Court continued to dismiss the notion that the Constitution commands a gender-neutral public policy. Only once did the Court bestow constitutional equality on women: without specifically overruling an earlier case upholding maximum hour legislation for women only (*Muller* v. *Oregon*, 1908), the Court in 1923 invalidated a minimum wage law designed to protect women workers, (*Adkins* v. *Children's Hospital*). Because the "ancient inequality of the sexes" was diminishing, said the Court, women's constitutional right to contract freely with employers could not be infringed by governmental efforts to assure women a living wage. Indeed, the Court turned the Nineteenth Amendment against women; with the addition of that Amendment, women were now, said the Court, equal to men. What this "equality" meant in practice was that women now enjoyed an even greater constitutional right than men to be underpaid.

With this problematic exception, when the Court confronted gender-based legislation, it simply reaffirmed a state's authority to classify on the basis of sex. In the 1940s, a Michigan woman who wanted to work as a bartender challenged the constitutionality of a state law which prohibited the occupation to women except for wives or daughters of bar owners. The Court rejected her plea (*Goesaert* v. *Cleary*, 1948). The Court held that nothing in the Constitution prohibited a state "from drawing a sharp line between the sexes;" the Equal Protection Clause of the Fourteenth Amendment—"No state shall . . . deny to any person within its jurisdiction the equal protection of the law"—did not mean that a state had to treat men and women similarly. To the Court it was reasonable for a state to decide that the occupation of bartending was inconsistent with the proper role of women, and to forbid women from entering that and, presumably, any other inappropriate occupation. When a Florida woman in the 1960s sought reversal of her conviction for beating her husband to death with a baseball bat, the Court rejected her challenge to the all-male composition of her jury; it held that the state's decision to relieve women of the duty of serving on juries was reasonable (*Hoyt* v. *Florida*, 1961). Throughout the 1960s, the Court was unreceptive to demands for sexual equality.

A New Women's Movement

During the 1960s, however, events occurred outside the Court that produced changes in the legal status of women within a decade. In February 1963, a new book appeared that spoke to the frustration of college-educated, middle-class women who were dissatisfied with their socially assigned roles: *The Feminine Mystique* by Betty Frie-

The principle of equality embodied in the Fourteenth Amendment's equal protection clause is sufficiently flexible to permit the Court to interpret it to require gender equality.

dan let these women know they were not alone in wanting access to the world outside their homes. Also in 1963, in June, Congress passed the first federal law which addressed sex discrimination in private employment; a new provision of the Fair Labor Standards Act, the Equal Pay Act prohibited discrimination in wage rates based upon sex. Then, in October, the President's Commission on the Status of Women, appointed by John F. Kennedy in 1961, issued its final report, documenting the inferior legal, economic and social position of women. The following year, Congress made a pivotal move. Title VII of the Civil Rights Act forbade discrimination on the basis of sex in hiring, firing, pay, and other conditions of employment. In 1967, President Lyndon Johnson required federal departments to insist upon sexually nondiscriminatory employment policies by federal contractors. By the end of the 1960s, gender had become an illegitimate employment criterion. In 1972, Congress not only adopted the ERA and sent it to the states, it also forbade sex discrimination in federally-funded educational programs. The Equal Credit Act of 1974 prohibited discrimination in credit on the basis of sex and marital status.

Women, having participated in the civil rights movement in the 1960s, much as their nineteenth-century counterparts had engaged in the abolitionist movement, followed the precedent of earlier feminists by moving into the political arena on their own behalf. The second women's rights movement was launched with the formation of the National Organization for Women (NOW) in 1966, the Women's Equity Action League (WEAL) in 1968, and the National Women's Political Caucus (NWPC) in 1971. Unlike such traditional women's organizations as the League of Women Voters or the American Association of University Women (AAUW), which shied away from identifying too closely with purely women's interests, these new organizations were explicitly feminist.

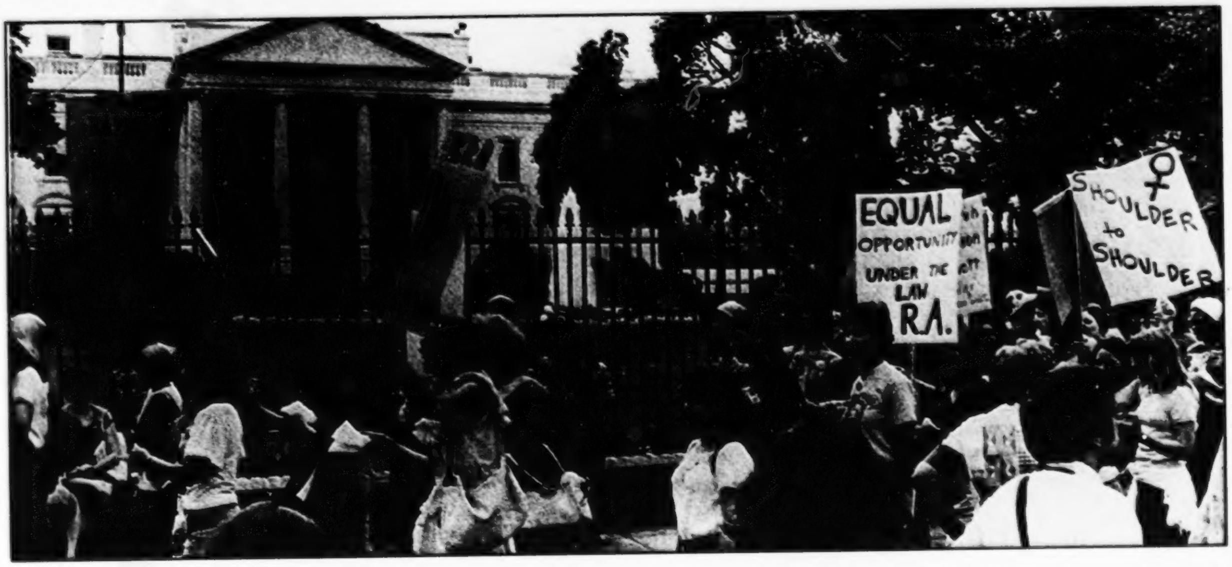
This new-found political power inspired changes in the law at the state as well as the national level. Equal rights amendments were added to the constitutions of 14 states. Some of the states made changes in their laws that would not be commanded even by the ERA—reform of rape laws and marital property laws, for example. In 1970, four states legalized abortion—three years before the Supreme Court decision in *Roe* v. *Wade* (1973) which severely limited the authority of the state to regulate abortion.

The Supreme Court, too, reflected the new awareness of the unequal status of women. Whereas the pre-1970s' Court considered legal distinctions on the basis of sex to be reasonable in almost all cases, the Court of the 1970s began to question the legitimacy of such distinctions. In 1971, the Court for the first time invalidated a state law on the grounds that it denied to women the equal protection of the law guaranteed by the Fourteenth Amendment provision.

The controversy which led to such a momentous, though limited, holding was an otherwise inconsequential dispute—a quarrel between an estranged husband and wife over the administration of their deceased son's $1,000 estate. An Idaho probate court appointed Cecil Reed rather than Sally Reed as administrator of their son's money; the case assumed constitutional proportions because a state law gave absolute preference to a father over a mother as administrator of a minor offspring's estate. Mrs. Reed charged that this gender distinction violated the equal protection clause. She argued that classifications on the basis of gender, like classifications on the basis of race, were "suspect"—constitutional only if the state can demonstrate that the objective the classification is designed to achieve is "compelling" and cannot be achieved by any other means; because the interest advanced by the classification was not compelling, the classification was unconstitutional.

The Court accepted Mrs. Reed's conclusion—that the legislation was unconstitutional—but not her reasoning. The Court held that classifications on the basis of sex did give rise to legitimate equal protection questions but that they were not necessarily "suspect," that the equal protection clause forbids arbitrary distinctions but it permits "reasonable" ones and that requires that similarly situated individuals be treated similarly; in short, the state has to have a good reason—though not a compelling one—to justify gender classifications. Finding no good reason for preferring a father over a mother as an administrator of a child's estate, the Court concluded that the classification was the very kind of arbitrary distinction that the equal protection clause was designed to prevent.

The Court's opinion was cautious. It simply reaffirmed the traditional equal protection standard—usually referred to as the "rationality" test to distinguish it from the stricter "compelling interest" test—a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly situated shall be treated alike." What was new was that the Court applied that standard to a gender classification for the first time; it questioned the



Demonstration in favor of the Equal Rights Amendment, August 29, 1976. © Washington Post; reprinted by permission of the D.C. Public Library.

reasonableness of the relationship between a gender classification and the achievement of a legitimate state objective. The mere fact that the Court invalidated sexually discriminatory legislation constituted an invitation to contest other sexually discriminatory laws. From this modest beginning in the *Reed* case, the Court began its role as an instrument of constitutional change for women as two decades earlier it had become a forum for the redress of the grievances of black Americans.

Following in Sally Reed's footsteps, subsequent litigants pressed the Court to adopt the stricter "compelling interest" standard to judge sex-based legislation. The Court refused to do so. It did, however, develop a distinct guideline to judge the constitutionality of legislation which classifies on the basis of sex—not as strict as the compelling interest test but more stringent than the test used in the *Reed* Case. In a 1976 case—*Craig* v. *Boren*—the Court enunciated an intermediate standard when it invalidated an Oklahoma law which permitted females between eighteen and twenty-one to buy beer but prohibited males of the same age from doing so. It held that in order for gender-based legal classifications to pass constitutional muster, the government would have to prove that the gender classification "substantially advanced an important governmental objective." Oklahoma sought to defend the constitutionality of its law by arguing that the purpose of the legislation was important (to reduce the slaughter on its highways) and that gender was related to that purpose (young males were more prone to drunk driving than were young females). Conceding that the purpose was important, the Court concluded that the state had not proved that the incidence of male drunk driving was significantly greater than the incidence of female drunk driving; the gender classification did not therefore substantially advance achievement of the state's objective.

Since 1971, the Supreme Court has invalidated most state and national legislation challenged on the grounds that it discriminated against women. Thus, it struck down a national law that made servicemen automatically eligible for certain spousal benefits but denied such benefits to service women unless their husbands were in fact dependent upon them (*Frontiero* v. *Richardson*, 1973); it overturned a state law which specified a lower age of majority for females than for males (*Stanton* v. *Stanton*, 1975) and it nullified a state law which declared husbands to be the "head and master" of the household and thus authorized to dispose unilaterally of jointly-owned property (*Kirchberg* v. *Feenstra*, 1981).

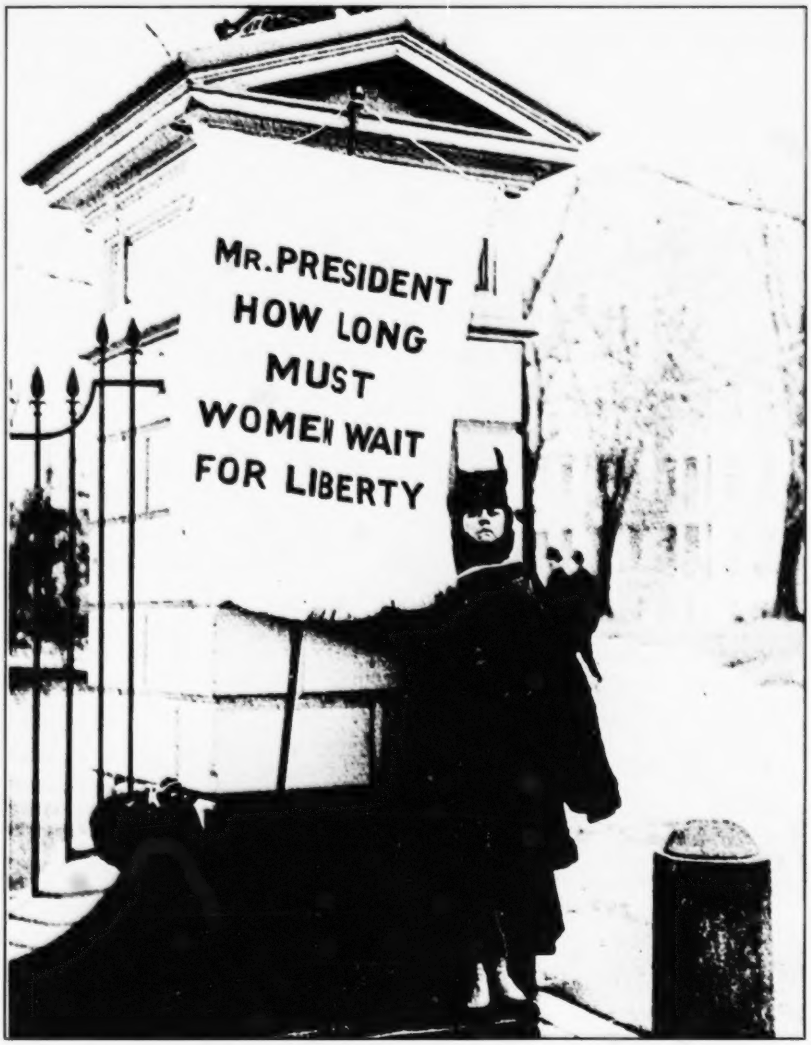
However, in 1974, the Court allowed California to deny benefits for pregnancy-related disabilities of its employees because it concluded that denial of benefits on the basis of pregnancy did not discriminate against women because of their sex (*Geduldig* v. *Aiello*, 1974). In response, Congress passed the Pregnancy Discrimination Act, prohibiting the action the Court had allowed.

The Court has also invalidated most legislation challenged on the grounds that it discriminated against men; thus it prohibited government from denying a man admission to a women's nursing school (*Mississippi University for Women* v. *Hogan*, 1982), from conferring social security benefits upon widows, but not widowers, with dependent children (*Weinberger* v. *Wiesenfeld*, 1975), and from authorizing alimony to wives only (*Orr* v. *Orr*, 1979). The Court has, however, upheld some gender-based legislation which burdened men more than women; it permitted government to confer a tax exemption upon widows but not on widowers (*Kahn* v. *Shevin*, 1974), to punish males but not females for statutory rape (*Michael M.* v. *Superior Court*, 1981), and to limit draft registration to men (*Rostker* v. *Goldberg*, 1981).

The Court's invalidation in the last decade of most gender-specific legislation is significant in light of the defeat of the ERA. Until recently, the Court refused to use its formidable power to realize the historic pleas for sexual equality; to the contrary, it openly conferred upon the state the authority to treat men and women differently. The principle of equality embodied in the Fourteenth Amendment's equal protection clause, however, is sufficiently flexible to permit the Court to interpret it to require gender equality. If the Court views most admittedly sexually discriminatory laws as illegitimate—and it seems now to have reached that point—the Constitution may now afford protection against most overt forms of governmental discrimination against women. All the egalitarian eggs are not, thus, in the ERA basket. The Court is serving as an instrument for achieving sexual equality in much the same way that it has served as an instrument for achieving racial equality.

The fact that the judiciary, along with Congress, the president, and the states, moved against sex discrimination in the 1960s and 1970s does not, of course, necessarily mean that it will continue to do so until sexual equality has been achieved. However, having construed the provisions of the Fourteenth Amendment to prohibit most challenged forms of sex discrimination for over a decade, the Court would find it as difficult to return to the pre-1970s interpretation permitting government to draw a sharp line between the sexes as it would to return to the pre-1950s interpretation permitting government to make racial distinctions.

There is no indication that the Rehnquist Court will reverse course. Although the Burger Court was perceived to be more conservative than the Warren Court (and a reconstituted Court appointed by President Reagan, it is widely assumed, would be even more conservative), it was the Burger Court, not the Warren Court, which effectively included women in the Constitution. Even the most conservative members of the present court agree that the Fourteenth Amendment forbids most sexually discriminatory laws.



Suffragist vigil in front of the White House. Library of Congress.

Whatever the fate of the ERA or whatever the changes on the Court, the Constitution has changed. The legal status of women has changed. The nation's legislative, executive, and judicial policy makers in the 1960s and the 1970s did "remember the ladies." This is not to say that the aims of Abigail Adams, of the women of Seneca Falls, of the suffragists, or of contemporary feminists have been totally achieved; gender continues to be relevant in determining an individual's social, political, and economic status. Nonetheless, national constitutional and statutory law now furnish the ammunition for destruction of officially-sanctioned sex discrimination.

Suggested additional reading:

Eleanor Flexner, *Century of Struggle: The Women's Rights Movement in the United States*, rev. ed. (Belknap Press of Harvard University Press, 1975).

Barbara Sinclair Deckard, *The Women's Movement: Political, Socioeconomic and Psychological Issues*, 2nd ed. (Harper and Row, 1979).

Susan Cary Nicholas, Alice Price, Rachel Rubin, *Rights and Wrongs: Women's Struggle for Legal Equality*, 2nd ed., (Feminist Press, McGraw Hill, 1983).

Janet Boles, *The Politics of the Equal Rights Amendment* (Longman, 1979).

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Thomas Jefferson and the Constitution

by MERRILL D. PETERSON

In the Declaration of Independence, Thomas Jefferson set forth in bold, round terms the political philosophy of the new nation. The principle that governments derive their just powers from "the consent of the governed" became the cornerstone of American constitutionalism. It opened an age of constitution-making both in the states and in the confederation. The creation of new republican government was, Jefferson said in 1776, "the whole object of the present controversy," for although independence might be achieved, without it the revolution would fail in the higher goal of securing human freedom and self-government. For the rest of his life Jefferson was involved in the making and remaking of constitutions and, of course, in their interpretation. As a constitutionalist, he is generally associated with theories of extreme suspicion of governmental power and strict construction of written constitutions. And this characterization is true. But it is only part of a much more complex truth. Jefferson was a democrat. He trusted the people to rule themselves. He was a philosopher of the Enlightenment, who distrusted the boasted "wisdom of ancestors," welcomed progress, and was receptive to change. This double commitment to preservation and to change proved difficult for Jefferson, and it is probably impossible for us. Yet it lay at the core of Jefferson's thought and it remains, in a sense, the basic dilemma of American constitutionalism.

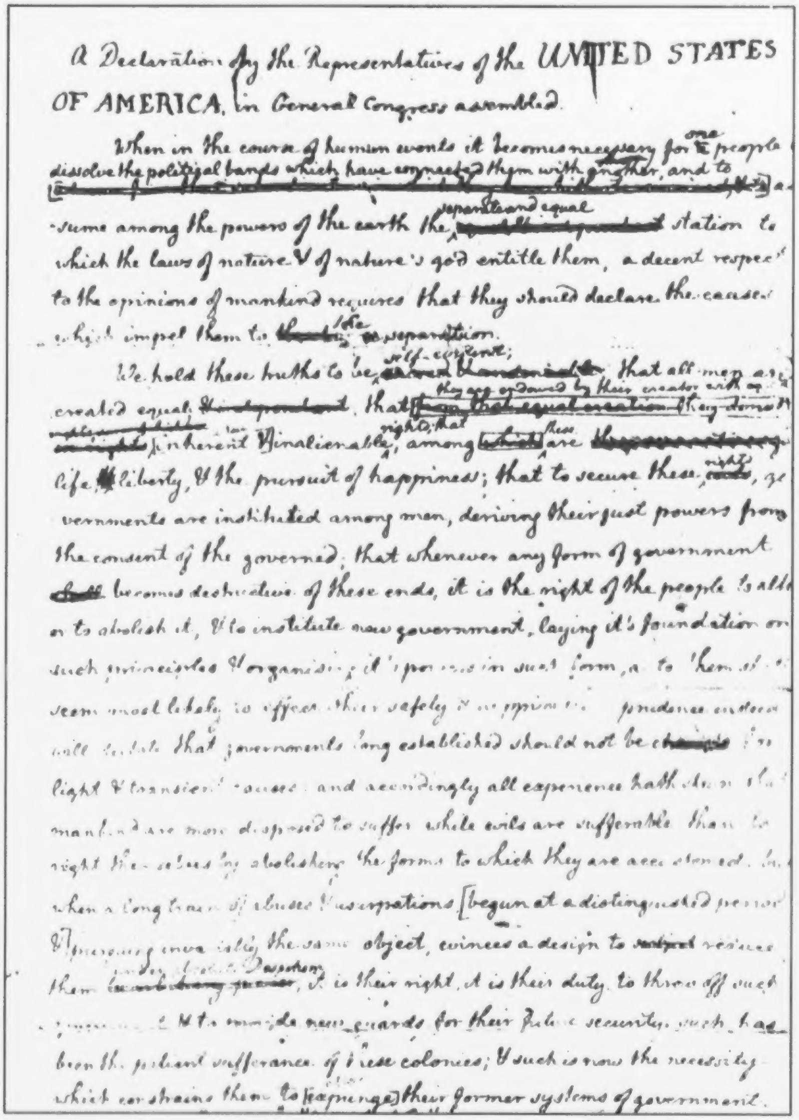
The forty-four year old Jefferson was United States Minister to France when the federal convention met at Philadelphia in 1787. For three years he had seen the infant republic scoffed, kicked,and jeered from London to Algiers, all respect for its government annihilated by the opinion of its weakness and incompetence. He had been frustrated in his diplomacy at Versailles, a friendly court, and had gone begging to Dutch banks for loans to keep the confederation afloat. Jefferson was, therefore, a warm advocate of a stronger government, one more national in character, and endowed with requisite powers to command influence and respect abroad as well as at home. Seeing a roster of the convention delegates, he exclaimed, "It is really an assembly of demigods," and he eagerly awaited the results of their deliberations.

When the finished work reached Paris in the fall, Jefferson was initially shocked and dismayed. "How do you like our new constitution?" he addressed his diplomatic friend and colleague, John Adams, in London. "I confess there are things in it which stagger all my dispositions." He had, of course, looked for a reinvigorated confederation rather than a bold new frame of government. Moreover, he pondered the constitution in Europe, where tyranny, not anarchy, was the problem, where the curtain had just gone up on the French Revolution, and where he had come to appreciate as never before the inestimable blessings of American liberty. He thought that the delegates had overreacted to Shays' Rebellion. Some months earlier, discussing the Massachusetts insurrection with Adams and members of his family, who were terrified by it, Jefferson declared philosophically, "I like a little rebellion now and then. It is like a storm in the atmosphere." This libertarian spirit, more congruous with the hopes of 1776 than the hopes of 1787, separated Jefferson from Adams and many of the framers of the Constitution. Nevertheless, the more Jefferson studied the Constitution the more he approved of it.

However, he voiced two major objections. First, the perpetual reeligibility of the chief magistrate opened the door to monarchy. Most of the evils of European government were traceable to their kings, he said; and a president of the United States reeligible every fourth year would soon become a king, albeit an elective one. These fears were little felt at home, however, chiefly because of the universal confidence of George Washington, whose election to the presidency was a foregone conclusion. So Jefferson suspended this objection and concentrated on the more important one, the omission of a bill of rights, in which he was supported by the mass of Anti-Federalists.

At first he unwittingly played into the game of using the demand for a bill of rights to delay or defeat ratification of the Constitution. His suggestion in a private letter that four states withhold assent until the demand was met contributed to the initial rejection of the Constitution in North Carolina. Actually, Jefferson always supported speedy adoption by the necessary nine states; and when Massachusetts opted for unconditional ratification with recommended amendments, Jefferson quickly endorsed the plan. Meanwhile, he employed his persuasive powers to convert his friend James Madison, the Federalist leader, to the cause of a bill of rights. Acknowledging the inconveniences and imperfections of parchment guarantees of liberty, conceding the theoretical objection to the denial of powers that had not been granted, Jefferson still insisted that "a bill of rights is what the people are entitled to against every government on earth, general or particu-

Thomas Jefferson by Charles Graffley.
Library of Congress.



A Declaration by the Representatives of the UNITED STATES OF AMERICA, in General Congress assembled.

When in the course of human events it becomes necessary for ~~a~~ one people [to] dissolve the political bands which have connected them with another, and to ~~[illegible]~~ assume among the powers of the earth the ~~equal & independent~~ separate and equal station to which the laws of nature & of nature's god entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to ~~the change~~ the separation.

We hold these truths to be ~~sacred & undeniable~~ self-evident; that all men are created equal ~~& independent~~; that ~~from that equal creation they derive~~ they are endowed by their creator with ~~[illegible]~~ [illegible] inherent & inalienable rights; that among ~~which~~ these are ~~the preservation of~~ life, ~~&~~ liberty, & the pursuit of happiness; that to secure these ~~ends~~ rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government ~~shall~~ becomes destructive of these ends, it is the right of the people to alter or to abolish it, & to institute new government, laying it's foundation on such principles & organising it's powers in such form, as to them shall seem most likely to effect their safety & happiness. prudence indeed will dictate that governments long established should not be ~~changed~~ for light & transient causes: and accordingly all experience hath shewn that mankind are more disposed to suffer while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. but when a long train of abuses & usurpations [begun at a distinguished period & pursuing invariably the same object, evinces a design to ~~subject~~ reduce them ~~to arbitrary power~~ under absolute Despotism, it is their right, it is their duty, to throw off such government & to provide new guards for their future security. such has been the patient sufferance of these colonies; & such is now the necessity which constrains them to [expunge] their former systems of government.

A page of Jefferson's rough draft of the Declaration of Independence. Library of Congress.

lar, and what no government should refuse, or rest on inference."

Jeffersonian Theory

The dominant feature of Jefferson's constitutional theory was the juxtaposition of "strict construction" of the fundamental law with readiness to accommodate change through the ongoing consent of the people. During the 1790s, as the emerging leader of the opposition Republican party, Jefferson appealed to the letter of the Constitution to curb Federalist excesses and he rose to the presidency in 1801 on a platform of state rights and limited government. Not surprisingly, this negative part of Jefferson's constitutional theory occupied so large a place in public debate that the positive part was all but forgotten. Yet the negative assumed the positive: a constitution should be strictly adhered to by mere law-making authorities because the constitution-making authority of the people is always available to introduce change either by amendment or by convention.

In 1789, the first year of the French Revolution and the first year of the new government under the Constitution, Jefferson set forth the theory that each generation should make its own constitution; and while he never found a way to reduce the theory to practice he never abandoned it. He abhorred the idolatry of constitutions. "I am certainly not an advocate for frequent and untried changes in laws and constitutions.... But I know also," he declared in a memorable letter, "that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man still to wear the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors." Yet, despite this progressive outlook, self-appointed Jeffersonians throughout American history have sought to impede the wheels of progress by invocations of strict construction and the sanctity of constitutions.

Jefferson had first wrestled with the problem of securing the means of change together with the benefits of a written fundamental law in connection with the Virginia constitution of 1776. In June, while he was drafting the Declaration of Independence in Philadelphia, Jefferson also drew up a plan of government for Virginia and sent it to the revolutionary convention in Williamsburg. The relationship of one state paper to the other was that of theory to practice, principle to application. Jefferson therefore included a number of liberal reforms in the draft constitution. None of these appeared in the constitution adopted for Virginia, however. Jefferson at once became the constitution's severest critic, not alone because of its conservative character but because it failed to meet the test of republican legitimacy. The "convention," so-called, that adopted it was the revolutionary succes-

The dominant feature of Jefferson's constitutional theory was the juxtaposition of "strict construction" of the fundamental law with readiness to accommodate change through the ongoing consent of the people.

sor of the House of Burgesses, elected in April to perform the regular business of government. How, then, could it frame a supreme law binding on government itself?

Making this objection, Jefferson was not being frivolous. He was groping toward the conception of constituent sovereignty in which the government actually rises upon "the consent of the governed." In his draft constitution he proposed a form of popular ratification—a radical idea of 1776. He also included a provision for future amendment by the consent of the people in two-thirds of the counties all voting on the same day. This was unprecedented. Only two of the first state constitutions contained an amendment power, both by the legislature solely. Jefferson made the omission of any provision for constitutional change a leading count in his indictment of the Virginia frame of government.

In 1783 when Jefferson drafted a more elaborate constitution for a reform convention that, alas, never materialized, he adopted a process of periodic revision and reform by way of popularly elected conventions. The plan of government was published in his book *Notes on the State of Virginia*. It was the proposal to "new model" (i.e., revise) constitutions more or less regularly that Madison singled out for criticism in the 49th *Federalist* paper. Madison pointed to the twin dangers of "disturbing the public tranquillity" by too frequent recurrence to the people and depriving the government of the veneration essential for its stability. Such considerations might be disregarded in a "nation of philosophers." "But," Madison sighed, "a nation of philosophers is as little to be expected as the philosophical race of kings wished for by Plato." This undoubtedly expressed the prevailing political wisdom. Jefferson, while he did not stand alone, showed greater receptivity to institutionalized constitutional change and more openness to popular will and opinion than any of his eminent contemporaries.

Yet in the political battles of the 1790s involving the United States Constitution, Jefferson associated himself with principles of strict construction, and this negative half of the equation entered deeply into emerging Republican ideology almost to the exclusion of the positive emphasis on change. The issue was drawn in the conflict between the two giants of the Washington administration, Jefferson, Secretary of State, and Alexander Hamilton, Secretary of Treasury.

As part of his financial plan for the new nation, Hamilton had proposed to Congress the incorporation of a great national bank. The bill was passed in 1791, but only after serious questions of constitutionality were raised. The president, in some doubt, asked his secretaries for opinions. Jefferson returned a brisk 2200 word brief against the bill. The Constitution established a government of delegated powers; no power to incorporate a bank had been delegated, nor could it be fairly inferred from any other power. The Bank Bill therefore breached the limits of the Constitution. "To take a single step beyond the boundaries thus specially drawn around the power of Congress," Jefferson warned, "is to take possession of a boundless field of power, no longer susceptible to any definition." In response to this opinion Hamilton enunciated the doctrine of "implied powers," under which Congress was authorized to employ all requisite means in the exercise of its limited powers. Persuaded by Hamilton's long and powerful argument, Washington signed the bill into law.

And so the Constitution, three years young, ceased to be immutable. It was not until 1819, however, in the opinion of the Supreme Court upholding the constitutionality of the Second Bank of the United States, that Hamilton's doctrine became the cornerstone, indeed the triumphal arch, of American law. The idea of " a living constitution," one that is continually accommodated to changing national circumstances, needs, and demands through legislative, executive, and, above all, judicial interpretation, was born when Chief Justice Marshall declared in *McCulloch* v. *Maryland* that the Constitution is "intended to endure for ages to come, and consequently, [is] to be adapted to the various crises of human affairs." Increasingly, Article III, which described the judicial power, eclipsed Article V, the amendment power, as the agency of constitutional change. The Supreme Court, as Woodrow Wilson later remarked, became "a constituent convention in continuous session."

Jefferson, of course, could never accept this development. He rejected the cornerstone upon which the whole astounding edifice of American constitutional law would be built. He opposed not the end of change, but rather the means of achieving it through loose construction or interpretation of the Constitution. He restated his position many times, as in the Kentucky Resolutions of 1798 denouncing the Alien and Sedition laws enacted by the Federalist majority during the undeclared war with France (1798–1800). These famous resolutions invoked the authority of a state to declare acts of Congress unconstitutional, thereby embodying the doctrine of strict construction in the doctrine of state rights.

"Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by Construction."

—Thomas Jefferson

Jefferson as President

Jefferson entered the presidency in 1801 pledged to restore the government to the original principles of the Constitution. The difficulties he encountered may be illustrated first by his efforts to curb the federal judiciary, and second by the Louisiana Purchase. He had always favored an independent judiciary as the guardian of individual liberties agains legislative and executive tyranny. But in the "crisis of '98" the courts became abettors of tyranny, upholding the Alien and Sedition Acts—the destroyers rather than the guardians of liberty, the usurpers rather than the enforcers of the Bill of Rights.

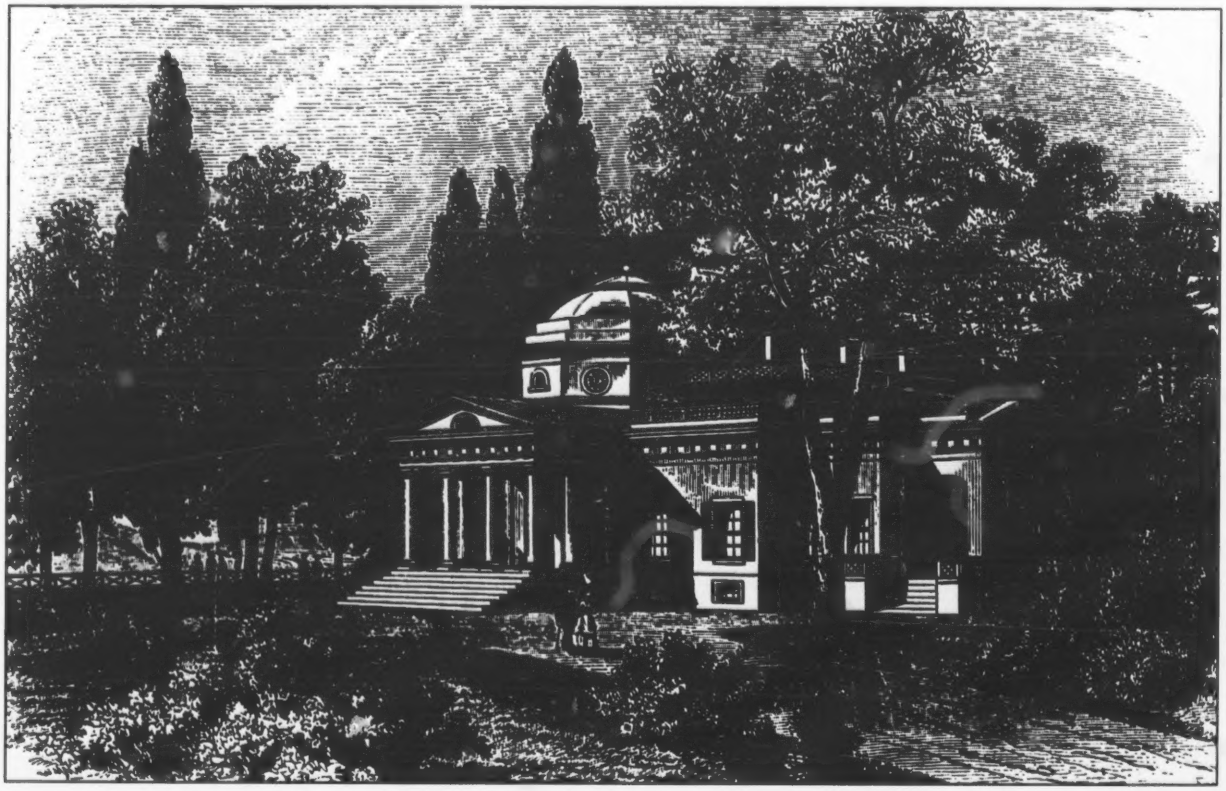
The power of the partisan judiciary had been increased by the Judiciary Act passed in 1801, in the waning hours of the Adams administration. The act created many new judgeships and expanded the jurisdiction of the federal courts. The Federalists, Jefferson believed, had retired to the judiciary as a stronghold from which to assail his administration, and he promptly called for repeal of the Judiciary Act, which he accomplished in 1802. The case of *Marbury* v. *Madison* in 1803, which arose on a technical point from the Judiciary Act, pitted Chief Justice John Marshall, a staunch Federalist, against the Republican president. Jefferson objected to the decision not because the court asserted the ultimate power to interpret the Constitution, for in fact it did not go that far, but because Marshall traveled out of the case, pretending to a jurisdiction he then disclaimed, in order to administer a slap to the chief magistrate for violating constitutional rights.

With regard to judicial review, Jefferson consistently held to the theory of "tripartite balance," under which each of the coordinate branches of government has an equal right to decide questions of constitutionality for itself. Such a theory was as necessary to maintaining the separation of powers, in his opinion, as the doctrine of state rights was to preserving the division of authority in the federal system. Jefferson's repugnance to judicial supremacy in constitutional matters was also grounded in democratic principles. Federal judges had no accountability to the people and ought not, therefore, be the ultimate interpreters of the sovereign will. He sought to secure greater accountability through impeachment and an amendment making judges removable, but nothing came of the amendment and impeachment proved an embarrassing failure from which he withdrew. In the end, though he held the judiciary at bay, Jefferson was unwilling to push his principles to conclusion and he left the foundations of judicial power undisturbed for Marshall to build upon when the time was ripe.

The great foreign affairs triumph of his administration, the Louisiana Purchase, was spoiled for Jefferson by his conviction that it was "an act beyond the Constitution." Nothing in the Constitution authorized the acquisition of foreign territory, much less the incorporation of that territory and its inhabitants into the Union, as provided by the treaty with France. Jefferson drafted a constitutional amendment—"an act of indemnity"—to sanction the treaty retroactively. "I had rather ask an enlargement of power from the nation. . .," he wrote to a Virginia senator, "than to assume it by construction which would make our powers boundless. Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction." Congress was less scrupulous, however, and when it declined to follow him, the president acquiesced. A revolution in the Union perforce became a revolution in the Constitution as well.

Jefferson later defended the unconstitutional actions of brigadier General James Wilkinson in the suppression of the Burr Conspiracy in the southwest in 1807. Wilkinson accused Aaron Burr of plotting the secession of the Louisiana Territory. To meet the threat, the General turned New Orleans into an armed camp, subverted the civil authority, and placed several of Burr's associates under military arrest. Yet Jefferson justified these actions under his own version of "executive prerogative." Strict observance of written law was not always the highest duty. "To lose our country by scrupulous adherence to written law," he wrote, "would be to lose the law itself, with life, liberty, property, and all those who are enjoying them with us, thus absurdly sacrificing the ends to the means." So it is incumbent on high officials, like Wilkinson in 1807, to risk themselves on great occasions when the safety of the nation or other paramount interests are at stake. In Jefferson's thinking, actions of this kind, which were exceptional and uncodified, were preferable to false and tortuous constructions of the Constitution, which permanently corrupted it.

In retirement at Monticello from 1809 until his death seventeen years later Jefferson repeatedly confronted the problem of constitutional preservation and change. He knew there could be no preservation without change, no constructive change without preservation. He again declared his belief, formed in 1789 in the shadow of the fallen Bastille, that each generation, rep-



Monticello. Library of Congress.

resenting a new constituent majority, should make its own constitution. The American republic was an experiment in liberty and self-government, and it would survive only as long as the people kept it responsive to change. "Nothing is unchangeable but the inherent and inalienable rights of man," he intoned. Changes should be made by constitutional convention or by specific amendment as prescribed in Article V. As president, Jefferson had advocated the Twelfth Amendment approved in 1804 separating the balloting for president from that for vice-president, and several others that were stillborn. Now, from Monticello, he advocated amendments authorizing federal internal improvements, the direct election of the president, and the two-term limitation on presidential eligibility. None made progress. Finally, not long before his death, he "despair[ed] of ever seeing another amendment to the Constitution," and declared, "Another general convention can alone relieve us."

Jefferson continued to the end to reject constitutional change by construction or interpretation. In the wake of the Panic of 1819, which threw his private affairs into hopeless disorder, he reacted sharply against the course of consolidation in the general government, above all the bold nationalism of the Supreme Court as exhibited in such decisions as *McCulloch* v. *Maryland*, in which the court took a broad view of the powers of the national government and authorized the creation of the Second Bank of the United States. "The judiciary of the United States is the subtle corps of sappers and miners constantly working under ground to undermine the foundations of our confederated fabric," Jefferson wrote in 1820. "They are construing our Constitution from a co-ordination of a general and special government to a general and supreme one. This will lay all things at their feet. . . ." Only by combining the theory of constituent sovereignty with the rule of strict construction would it be possible, Jefferson believed, to maintain constitutional government on the republican foundation of "the consent of the governed."

In our time, of course, Americans have accepted, wittingly or unwittingly, the idea of a "living constitution," and passive or "implied consent" has replaced the active and real consent of the original theory of government founded on civil contract. This outcome is owing to many things—the responsiveness of modern government to public opinion, the technical complexities of present-day government, and the anachronistic character of the political language of natural rights, contract, and popular sovereignty. How Jefferson's philosophy might have come to terms with these changes, it is impossible to say. We should remember, nevertheless, that his philosophy, for all its jealousy of power, for all its opposition to judicial construction, was not rigid and conservative but enlightened, progressive, and democratic in outlook.

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Race and the Constitution: The Case of the Japanese American Internment

by PETER IRONS

More than four decades have passed since the forced exodus of Japanese Americans from the West Coast in 1942. Herded from their homes by Army orders, more than 110,000 members of this racial minority spent the wartime years behind the barbed-wire fences of detention camps guarded by armed troops. For an average of 900 days each, Americans of Japanese ancestry were imprisoned, held without charge, without counsel, and without trial. With an excess of candor, Assistant Secretary of War John J. McCloy, the official most responsible for this assault on the Constitution, later attributed the mass incarceration to "retribution" for the Japanese attack on Pearl Harbor.

All three branches of the federal government shared responsibility in the evacuation and internment of Japanese Americans. Acting on the advice of War Department officials, President Franklin D. Roosevelt signed Executive Order 9066 on February 19, 1942, authorizing the exclusion by military order of "any or all persons" from areas designated by these officials. One month later, both houses of Congress enacted without any recorded opposition a law that made violation of any military order a federal crime, punishable by imprisonment for one year. Finally, the Supreme Court ruled in 1943 and 1944 that the military curfew and exclusion orders did not violate the constitutional rights of those few Japanese Americans who had risked a criminal record to challenge the orders.

The wartime internment of Japanese Americans, and the Supreme Court decisions that upheld Roosevelt's order, have generated an almost unanimous condemnation by legal scholars and historians. As early as 1945, Eugene V. Rostow of the Yale School faculty blasted the Court's opinions as a judicial "disaster" for allowing imprisonment without charge or trial on the basis of ancestry alone. One of the government prosecutors in the internment cases later denounced the program as "the greatest deprivation of civil liberties in this country since slavery." More recently, a blue-ribbon federal commission reported to Congress in 1982 that a "grave injustice" had been done to the Japanese Americans who suffered the loss of their liberties.

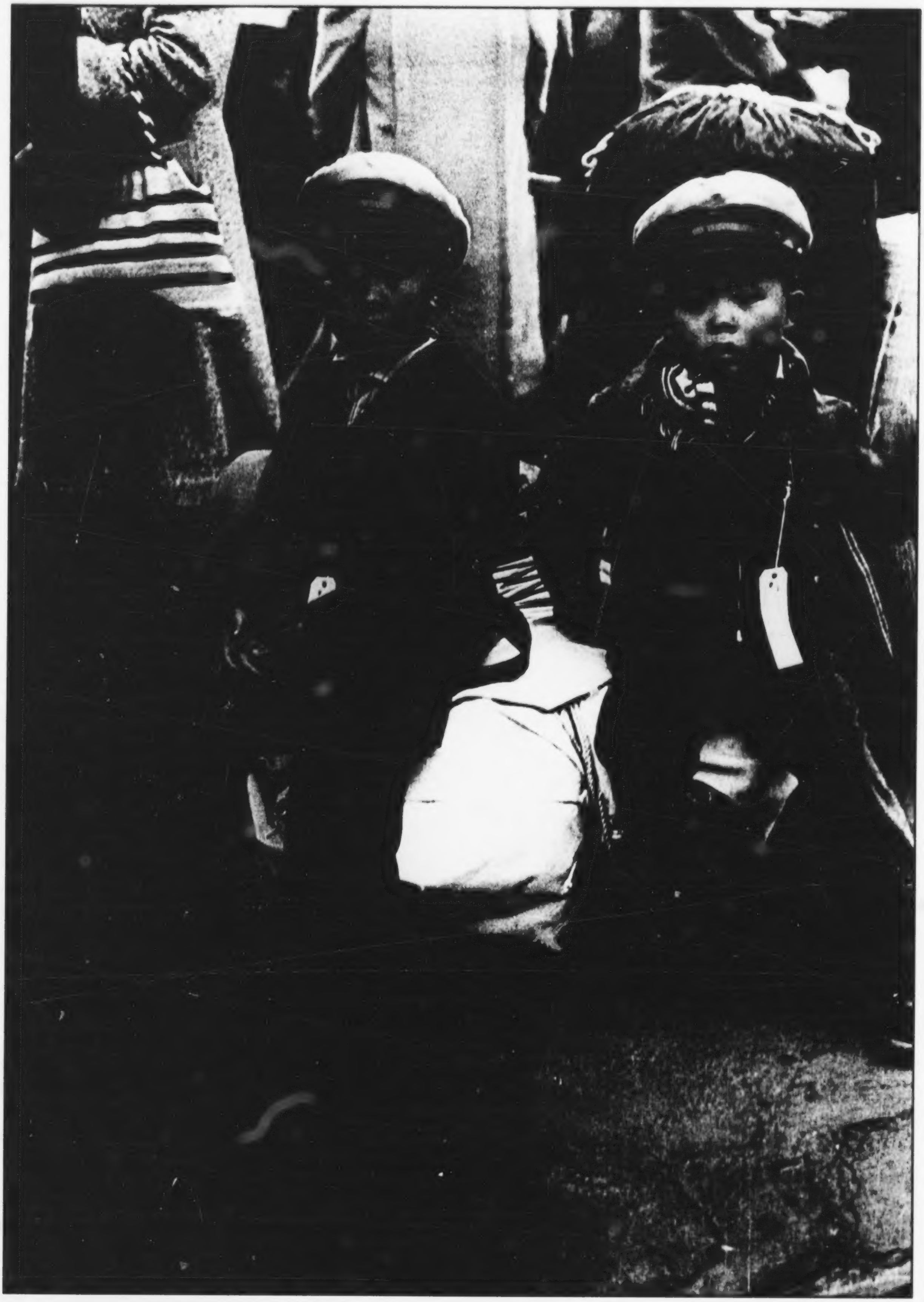
Few decisions of the Supreme Court have been so thoroughly repudiated as those that upheld the military orders that forced Japanese Americans from their homes. Only the *Dred Scott* decision in 1857, ruling that black Americans were not citizens, and the *Plessy* decision in 1896 that established the "separate but equal" doctrine of racial segregation, match the internment decisions as "self-inflicted wounds" on the Court's reputation. Significantly, all these discredited decisions involved the "American dilemma" of race. But the corrective processes of constitutional amendment and congressional enactment have erased *Dred Scott* and *Plessy* from the law, while the internment decisions have not received explicit reversal as judicial precedent.

The widespread criticism of these Supreme Court opinions raises several fundamental questions. Stated most simply, how could the Court allow such a judicial disaster to happen? Answering this question requires a close look beneath the surface of the internment cases and behind the closed door of the Court's conference room. How the Court defined the constitutional issues in these cases, and applied the "facts" presented by the opposing lawyers in their briefs and arguments, becomes an exercise in historical dissection, much as a coroner performs an autopsy.

A Tide of Intolerance

Our examination of the internment cases begins in the hectic weeks that followed the shock of the Pearl Harbor attack on December 7, 1941. Widespread fear of a follow-up invasion of the West Coast provoked a resurgence of the "Yellow Peril" campaign that infected the public in earlier decades. Editorial calls for tolerance of Japanese Americans gave way to a crusade for their removal in late January, 1942, spurred by headlines that charged Hawaiians of Japanese ancestry with aiding the Pearl Harbor attackers through espionage and sabotage. These charges, made by a presidential commission headed by Supreme Court Justice Owen Roberts, were disclaimed by military officials after the war. But the wave of hostility that followed these headlines did its damage before the belated retraction of the disloyalty charges.

The tide of intolerance toward Japanese Americans had its greatest impact on General John L. DeWitt, the elderly and indecisive commander of Army troops on the West Coast. Before the publication of the Roberts commission report, DeWitt resisted pressure to order the "wholesale internment" of Japanese Americans and assured a fellow general that the Army could "weed the disloyal out of the loyal and lock them up if necessary." DeWitt knew the Army lacked power, without presidential approval, to impose restrictions on American citizens of any ancestry. Although Congress had barred persons born in Japan from citizenship in 1924, two-thirds of those with Japanese ancestry were native-born Ameri-



Evacuees waiting at the Santa Fe station for train to relocation camp, April 1942. Library of Congress.

Few decisions of the Supreme Court have been as thoroughly repudiated as those that upheld the military orders that forced Japanese Americans from their homes.

cans and held full citizenship under the Constitution. "An American citizen, after all, is an American citizen," DeWitt reminded an advocate of mass internment in the last week of 1941.

DeWitt's initial reluctance to ask for authority to uproot the Japanese Americans crumbled quickly under political pressure. After meeting with California Governor Culbert Olson and Attorney General Earl Warren in late January, 1942, DeWitt reported "a tremendous volume of public opinion now developing against the Japanese" that included pressure from "the best people of California." The majority of Japanese Americans lived in California, and visitors to DeWitt's headquarters in San Francisco "feel that they are living in the midst of a lot of enemies," the general told his subordinate, Colonel Karl R. Bendetsen.

Bendetsen was a Stanford Law School graduate who played a key role in the internment decision as liason between DeWitt and John J. McCloy, the Assistant Secretary of War who assumed responsibility for deciding the fate of Japanese Americans. Caught between pressure from West Coast politicians who demanded immediate evacuation and the qualms of Secretary of War Henry L. Stimson, who feared that the forcible removal of American citizens would tear "a tremendous hole in our constitutional system," McCloy delegated Bendetsen to assist DeWitt in preparing a "final recommendation" on the treatment of Japanese Americans.

In approaching his assignment from McCloy, Bendetsen knew as a lawyer that authority to force citizens to leave their homes depended on a showing that "military necessity" required such an extreme move. In cases that stemmed back to the Civil War, the Supreme Court had restrained the military from control over civilians, absent a formal declaration of martial law or proof that civilians posed a real threat to military security. General DeWitt had received many reports, both from Army units and civilians, that Japanese Americans had committed acts of espionage and sabotage, from cutting power lines to making short-wave radio transmissions to Japanese submarines lurking off the coastline. Bendetsen also knew, from the reports of intelligence officials who investigated these charges, that not a single claim of espionage or sabotage had been substantiated. Every such charge had been investigated and traced to mistaken reports, from thinking erroneously that a radio station in Japan was transmitting from California to concluding that interference from cows rubbing their backs on power lines meant sabotage.

Faced with intelligence reports that dismissed claims of espionage and sabotage, Bendetsen responded to calls for internment by warning that "no one has justified fully the sheer military necessity for such action." But the mounting tide of political pressure finally took its toll. After meeting in Washington with insistent members of the West Coast congressional delegation, Bendetsen prepared a "final recommendation" to the Secretary of War that labeled Japanese Americans as members of "an enemy race" whose loyalty to the United States was inherently suspect. Arguing that Japanese "racial strains are undiluted" even among those born and educated in America, Bendetsen recommended on behalf of General DeWitt the "mass internment" of Japanese Americans as a step in their removal from the West Coast.

Armed with DeWitt's signature on the report that Bendetsen prepared, McCloy subdued the last opponents of internment. Secretary of War Stimson reluctantly accepted Bendetsen's argument that "their racial characteristics are such that we cannot understand or trust even the citizen Japanese." Attorney General Francis Biddle, who initially opposed internment because DeWitt had not proved its military necessity, finally bowed to Stimson and abandoned his objections in a dramatic show-down with McCloy and Bendetsen on February 17, 1942. At this crucial meeting, held in Biddle's living room, tempers flared over McCloy's dismissal of the constitutional objections raised by two of Biddle's assistants, Edward Ennis and James Rowe. One observer, Army general Allen Gullion, quoted McCloy as responding that "to a Wall Street lawyer, the Constitution is just a scrap of paper." Although Biddle later expressed regret at his action, he failed at this meeting to back up Ennis and Rowe and deferred to the War Department. Two days later, President Roosevelt signed the executive order that Biddle and McCloy had jointly approved.

General DeWitt wasted no time in implementing the authority conferred on him by Roosevelt. He first appointed Colonel Bendetsen, the architect of internment, to "provide for the evacuation of all persons of Japanese ancestry" from the West Coast. Bendetsen recommended that a curfew be imposed on Japanese Americans as a first step, and DeWitt signed an order that forced members of this minority to remain indoors between 8 p.m. and 6 a.m. DeWitt accompanied the curfew order with the first of more than 100 "exclusion orders." These military edicts, applied to Japanese Americans up and down the West Coast, required that they dispose of their property on a week's notice, leave their homes and businesses, and report to "assembly centers" in race tracks and fairgrounds with only those possessions they could carry in their arms. From these temporary quarters, they were dispatched under armed guard to permanent "relocation centers" located in barren deserts and swamps from California to Arkansas. Confronted with the choice between barbed-wire fences or prison bars, it is hardly surprising that all but a handful of law-abiding Japanese Americans chose to obey the orders and "relocate" with family and friends.

Three Challenges

Only three young men accepted the risk of a criminal record in deciding to challenge DeWitt's curfew and exclusion orders. The first challenger was Min Yasui, a lawyer and Army reserve officer who resigned his job with the Japanese consulate in Chicago the day after Pearl Harbor to volunteer for military service in Portland, Oregon. Turned away on account of his race, Yasui decided that DeWitt's curfew order "infringed on my rights as a citizen" because it made "distinctions between citizens on the basis of ancestry." Yasui turned himself in for curfew violation and was sentenced after conviction to a maximum term of one year in prison.

The second challenger to DeWitt's orders was a University of Washington senior, Gordon Hirabayashi, a Quaker pacifist who opposed both the curfew and exclusion orders on religious grounds. "I must maintain my Christian principles," Hirabayashi wrote in a statement to the FBI. "I consider it my duty to maintain the democratic principles for which this nation lives. Therefore, I must refuse this order for evacuation." Tried before a judge who ordered the jury to find him guilty, Hirabayashi was convicted of violating both the curfew and exclusion orders and was sentenced to three-month terms for each offense.

The final criminal defendant among the internment challengers was Fred Korematsu, a ship-yard welder who had been rejected on medical grounds after volunteering for military service. Korematsu went to the extreme of plastic surgery to change his appearance, hoping to remain with his Caucasian fiancee and to escape the internment camps. Picked up by the police on a street corner, Korematsu offered himself as a test case to the American Civil Liberties Union in San Francisco and demanded on behalf of all Japanese Americans "a fair trial in order that they may defend their loyalty at court." But the federal judge who presided at Korematsu's trial for violation of the exclusion order ignored the prosecutor's concession that he was loyal. After pronouncing Korematsu guilty, the judge imposed a five-year probationary sentence and imprisonment in an internment camp.

All three of these criminal convictions reached the Supreme Court early in 1943, passed on by the Court of Appeals in San Francisco without decision. Each of the criminal defendants based his appeal on claims that the "due process" clause of the Fifth Amendment

Fred Korematsu. *Courtesy Mouchette Films.*

Gordon Hirabayashi. *Courtesy Mouchette Films.*

Minoru Yasui. *Courtesy Mouchette Films.*

Lt. Gen. John L. DeWitt receives second Oak Leaf Cluster. Library of Congress.

prohibited discrimination founded solely on racial factors. Because the right of Fred Korematsu to appeal his probationary sentence remained unclear, the Supreme Court remanded his case to the lower appellate court and deferred decision on the lawfulness of the exclusion orders. Lawyers for Gordon Hirabayashi and Min Yasui focused their arguments before the Supreme Court on claims that racial antagonism—and not military necessity—had motivated General DeWitt. They cited DeWitt's statement to a congressional panel that "a Jap's a Jap" and the government's failure to present evidence of espionage and sabotage as arguments against the convictions.

Responding to these arguments on behalf of the government, Solicitor General Charles Fahy defended DeWitt's orders as reasonable responses to the "serious threat" of Japanese attack on the West Coast. Fahy also warned the Court that the Japanese American population included "a number of persons who might assist the enemy" in case of attack or invasion. The Supreme Court adopted Fahy's argument in its unanimous opinion in the Hirabayashi case, issued in June 1943. The Court also sustained Yasui's conviction without dissent, although it found flaws in the trial judge's opinion and sent the case back for resentencing.

Writing for the Court in *Hirabayashi*, Chief Justice Harlan Fiske Stone admitted that legal distinctions "between citizens soley because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." Stone had proclaimed in a 1938 decision the proposition that racial discriminations were presumptively unconstitutional and required "more searching" judicial scrutiny than ordinary laws. But the Chief Justice held in *Hirabayashi* that the government might in wartime "place citizens of one ancestry in a different category from others." The relevant factors, Stone wrote, were those that might hinder the assimilation of Japanese Americans "as an integral part of the white population" and thus make them "a greater source of danger than those of a different ancestry." Along with those tainted assumptions, Fahy's undocumented claims that there were "disloyal members" of the Japanese American population who could not be "precisely and quickly" identified persuaded the Supreme Court to uphold DeWitt's curfew order.

The Supreme Court consciously evaded decision in *Hirabayashi* on the exclusion orders and the legality of continued detention of Japanese Americans. The appeal of Fred Korematsu, which returned to the Court in late 1944, raised the first issue, while the case of Mitsuye Endo posed the second question. Unlike the three criminal defendants, Endo was a young woman who first reported for internment and then filed a challenge to her detention through a habeas corpus petition. The denial of her petition for release by lower courts came before the Supreme Court at the same time as the *Korematsu* case. Between them, these two cases confronted the Justices with the most troubling aspects of the internment program, exclusion and temporary detention in *Korematsu* and indefinite detention in *Endo*.

Solicitor General Fahy returned to the Supreme Court in October 1944 to argue for the government in the second pair of internment cases. He was prepared for defeat in the *Endo* case, since he conceded that Congress had not authorized the indefinite detention of admit-

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tedly loyal citizens. Along with most federal officials, Fahy was willing at this time—with an Allied victory over the Axis within sight—to allow the Court to open the internment camps. But Fahy also supported the argument that General DeWitt was justified in ordering Fred Korematsu and other Japanese Americans to undergo a temporary period of detention while their loyalty was investigated. Fahy considered this issue as a matter of principle, since he strongly believed in expanded military powers during wartime.

Korematsu's lawyers based their attack on his conviction on the claim that the only alternative to "remaining in" his home town, the legal charge against him, was temporary detention in an assembly center. Since the record showed that virtually all the Japanese Americans who reported to assembly centers were later shipped to internment camps, Korematsu's lawyers argued strenuously that compliance with the exclusion order would have subjected him to indefinite detention. Fahy confronted an agonizing dilemma in countering this argument. Justice Department lawyers who dug into the facts of the internment program had presented Fahy with powerful evidence that Korematsu could not have escaped transfer to an internment camp. Over their heated protest, Fahy ignored this evidence and assured the Court that Korematsu had no basis for claiming that "he would ever have found himself in a relocation center" if he had obeyed the exclusion order.

Another issue in the *Korematsu* case raised doubts about the claims of "military necessity" on which General DeWitt's exclusion orders rested. DeWitt had submitted an official report to Secretary of War Stimson that made explicit charges of espionage against Japanese Americans to support the orders. Two of the Justice Department lawyers assigned to prepare the Supreme Court brief in *Korematsu* had become suspicious about DeWitt's charges. These young lawyers, Edward Ennis and John Burling, convinced Attorney General Biddle to order an investigation of the espionage charges by the FBI and other intelligence agencies. Reports from these agencies convinced Ennis and Burling that DeWitt had included "lies" and "intentional falsehoods" in his report.

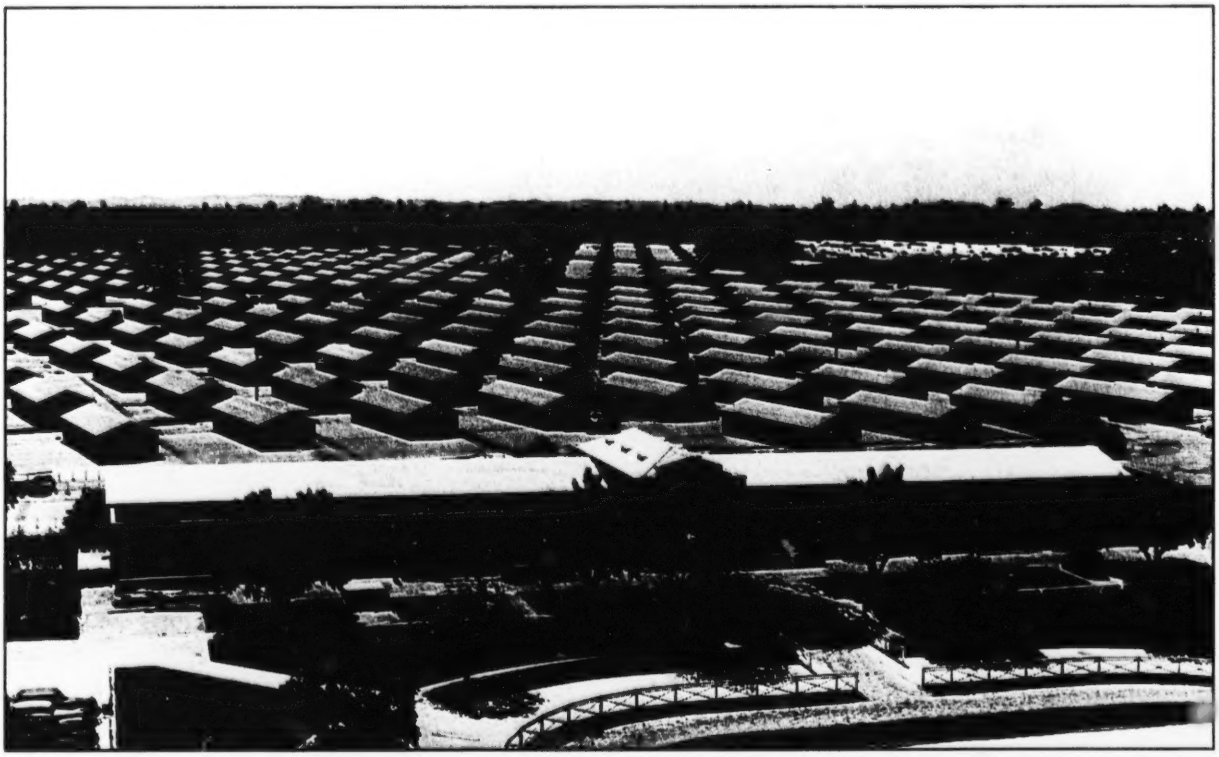
A Crucial Footnote

Appalled by evidence of DeWitt's deliberate fabrications, Ennis and Burling drafted a crucial footnote in their brief that alerted the Court to the "contrariety of evidence" on the Army's espionage charges. This footnote stated that the Justice Department had evidence that disputed these charges and was intended to wave a red flag in front of the Court on the issue of DeWitt's veracity. Before the brief reached the Court, however, Assistant Secretary of War McCloy prevailed on Fahy to dilute the wording and to remove any hint that the DeWitt report had lied about the espionage charges. When they argued to the Supreme Court, Korematsu's lawyers stressed the lack of evidence in the public record to support DeWitt's charges and suggested that the revised footnote constituted a confession by the government on this issue.

Stung by suggestions that he did not stand behind "the truth of every recitation" in the disputed report of General DeWitt, Fahy assured the Court that "there is not a single line, a single word, or a single syllable in that report" which cast any doubt on the "military necessity" of DeWitt's exclusion orders. Fahy responded to critical questions from the bench about the factual basis of DeWitt's report with an assurance that it constituted "a complete justification and explanation of the reasons which led to his judgment." Although the Solicitor General had been warned by Ennis and Burling that reliance on the DeWitt report would compromise the government's integrity, Fahy told the Court that he stood "four square and indivisible in support of this conviction."

When the justices returned to their conference room to discuss the *Korematsu* case behind closed doors, the unanimity of the previous year turned to discord. Four members of the Court voted to reverse Korematsu's conviction. Justice Wiley Rutledge, the junior member and the last to vote at the conference, expressed his "anguish" over the case. "Nothing but necessity would justify it because of Hirabayashi and so I vote to affirm," Rutledge told his colleagues with resignation in his voice. Fahy's unbending defense of General DeWitt's "military necessity" had swayed the deciding vote on the Supreme Court.

Before the Court announced its opinion in *Korematsu*, Justice William O. Douglas shifted his vote to the majority in order to placate Hugo Black, who wrote the Court's opinion. Black first deferred to the principle that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and are subject to "the most rigid scrutiny" by the Court. Despite this shifting of the burden of proof to the government, Black echoed Fahy in concluding that "evidence of disloyalty" among the Japanese Americans overcame the concession that Fred Korematsu was a loyal American citizen who



Santa Anita reception center, Los Angeles, CA, April 1942. Library of Congress.

posed no threat of espionage or sabotage. This concept of racial guilt prompted Justice Frank Murphy, the most vehement of the three dissenters, to blast his colleagues for approving "this legalization of racism." Another dissenter, Justice Robert Jackson, noted "the sharp controversy as to the credibility of the DeWitt report." With no "real evidence before it," Jackson complained, the Court had "no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable."

The Court's bitter division over the *Korematsu* case did not extend to the *Endo* case. Justice Douglas wrote for a unanimous Court in granting the habeas corpus petition; advance word of the decision prompted the War Department to announce that Japanese Americans cleared as "loyal" could leave the internment camps in January 1945. But the *Endo* decision was hardly a victory, since the Court evaded the constitutional question of detention without charge and simply held that Congress had failed to sanction the indefinite detention program. The proper legislative action, Douglas hinted, would have permitted the internment to continue.

Vindication

The three young men whose challenges to internment were rebuffed by the Supreme Court lived for four decades with criminal records and neared retirement before the dramatic revival of their cases. The judicial principle of finality, holding that a Supreme Court decision brings an end to every case, would normally bar any later review. But the release in 1981 of Justice Department files in these cases, under the Freedom of Information Act, allowed the defendants to ask the courts for vindication.

With the help of third-generation Japanese American lawyers, whose parents had endured the wartime internment camps, the three original challengers filed similar suits in 1983 in the fedeal courts in San Francisco, Portland, and Seattle. These suits rested on an obscure provision of federal law that allows criminal defendants who have completed their sentences to argue that acts of "prosecutorial misconduct" had violated their constitutional right to due process of law. The acts of misconduct charged in the suits came from the recently opened Justice Department files, which revealed that government lawyers had accused Solicitor General Fahy of "suppression of evidence" in the *Hirabayashi* and *Yasui* cases and with failing to alert the Supreme Court to the "lies" in the internment report of General DeWitt.

The first suit to be heard was that filed by Fred Korematsu in San Francisco. Government lawyers agreed to the vacation of his conviction and labeled the wartime internment as an "unfortunate episode" in our history. They refused, however, to admit to any claims of prosecutorial misconduct and asked Federal Judge Marilyn Hall Patel of the Federal District Court to dismiss the suit. Judge Patel listened to the legal arguments by the lawyers on both sides at a hearing in October 1983. After the lawyers concluded, she asked Fred Korematsu to address the court. Speaking in a quiet but firm voice, before an audience filled with former residents of the internment camps, Korematsu recalled the time in 1942 he

If the Constitution cannot restrain the excesses of wartime passions, we cannot protect any group of citizens from hostility and racial prejudice.

had been led in handcuffs and at gunpoint into the courtroom. "I knew I was an American, and I knew I hadn't done anything wrong," he told the hushed audience.

Many in the courtroom shed joyful tears when Judge Patel told Fred Korematsu that she would vacate his conviction and erase his criminal record. In a later written opinion, the judge dismissed the government's response as "tantamount to a confession of error" and went on to find "substantial support in the record that the government deliberately omitted relevant information" before the Supreme Court. Citing the disputed footnote in the original *Korematsu* brief, Judge Patel upheld the misconduct charges and wrote that "the judicial process is seriously impaired when the government's law enforcement officers violate their ethical obligations to the court."

Stung by this judicial rebuke, government lawyers changed course in defending the two remaining suits. Federal District Court Judge Robert Belloni gave the government a sympathetic hearing in the suit filed by Min Yasui in Portland, Oregon. Granting the government's motion to vacate the conviction, Judge Belloni ruled that Yasui had no right to judicial review of the misconduct charges in his suit. After this ruling in February 1984, Yasui asked the Ninth Circuit Court of Appeals to reverse Judge Belloni and return his suit for a full hearing. As of October 1986, Yasui was currently awaiting a decision on his appeal.

The most dramatic, and potentially the most significant, hearing in the internment suits took place in Seattle in June 1985. Federal District Court Judge Donald Voorhees listened for two weeks to witnesses on both sides of the suit filed by Gordon Hirabayashi. Voorhees scheduled the full-scale hearing over the government's objections, ruling that Hirabayashi had the right to seek "vindication of his honor" through a review of his misconduct charges. In an unprecedented turn-around, Hirabayashi's lawyers called as their chief witness Edward Ennis, who had defended his conviction four decades earlier. Ennis told Judge Voorhees that crucial evidence had been withheld from the Supreme Court in 1943 by Solicitor General Fahy, and that War Department officials had altered a key military report in order to mislead the Court.

The government's lawyers in the Seattle hearing tried to convince Judge Voorhees that the misconduct charges Ennis had substantiated were "ridiculous." To counter these charges, they called witnesses who claimed that decoded Japanese wartime cables showed evidence of a "massive espionage network" on the West Coast that included Americans of Japanese ancestry. Fears of widespread espionage, government lawyers told Judge Voorhees, justified the internment program. The need for wartime secrecy, they added, required that evidence of espionage be withheld from the Supreme Court. A former military officer called by the government echoed Gen. DeWitt's "a Jap's a Jap" statement in testifying that Japanese Americans were the most likely "friends of the enemy" on the West Coast. Under cross-examination by Hirabayashi's lawyers, none of the government's witnesses could identify a single instance of wartime espionage or sabotage by Japanese Americans.

After both sides submitted final arguments in written form, Judge Voorhees handed down his decision on February 10, 1986. The judge struck down Hirabayashi's conviction for refusing to obey the military exclusion order that required him to report for detention in a barbed-wire compound, an issue that Supreme Court had evaded in its 1943 decision. Judge Voorhees based his 35-page opinion on the initial version of Gen. DeWitt's official evacuation report, which War Department officials had withheld from Justice Department lawyers and the Supreme Court in 1943. This version claimed that lack of time to conduct individual loyalty hearings had not been a factor in ordering mass evacuation, since DeWitt considered it "impossible" to separate the loyal and disloyal among the Japanese Americans. "There isn't such a thing as a loyal Japanese," DeWitt had stated.

Keeping this report from the Supreme Court and Hirabayashi's lawyers, Voorhees concluded, "was an error of the most fundamental character" because it directly contradicted the government's argument that lack of time to conduct loyalty hearings had forced the evacuation. Hirabayashi won a legal victory, and belated vindication, on the most serious charge against him, although Judge Voorhees declined to reverse the curfew conviction, finding the curfew a "relatively mild" burden as opposed to exclusion from one's home. Significantly, Voorhees completely ignored the government's espionage charges in his opinion, indicating he considered all the testimony on this issue irrelevant to the misconduct charges raised by Hirabayashi.

There is an obvious drama to the outcome of the wartime internment cases. First of all, three men who lived with criminal records for more than four decades have finally won their vindication. Second, judicial review of the Korematsu and

Examining baggage of Japanese as they arrived at Santa Anita reception center, Los Angeles, CA, April 1942. Library of Congress.

Hirabayashi cases has exposed the racist underpinnings of the government's "military necessity" claims and has cleared all the Japanese Americans who endured the internment as suspects in a spy plot that rested only on suspicion. Finally, the recent judicial decisions have undermined the value of the wartime Supreme Court opinions as legal precedent. "Only two of this Court's modern cases have held the use of racial classifications to be constitutional," Justice Lewis Powell wrote in a 1980 decision that cited the *Korematsu* and *Hirabayashi* opinions.

What lessons can we learn from this account of these historic cases? Judge Patel stated one lesson in her opinion, a moral that is easy to grasp but hard to implement: the wartime conviction of Fred Korematsu "stands as a caution that in times of international hostility and antagonism our institutions, legislative, executive and judicial, must be prepared to protect all citizens from the petty fears and prejudices that are so easily aroused." Japanese Americans became the victims of fear and prejudice in the aftermath of Pearl Harbor, but the members of any racial or ethnic group can be held hostage to the actions of their country of ancestry if we do not guard against prejudice.

Another obvious lesson is that any form of racial discrimination must be subject, as Justice Stone argued in 1938, to the most stringent test of judicial scrutiny. The courts had failed to apply this test in the internment cases. Over the protest that Gen. DeWitt's espionage charges had never been subjected to cross-examination, the Supreme Court adopted the "military necessity" claims that Solicitor General Fahy echoed to the justices. Forty years later, when the government raised the same charges at the hearing before Judge Voorhees, they were demolished by cross-examination and judicial scrutiny.

Finally, we have learned from the recent hearings in the internment cases a truth that goes back more than a century to the Civil War cases. In denying to the military the power to punish civilians, the Supreme Court in 1867 denounced the "pernicious doctrine" that America has one Constitution for peacetime and another in wartime. More than a century has passed since the Court proclaimed this profound truth. If the Constitution cannot restrain the excesses of wartime passions, we cannot protect any group of citizens from hostility and racial prejudice. If the nation had heeded this lesson four decades ago, we might have avoided the "grave injustice" that we imposed on Americans of Japanese ancestry.

Suggested Additional Reading:

Peter Irons, *Justice at War: The Story of the Japanese American Internment Cases* (Oxford University Press, 1983).

Peter Irons, *Justice Delayed* (Wesleyan University Press, 1986).

Jacobus tenBroek, Edward N. Barnhart, and Floyd W. Matson, *Prejudice, War and the Constitution: Causes and Consequences of the Evacuation of the Japanese Americans in World War II* (University of California Press, 1954).

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DOCUMENTS

Thomas Jefferson: Writings on the Constitution

by CHARLES T. CULLEN

The United States Constitution occupied Thomas Jefferson's thoughts periodically throughout his lifetime. His fundamental attitude toward democratic government had found expression early and most eloquently in the Declaration of Independence, and his commitment to democracy and republican government never waned. Throughout the birth of our nation, a unique assemblage of talented Americans discussed the best form of unified government with a level of intense interest never again seen in this country, except perhaps during the Civil War. Even then, the deep differences in attitudes toward slavery made creative and peaceful political solutions impossible. The contrast is stark next to Jefferson's boastful claim about America in 1787:

> *Happy for us, that when we find our constitutions defective and insufficient to secure the happiness of our people, we can assemble with all the coolness of philosophers and set it to rights, while every other nation on earth must have recourse to arms to amend or to restore their constitutions.*

(Julian P. Boyd et al., eds., *Papers of Thomas Jefferson*, vol. 12, p. 113)

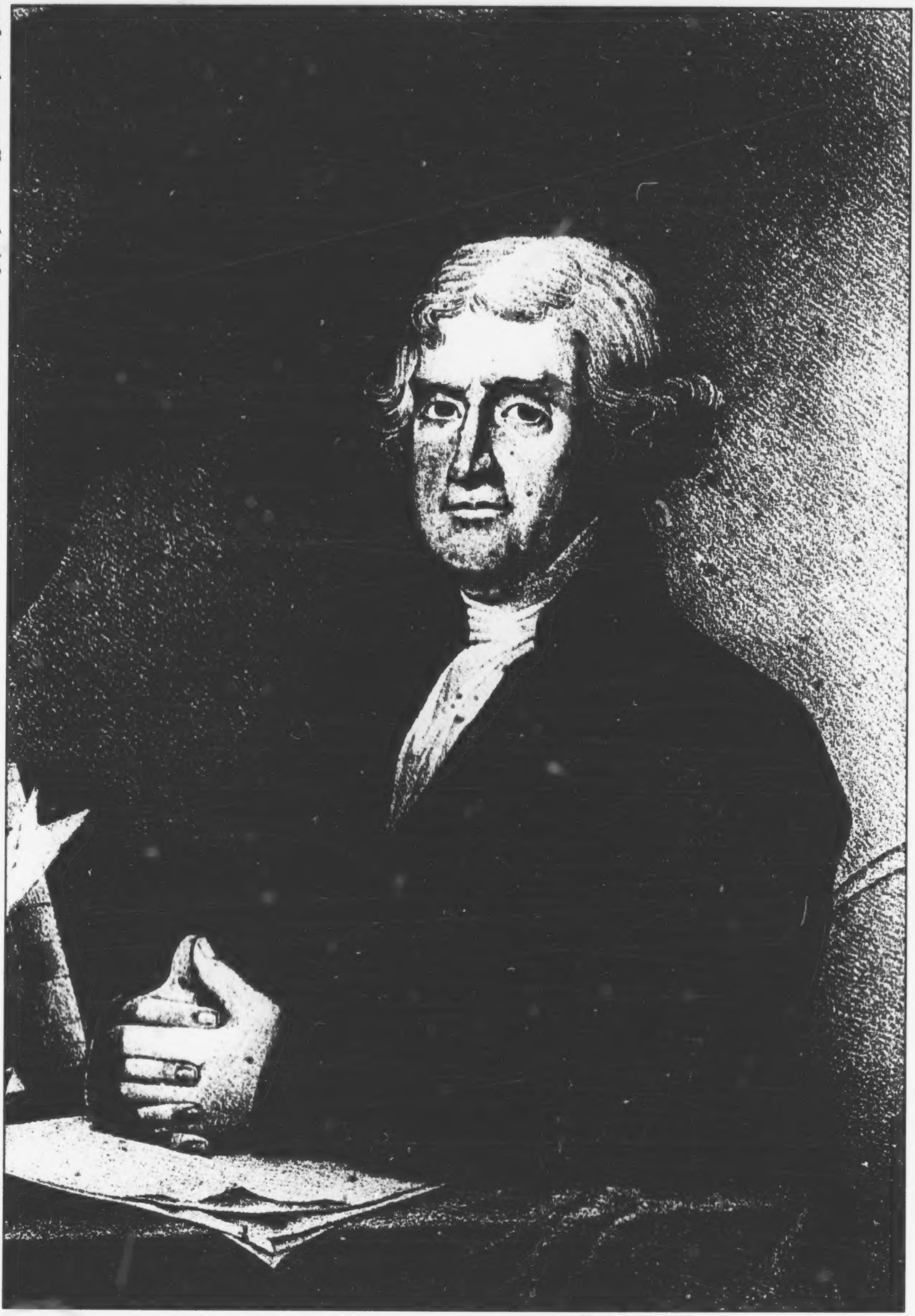
From his position as the United States representative to France, so Jefferson viewed the deliberations back home. Of these, he had great expectations which he shared with his fellow Virginian James Madison, urging him to argue for a central government with sufficient power to deal effectively with national issues. Jefferson had proposed a method of creating an executive branch of government in 1776 while he served in the Continental Congress, "so that Congress itself should meddle only with what should be legislative." He became convinced that the Confederation could be fixed by creating three separate branches of government, and that "to make us one nation as to foreign concerns, and keep us distinct in Domestic ones, gives the outline of the proper division of powers between the general and [state] governments." This judgment led him toward a broad view of what the proposed 1787 convention should do, and he formulated in the process a rather advanced philosophy of judicial review as a counterpoise to Madison's suggestion that Congress be given a veto power over state laws. In fact, Jefferson argued that even the Confederation Congress had inherent powers to govern in areas not expressly provided by the Articles of Confederation. His broad, and mostly centralist, position became settled in his mind by late summer in 1787, the time when the convention was locked in heated debate. Writing to Edward Carrington, a fellow Virginian, on August 4, he remarked:

> *With all the imperfections of our present government, it is without comparison the best existing or that ever did exist. Its greatest defect is the imperfect manner in which matters of commerce have been provided for. It has been so often said, as to be generally believed, that Congress have no power by the confederation to enforce any thing, e.g. contributions of money. It was not necessary to give them that power expressly; they have it by the law of nature. When two nations make a compact, there results to each a power of compelling the other to execute it. Compulsion was never so easy as in our case, where a single frigate would soon levy on the commerce of any state the deficiency of its contributions; nor more safe than in the hands of Congress which has always shewn that it would wait, as it ought to do, to the last extremities before it would execute any of its powers which are disagreeable.*

(*Papers of Thomas Jefferson*, vol. 11, p. 678–9)

In Jefferson's mind, viewed from his perspective in royal France, a division of powers would serve the new nation well. It was the difficulty of administering every detail of government that caused the Confederation Congress to lose sight of its duties and responsibilities. Jefferson favored creation of some sort of executive office to correct this problem.

> *I think it very material to separate in the hands of Congress the Executive and Legislative powers, as the Judiciary already are in some degrees. This I hope will be done. The want of it has been the source of more evil than we have ever experienced from any other cause. Nothing is so embarrassing nor so mischievous in a great assembly as the details of execution. The smallest trifle of that kind occupies as long as the most important act of legislation, and takes place of every thing else. Let any man recollect, or look over the*



Thomas Jefferson, lithograph by D. W. Kellogg & Co. Library of Congress.

> *files of Congress, he will observe the most important propositions hanging over from week to week and month to month, till the occasions have past them, and the thing never done. I have ever viewed the executive details as the greatest cause of evil to us, because they in fact place us as if we had no federal head, by diverting the attention of that head from great to small objects; and should this division of power not be recommended by the Convention, it is my opinion Congress should make it itself by establishing an Executive committee.*
>
> (***Papers of Thomas Jefferson***, **vol. 11, p. 679)**

When he learned of the proposed new constitution, he expressed general approval of the plan, and he especially liked the parts that introduced more direct democratic government. Features providing for the peaceful continuation of government without continual recurrence to the states, the separation of powers, and creation of an executive branch with veto power promised to improve the nation's government. He described his reaction in a long letter to Madison:

> *I like the power given the Legislature to levy taxes; and for that reason solely approve of the greater house being chosen by the people directly. For tho' I think a house chosen by them will be very illy qualified to legislate for the Union, for foreign nations &c. yet this evil does not weigh against the good of preserving inviolate the fundamental principle that the people are not to be taxed but by representatives chosen immediately by themselves. I am captivated by the compromise of the opposite claims of the great and little states, of the latter to equal, and the former to proportional influence. I am much pleased too with the substitution of the method of voting by persons, instead of that of voting by states: and I like the negative given to the Executive with a third of either house, though I should have liked it better had the Judiciary been associated for that purpose, or invested with a similar and separate power.*
>
> (***The Papers of Thomas Jefferson***, **vol. 12, p. 439–40)**

Jefferson continued with an outline of what he did not like, listing first the omission of a bill of rights that would provide "clearly and without the aid of sophisms" for such fundamental freedoms as religion and press, trial by jury, and protection from standing armies and monopolies. "A bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference," he added, and on this particular point he never wavered. At first, Jefferson felt so strongly about the need for amendments to protect fundamental rights that he expressed in no uncertain terms his hope that nine states would approve the constitution so that it would be ratified, but that the last four might withhold approval until a bill of rights was added. This would prevent a clear and firm union from coming into being until such a bill was added to the Constitution. Ironically, Jefferson's impractical design for ratification, expressed in a letter to a fellow Virginian, was used by Patrick Henry in the Virginia convention in an attempt to win votes for those opposed to the constitution on other grounds, a ploy strongly challenged by James Madison. Jefferson continued to press for a bill of rights, and he had the pleasure of watching it move rapidly toward adoption when he was Secretary of State in the first administration.

The only other part of the proposed constitution that greatly troubled Jefferson was the re-eligibility of the president. As he explained to George Washington, whom he knew would be elected the first president, Jefferson feared that the office would be given several times by election, then made an office for life, then become hereditary. He wrote:

> *I was much an enemy to monarchy before I came to Europe. I am ten thousand times more so since I have seen what they are. There is scarcely an evil known in these countries which may not be traced to their king as its source, nor a good which is not derived from the small fibres of republicanism existing among them. I can further say with safety there is not a crowned head in Europe whose talents or merit would enable him to be elected a vestryman by the people of any parish in America. However I shall hope that before there is danger of this change taking place in the office of President, the good sense and free spirit of our countrymen*

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> *will make the changes necessary to prevent it. Under this hope I look forward to the general adoption of the new constitution with anxiety, as necessary for us under our present circumstances.*
>
> **(*Papers of Thomas Jefferson*, vol. 13, p. 128)**

But because of the universal popularity of George Washington, few contemporaries shared Jefferson's apprehensions, and his unceasing belief that the re-election of the president should be limited did not become part of the constitution until 1951 when the Twenty-second Amendment was ratified.

By the spring of 1788, Jefferson had reconciled himself to improving the imperfect Constitution over the coming years rather than during the process of ratification. As he explained to a Frenchman:

> *I see in this instrument a great deal of good. The consolidation of our government, a just representation, an administration of some permanence and other features of great value, will be gained by it. There are indeed some faults which revolted me a good deal in the first moment: but we must be contented to travel on towards perfection, step by step. We must be contented with the ground which this constitution will gain for us, and hope that a favourable moment will come for correcting what is amiss in it.*
>
> **(*Papers of Thomas Jefferson*, vol. 13, p. 174)**

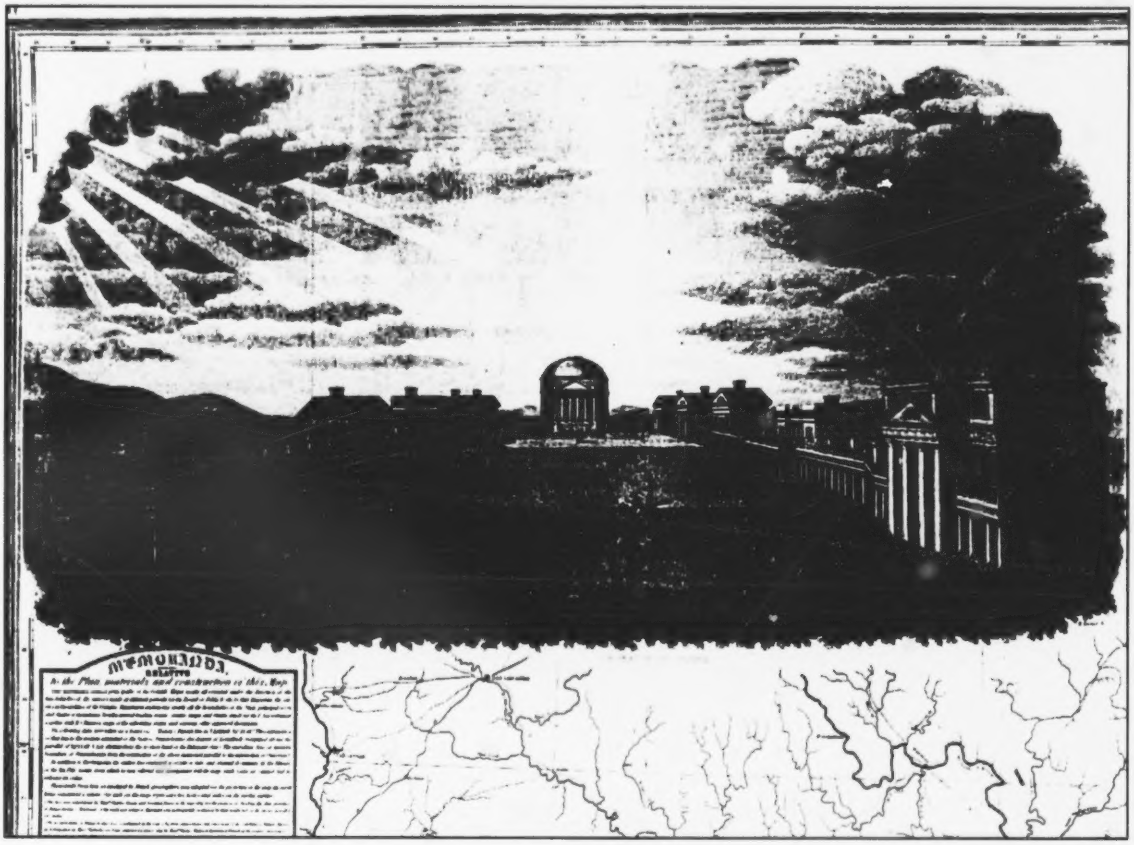
And on the eve of establishing the new government, Jefferson viewed the future optimistically:

> *Our new constitution, of which you speak also, has succeeded beyond what I apprehended it would have done. I did not at first believe that 11 states out of 13 would have consented to a plan consolidating them so much into one. A change in their dispositions which had taken place since I left them, had rendered this consolidation necessary, that is to say, had called for a federal government which could walk upon its own legs, without leaning for support on the state legislatures. A sense of this necessity, and a submission to it, is to me a new and consolatory proof that wherever the people are well informed they can be trusted with their own government; that whenever things get so far wrong as to attract their notice, they may be relied on to set them to rights.*
>
> **(*Papers of Thomas Jefferson*, vol. 14, p. 420)**

Jefferson's philosophy remained as he expressed it to George Mason, a Virginia delegate to the Constitutional Convention who refused to sign the document, not long after becoming Secretary of State: "In general I think it necessary to give as well as take in a government like ours." He was to have many chances to practice that philosophy as the new government moved forward and he found himself at odds with the strong Secretary of the Treasury, Alexander Hamilton, whose view of republicanism differed considerably from his own. Their debate and opposing philosophies over the creation of the national bank are classic statements of strict and loose interpretations of federal powers as outlined in the Constitution. Jefferson argued that the Constitution said nothing about a bank, and that the government could not therefore create one. But his position was not so simple on the matter of constitutional interpretation. Jefferson above all other founding fathers was comfortable with change throughout his long life, and to isolate his opinions in a few statements made during the first decade of the nation's history leads to a contorted understanding of his philosophy in general.

Some of the strict constructionist views he expressed during the 1790s stemmed from what Jefferson thought to be monarchists' attempts to centralize power in the executive branch and in the Senate, steps he believed to be confirmed by adoption of the Alien and Sedition Acts. Enforcement of those acts threatened the liberties of all Americans by restricting speech and freedom of expression, and Jefferson had denounced them most strongly in his Kentucky Resolution of 1798. Concerned that the threat of war with European powers was being used by the Federalists to concentrate power in a few hands, Jefferson wrote a remarkable statement of his political principles in which he stated—perhaps overstated in some instances—his fundamental commitment to the Constitution and republican government. In a 1799 letter to Elbridge Gerry, another delegate to the Constitutional Convention who refused to sign, he said:

> *I . . . wish an inviolable preservation of our present federal constitution, according to the true sense in which it was adopted by the States, that in which it was advocated by its friends, and not that*

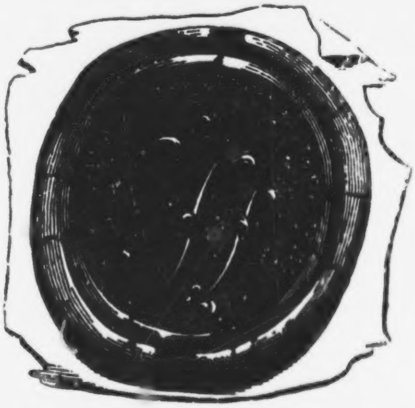


The University of Virginia, engraving by Benjamin Tanner, 1826. Library of Congress.

> *which its enemies apprehended, who therefore became its enemies; and I am opposed to the monarchising its features by the forms of its administration, with a view to conciliate a first transition to a President and Senate for life, and from that to a hereditary tenure of these offices, and thus to worm out the elective principle. I am for preserving to the States the powers not yielded by them to the Union, and to the legislature of the Union its constitutional share in the division of powers; and I am not for transferring all the powers of the States to the general government, and all those of that government to the Executive branch.*
>
> **(Paul Leicester Ford, *The Writings of Thomas Jefferson* (1896), VII, 327)**

He feared a trend toward the abuses of power as he outlined them in this letter, and the climate of partisan strife during the late 1790s discouraged him. Typically, Jefferson turned toward philosophical principles that he had advocated since the birth of the nation, and he applied them to acts of government with which he had disapproved since adoption of the Constitution. He had opposed a standing army all along and detested Hamilton's use of a national debt to strengthen federal authority. In the months after debate over the Kentucky and Virginia Resolutions, Jefferson became expansive in his expression of opinion regarding the Constitution as he continued his letter to Gerry:

> *I am for a government rigorously frugal and simple, applying all the possible savings of the public revenue to the discharge of the national debt; and not for a multiplication of officers and salaries merely to make partisans, and for increasing, by every device, the public debt, on the principle of its being a public blessing. I am for relying, for internal defence, on our militia solely, till actual invasion, and for such a naval force only as may protect our coasts and harbors from such depredations as we have experienced; and not for a standing army in time of peace, which may overawe the public sentiment; nor for a navy, which, by its own expenses and the eternal wars in which it will implicate us, will grind us with public burthens, and sink us under them. I am for free commerce with all nations; political connection with none; and little or no diplomatic establishment. And I am not for linking ourselves by new treaties with the quarrels of Europe; entering that field of slaughter to preserve their balance, or joining in the confederacy of*



Jefferson's seal, with the inscription, "Rebellion to tyrants is obedience to God." Library of Congress.

> *kings to war against the principles of liberty. I am for freedom of religion, and against maneuvres to bring about a legal ascendancy of one sect over another: for freedom of the press, and against all violations of the constitution to silence by force and not by reason the complaints or criticisms, just or unjust, of our citizens against the conduct of their agents. And I am for encouraging the progress of science in all its branches; and not for raising a hue and cry against the sacred name of philosophy; for awing the human mind by stories of raw-head and bloody bones to a distrust of its own vision, and to repose implicitly on that of others; to go backwards instead of forwards to look for improvement; to believe that government, religion, morality, and every other science were in the highest perfection in ages of the darkest ignorance, and that nothing can ever be devised more perfect than what was established by our forefathers.*
>
> **(Ford, *The Writings of Thomas Jefferson*, VII, 327–9)**

This statement was written during a time when Jefferson feared for the survival of the union, but in it one sees clearly his belief that it must be preserved by recourse to the power of the people scattered over the land, in whom he had consummate faith. Jefferson was prepared to repose fully his faith in the people, contrasting them with the commercial, monied interests collected into the cities of the eastern seaboard. By 1820 he believed those latter groups had finally abandoned the hope of producing a monarchy in this country, but they had turned their energies toward consolidating all power in the national government. This he found disturbing.

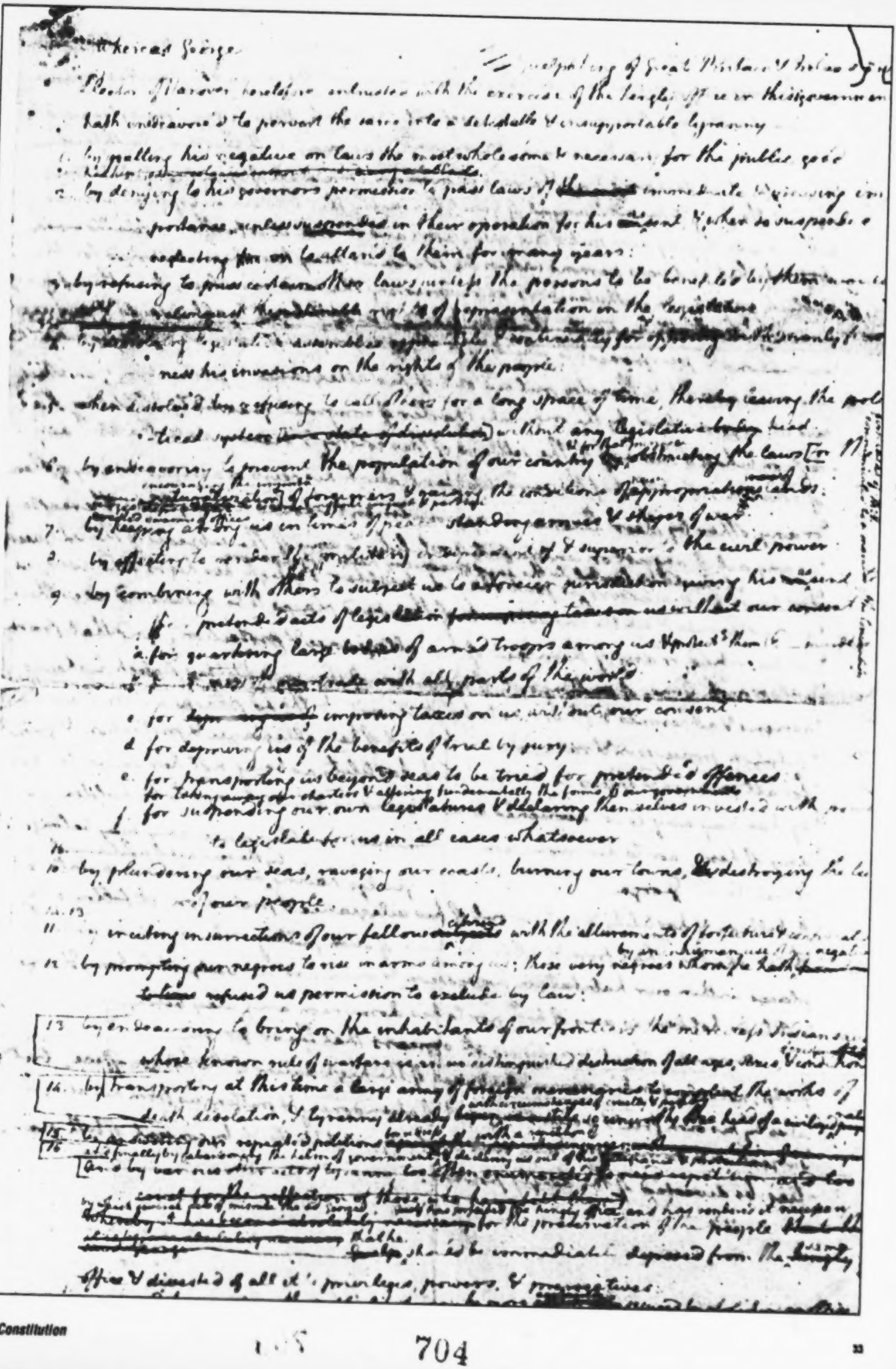
While he continued to express his belief in the separation of powers and the system of checks and balances, he refused to appeal to the public when some thought these principles were under attack. As he explained to Spencer Roane, A Virginia judge, in 1819:

> *I withdraw from all contests of opinion, and resign everything cheerfully to the generation now in place. They are wiser than we were, and their successors will be wiser than they, from the progressive advance of science. Tranquillity is the* summum bonum *of age. I wish, therefore, to offend no man's opinion, nor to draw disquieting animadversions on my own. While duty required it, I met opposition with a firm and fearless step. But loving mankind in my individual relations with them, I pray to be permitted to depart in their peace; and like the superannuated soldier,* 'quadragenis stipendiis emeritis,' *to hang my arms on the post.*
>
> **(Ford, *The Writings of Thomas Jefferson*, X, 142–3)**

His faith in improvement found its constitutional home in the amending system adopted as part of the Constitution. He argued that "the real friends of the constitution in its federal form, if they wish it to be immortal, should be attentive, by amendments, to make it keep pace with the advance of the age in science and experience." This process would allow peaceful change and demonstrate how our superior system of government moved forward without the revolution or force that still characterized European governments.

Jefferson believed in a strict construction of the Constitution, to be sure, but his support for the governmental system designed in 1787 was always firm, sustained by his faith in the democratic process. His advocacy of "a little revolution" periodically—perhaps in each generation—must be viewed alongside his dedication to the amending process to bring about peaceful change, and his fear that a second constitutional convention would be unwise. A study of Jefferson's constitutional thought reveals most clearly the characteristic of his great mind often overlooked: his opinion was never fixed in any one position to remain unchanging forever. Moreover, his evolving philosophy throughout his long life was quite positive and optimistic. These are characteristics one should expect in the foremost spokesman for democracy in the modern world, and our constitutional system is stronger because of them.

Charles T. Cullen is president and librarian of the Newberry Library in Chicago; he was until recently editor of *The Papers of Thomas Jefferson*.



Whereas George [illegible] king of Great Britain & Ireland & [illegible]
Elector of Hanover heretofore entrusted with the exercise of the kingly office in this government
hath endeavoured to pervert the same into a detestable & insupportable tyranny
1. by putting his negative on laws the most wholesome & necessary for the public good
~~[illegible]~~
2. by denying to his governors permission to pass laws of ~~[illegible]~~ immediate & pressing importance, unless suspended in their operation for his assent & when so suspended neglecting to attend to them for many years:
3. by refusing to pass certain other laws unless the persons to be benefited by them would relinquish the inestimable right of representation in the legislature
4. by dissolving legislative assemblies repeatedly & continually for opposing with manly firmness his invasions on the rights of the people:
5. when dissolved by refusing to call others for a long space of time, thereby leaving the political system ~~[illegible]~~ without any legislative head:
6. by endeavouring to prevent the population of our country & for that purpose obstructing the laws for [illegible] of foreigners & raising the conditions of new appropriations of lands:
7. by keeping among us in times of peace standing armies & ships of war:
8. by affecting to render the military independent of & superior to the civil power:
9. by combining with others to subject us to a foreign jurisdiction giving his assent to their pretended acts of legislation ~~for imposing taxes on us without our consent~~
a. for quartering large bodies of armed troops among us & protecting them [illegible]
b. for cutting off our trade with all parts of the world
c. for ~~[illegible]~~ imposing taxes on us without our consent
d. for depriving us of the benefits of trial by jury
e. for transporting us beyond seas to be tried for pretended offences
for taking away our charters & altering fundamentally the forms of our governments
f. for suspending our own legislatures & declaring themselves invested with power to legislate for us in all cases whatsoever
10. by plundering our seas, ravaging our coasts, burning our towns, & destroying the lives of our people:
11. by inciting insurrections of our fellow citizens with the allurements of forfeiture & confiscation:
12. by prompting our negroes to rise in arms among us; those very negroes whom by an inhuman use of his negative he hath ~~from time to time~~ refused us permission to exclude by law:
13. by endeavouring to bring on the inhabitants of our frontiers the merciless Indian savages whose known rule of warfare is an undistinguished destruction of all ages, sexes, & conditions
14. by transporting at this time a large army of foreign mercenaries to complete the works of death, desolation, & tyranny already begun with circumstances of cruelty & perfidy so unworthy the head of a civilized nation:
15. by answering our repeated petitions for redress with a repetition of injuries:
16. and finally by abandoning the helm of government & declaring us out of his allegiance & protection:
[illegible]
by which several acts of misrule the said George [illegible] has forfeited the kingly office and has rendered it necessary for the preservation of the people that he should be immediately deposed from the kingly office & divested of all its privileges, powers, & prerogatives:

Jefferson's first draft of the Virginia Constitution (page one), June 1776. Library of Congress.

For the Classroom

CONSTITUTIONAL RIGHTS IN A TIME OF CRISIS, 1941 - 1945

Chief Justice Harlan Stone. Library of Congress.

The lesson which follows has been designed for use in the high school classroom, in courses that teach American history and government. It is one of sixty lessons developed by Project '87 with a grant from the National Endowment for the Humanities. This lesson may be photocopied for classroom application with the attribution noted on page 1.

The complete book of lessons, called Lessons on the Constitution: Supplements to High School Courses in American History, Government and Civics, *was developed for Project '87 by John J. Patrick, Department of Curriculum and Instruction, Indiana University, and Richard C. Remy, Mershon Center, Ohio State University. Paul Finkelman, History Department, State University of New York, Binghamton, served as consulting historical editor. The book may be ordered from the Social Science Education Consortium, 855 Broadway, Boulder, CO 80302. Single copies are $19.50 prepaid.*

On December 7, 1941, Japanese aircraft attacked Pearl Harbor in Hawaii. The surprised defenders suffered a crushing defeat. The Japanese disabled or destroyed five American battleships and three cruisers, killing 2,355 members of the American armed services. The attack left another 1,178 military personnel wounded.

President Roosevelt denounced the "sneak attack" and Congress declared war on Japan. A few days later Germany and Italy declared war on the United States. Thus, Americans entered World War II.

Within three months, the Japanese overran most of southeast Asia and the American territories of Guam and the Philippine Islands. Americans feared a Japanese invasion of Hawaii, or even of California.

General J. L. DeWitt, responsible for defending the Pacific Coast against enemy attack, feared that the 112,000 persons of Japanese ancestry who lived in the West Coast states might be a threat to national security. General DeWitt recommended that these people be sent away from the region.

Suspension of Constitutional Rights

More than 75,000 American citizens of Japanese ancestry lived on the West Coast of the United States. With a few exceptions, all of these citizens had been born and raised in the United States. The overwhelming majority of them had never seen Japan. Virtually all of them spoke English. These Japanese Americans considered themselves loyal American citizens.

Over thirty-five thousand Japanese immigrants also lived on the West Coast. These men and women had come to the United States before 1924. Although legally citizens of Japan, most considered themselves loyal to their adopted country.

In the weeks after the bombing at Pearl Harbor, some people pointed out that these older Japanese were not United States citizens, but Japanese citizens, even though they had lived in the U.S. for many years. However, few Americans understood that at the time it was illegal for Japanese nationals to become naturalized citizens. In 1922, in the case of *Ozawa* v. *United States,* the Supreme Court held that certain Asians (such as Japanese, Chinese, and Koreans) could not become naturalized citizens. Thus, although many of the Japanese immigrants living in the United States had wanted to become citizens, the Court had denied them that right. The government only made exceptions for Japanese immigrants who had fought in World War I. Further examples of discrimination against the Japanese came in 1924, when the Congress prohibited all Japanese immigration to the United States.

Thus, the government did not allow Japanese immigrants to become citizens and prohibited their relatives from joining them in the United States. Nevertheless, these Japanese were loyal to their adopted country. Born in the United States, the children of these immigrants had, of course, become citizens at birth. They also considered themselves patriotic and loyal. Yet many American politicians and leaders thought otherwise. Secretary of War Henry L. Stimson urged President Roosevelt to take action to remove all American citizens of Japanese ancestry, as well as all Japanese immigrants, from the West Coast.

On February 19, 1942, The President issued Executive Order #9066 giving authority to military commanders to establish special zones in territory threatened by enemy attack. The order invested the military commanders with power to decide who could come, go, or remain in the special military areas. The President issued this executive order on his own authority, under the Constitution, as commander-in-chief of the nation's armed forces.

On March 2, General DeWitt established Military Areas #1 and #2 in the western part of the United States.

On March 21, Congress passed a law in support of the President's Executive Order and of the subsequent actions of General DeWitt.

On March 24, General DeWitt proclaimed a curfew between the hours of 8:00 p.m. and 6:00 a.m. for all persons of Japanese ancestry living within Military Area #1, which comprised the entire Pacific coastal region.

On May 9, General DeWitt ordered the exclusion from Military Area #1 of all persons of Japanese background. The vast majority of these people were U.S. citizens born on American soil. These people had thoroughly American attitudes, beliefs, and behavior. Most of them would have felt out of place in Japan.

The military sent the Japanese Americans to the relocation centers far from the coastal region. In effect, this action placed more than 75,000 American citizens who had broken no laws in jail without trials. The government did not charge any of these people with crimes.

They could take with them only what they could carry. A government order dated December 8, 1941 froze their bank accounts leaving them without funds. To raise cash, they had to sell any possessions they could. Other Americans and local governments took advantage of their plight, offering to buy possessions and property at low prices that rarely reflected the value of the goods. These Japanese Americans could never regain most possessions and property lost in this way.

Constitutional Issues

Military commanders, acting under authority granted by the President and Congress, had denied more than 75,000 American citizens their constitutional rights of "due process." The Fifth Amendment says, "No person shall be. . .deprived of life, liberty, or property, without due process of law. . . ." Article I, Section 9, of the Constitution grants the privilege of the *writ of habeas corpus*, a written court order issued to inquire whether or not a person is lawfully imprisoned or detained. The writ demands that the persons holding the prisoner either justify his or her detention or release the person.

Had the government taken away the constitutional rights of Japanese Americans? The Supreme Court finally had to rule on the legality of holding thousands of American citizens in detention camps solely because of their ancestry. Would the Court overturn military actions sanctioned by the President and Congress?

Three notable cases involving the constitutional rights of Japanese Americans came before the Supreme Court. They were:

1. **Hirabayashi v. United States** (1943)
2. **Korematsu v. United States** (1944)
3. **Ex parte Endo** (1944)

The Hirabayashi Case

Gordon Hirabayashi was an American citizen of Japanese ancestry. Born in the United States, he had never seen Japan. He had done nothing to suggest disloyalty to the United States.

Background to the Case. Hirabayashi was arrested and convicted for violating General DeWitt's curfew order and for failing to register at a control station in preparation for transportation to a relocation camp. At the time Hirabayashi was studying at the University of Washington. He was a model citizen and well-liked student, active in the local Y.M.C.A. and church organizations. Hirabayashi refused to report to a control center or obey the curfew order because he believed both orders were discriminatory edicts contrary to the very spirit of the United States. He later told a court, "I must maintain the democratic standards for which this nation lives. . . . I am objecting to the principle of this order which denies the rights of human beings, including citizens."

The Decision. The Court unanimously upheld the curfew law for "Japanese Americans" living in Military Area #1. The Court said the President and Congress had used the war powers provided in the Constitution appropriately. The Court also held that the curfew order did not violate the Fifth Amendment.

Speaking for the Court, Chief Justice Harlan F. Stone said discrimination based only upon race was "odious to a free people whose institutions are founded upon the doctrine of equality." However, in this case, Stone said, the need to protect national security in time of war necessitated consideration of race.

The Court only ruled on the legality of the curfew order. It avoided the larger issue of the legality of holding American citizens in detention centers and later in large, barbed-wire enclosures, which the government called "relocation camps."

Hirabayashi eventually spent more than three years in county jails and federal prisons for his refusal to go along with a law that made him a criminal simply because of his ancestry.

The Korematsu Case

Fred Korematsu was born and raised in Oakland, California. He could read and write only English. He had never visited Japan and knew little or nothing about the Japanese way of life.

Background to the Case. In June, 1941, before America's official entry into World War II, Fred Korematsu tried to enlist in the Navy. Although the Navy was actively recruiting men in anticipation of entering the war, the service did not allow Korematsu, an American citizen of Japanese ancestry, to enlist. He then went to work in a shipyard as a welder. When the war began, he lost his job because of his Japanese heritage. Korematsu found part-time work as a welder. Hoping to move to Nevada with his fiancee, who was not a Japanese-American, Korematsu ignored the evacuation orders when they came. As an American citizen he felt the orders should not apply to him in any event. The FBI arrested Korematsu, who was convicted of violating orders of the commanders of Military Area #1.

The Decision. By a 6–3 vote, the Court upheld the exclusion of Japanese Americans from the Pacific coastal region. The needs of national security in a time of crisis justified the "exclusion orders." The war power of the president and Congress, provided by the Constitution, provided the legal basis for the majority decision.

Justice Hugo L. Black admitted that the "exclusion orders" forced citizens of Japanese ancestry to endure severe hardships. "But hardships are a part of war," said Black, "and war is an aggregation of hardships."

Justice Black maintained that the orders had not "excluded" Korematsu primarily for reasons of race, but for reasons of military security. The majority ruling really did not say whether or not the relocation of Japanese Americans was constitutional. Rather, the Court sidestepped that touchy issue, emphasizing instead the national crisis caused by the war.

Dissenting Opinions. Three justices—Murphy, Jackson, and Roberts—disagreed with the majority. Justice Roberts thought it a plain "case of convicting a citizen as punishment for not submitting to imprisonment in a concentration camp solely because of his ancestry," without evidence concerning his loyalty to the United States.

Justice Murphy said that the "exclusion orders" violated the right of citizens to "due process of law." Furthermore, Murphy claimed that the decision of the Court's majority amounted to the "legalization of racism." "Racial discrimination," he said, "in any form and in any degree has no justifiable part whatever in our democratic way of life."

Murphy admitted that the argument citing military necessity carried weight, but he insisted that the military necessity claim must "subject itself to the judicial process" to determine "whether the deprivation is reasonably related to a public danger that is so 'immediate, imminent, and impending'. . . ."

Finally, Murphy concluded that "individuals must not be left impoverished in their constitutional rights on a plea of military necessity that has neither substance nor support."

The Endo Case

In 1942, the government dismissed Mitsuye Endo from her civil service job in California and the military ordered her to a relocation center. She had never attended a Japanese language school and could neither read nor write Japanese. She was a United States citizen with a brother serving in the U.S. Army. Her family did not even subscribe to a Japanese language newspaper.

Background on the Case. Miss Endo's attorney filed a *writ of habeas corpus* on her behalf, contending that the War Relocation Authority had no right to detain a loyal American citizen who was innocent of all the various allegations that the Army had used to justify evacuation.

The Decision. The Supreme Court ruled unanimously that Mitsuye Endo "should be given her liberty." The government should release the Japanese American woman from custody whose loyalty to the United States had been clearly established.

Justice Douglas said, "Loyalty is a matter of the heart and mind, not of race, creed or color. . . ."

Justice Murphy added, "I am of the view that detention in Relocation Centers of persons of Japanese ancestry regardless of loyalty is not only unauthorized by Congress or the Executive, but is another example of the unconstitutional resort to racism inherent in the entire evacuation program. . . . Racial discrimination of this nature bears no reasonable relation to military necessity and is utterly foreign to the ideals and traditions of the American people."

Shortly after the Court's decision in the *Endo* case, Major General Pratt, commander of Military Area #1 at that time, ordered a suspension of the "exclusion orders" that had resulted in the detention of people such as Korematsu and Endo. Most of the detained "Japanese Americans" were free to return home.

Constitutional Significance

The Court had not used the Constitution to protect Japanese Americans from abusive treatment during World War II. There was military interference with civil liberties in the name of a wartime emergency. The Supreme Court allowed the executive and legislative branches of government to engage in behavior that it surely would have found unconstitutional in peacetime.

The Court avoided answering a significant constitutional question in reaching verdicts in the cases of Hirabayashi, Korematsu and Endo. Can military authorities, even if supported by acts of the president and Congress, detain citizens outside of a combat zone without charging them with any crime, merely on grounds of defending the nation during wartime?

By avoiding this question, the Court allowed the Executive and Legislative actions that sanctioned the Relocation Centers during world War II to set a dangerous precedent. The Court established a precedent supporting the evacuation and detention of unpopular minorities during time of war. Will others use this precedent to deny constitutional rights to certain groups of citizens during a national crisis in the future?

Afterward

A government commission formed to investigate wartime espionage reported that no evidence existed of disloyal behavior among the Japanese Americans on the West Coast. The government did not find a single Japanese American guilty of spying for Japan during World War II, even though it jailed many as suspected spies. In addition, one of the best fighting units of the U.S. army in Europe, the Nisei Brigade, was made up of Japanese Americans. This brigade became the most decorated unit in the history of the U.S. Army. Its soldiers proved their loyalty by fighting for their country even though their families had been jailed without "due process of law."

After release from the detention camps, most Japanese Americans returned to the Pacific Coast. They began again, resettling in cities and starting new farms. Many initiated legal actions to regain their lost property. In 1948, Congress agreed to pay for some of that property, giving the Japanese Americans less than ten cents for each dollar they had lost. This action was to prove the only admission Congress made that it had done anything wrong to the Japanese Americans during the war. This minor recompense was a small way of saying, "We're sorry."

The U.S. Government justified the internment two ways. The government claimed that American citizens of Japanese ancestry, more loyal to Japan than to their own country, would spy for Japan. Second, the U.S. Government claimed that because Japan had attacked the U.S., those Americans of Japanese ancestry might have helped Japan. Yet many have always questioned the validity of these fears.

No evidence justified fears that American citizens of Japanese descent or Japanese immigrants living in the U.S. supported Japan in any substantial fashion. The few supporters of Japan, mostly old men who posed no danger to the U.S., quickly suffered arrest long before the planning of any mass deportation of Japanese Americans. No Japanese Americans or Japanese immigrants committed acts of sabotage during the war.

John J. McCloy, a key advisor to Secretary of War Stimson, was the civilian in the War Department most responsible for the removal. Many years after the war he admitted that the purpose of the internment was "in the way of retribution for the attack that was made on Pearl Harbor." In other words, their own government forced American citizens to leave their homes and property and to spend four years behind barbed wire guarded by armed soldiers, because a foreign country (which most of these citizens had never visited) had attacked the United States.

In 1980, Congress re-opened investigations into the treatment of Japanese Americans during World War II and created the commission on Wartime Relocation and Internment of Civilians. After nearly three years of careful examination of the evidence, which included testimony from 750 witnesses, the Commission issued a report on February 25, 1983. The report concluded: "A grave injustice was done to American citizens and resident aliens of Japanese ancestry who, without individual review or any probative evidence against them, were excluded, removed, and detained by the United States during World War II."

EXERCISES FOR LESSON IV-12

Reviewing Main Ideas and Facts

1. Why were Americans of Japanese ancestry sent to Relocation Centers?
2. What legal authority for evacuating and detaining Japanese Americans did the president and Congress provide?
3. What constitutional issues did the evacuation and detention of Japanese Americans during World War II raise?
4. What constitutional issue did the Supreme Court address in each of these cases?
   a. *Hirabayashi* v. *United States*
   b. *Korematsu* v. *United States*
   c. *Ex parte Endo*
5. What did the Court decide in each of these cases?
   a. *Hirabayashi* v. *United States*
   b. *Korematsu* v. *United States*
   c. *Ex parte Endo*
6. What constitutional issue did the court avoid?
7. What continuing constitutional significance does the treatment of Japanese Americans during World War II have?

Interpreting and Appraising Judicial Opinions

1. List the main ideas of the dissenting opinions in the *Korematsu* case by Justices Roberts and Murphy.
2. Following is an excerpt from Justice Jackson's dissent in the *Korematsu* case. What is the main idea of this excerpt?

   > A military order, however unconstitutional, is not apt to last longer than the military emergency.... But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution. . .the Court for all time has validated the principle of racial discrimination in criminal procedures and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.

3. Do you agree with the decisions of the court in the cases of Hirabayashi, Korematsu and Endo? Explain.
4. Do you agree with the dissenting opinions of Justices Murphy, Roberts, and Jackson?

The evacuation of Japanese Americans to Owens Valley, April 1942. Library of Congress.

A Parley

Judicial Activism: Pro

by ARTHUR S. MILLER

"All laws, written and unwritten," Thomas Hobbes observed in 1651, "have need of interpretation." So they do, particularly when they are deliberately couched in ambiguous terms. Since the Constitution is law—the fundamental law—and since it is written largely in imprecise language, two questions immediately crop up: (a) Who is to interpret it? (b) What criteria should interpreters employ?

Although the Constitution does not provide for judicial review of other governmental acts, the legitimacy of the Supreme Court at times substituting its judgment for that of other governmental officers is now solidly settled. Judicial review unavoidably means judicial activism; the terms may not be exactly synonymous, but both involve the Supreme Court's propensity to intervene in the governing process. The problem is one of degree, not whether there should be judicial activism (or review) of any type, but how much and in what direction.

Since 1803 the Court has successfully asserted the ultimate power "to say what the law is." This claim of inherent power has been hotly disputed at times. Controversy today, however, is not over *whether* the Supreme Court should make constitutional decisions but the *nature and direction* of what the justices decide. Most of the literature on judicial activism reflects the principle of the gored ox: Specific decisions are liked or disliked in direct proportion to whether they accord with the personal values of the commentator.

If, as Professor Ronald Dworkin maintains, "our constitutional system rests on a particular moral theory, namely, that men have moral rights against the State," how are those rights to be enforced? Someone or somebody must have the final say in answering that question. Although both Congress and the president routinely make constitutional decisions, in cases of conflict, the Supreme Court prevails. The justices thereby help to fulfill the Madisonian prescription: They "oblige" other governmental officers to control themselves. Not that they act as a super-legal aid bureau. Far from it: only about 150 (out of 5000 filed) cases receive complete review each term.

No one has yet produced a satisfactory substitute for judicial review, which, as noted, cannot help being activist. The Constitution does not define itself. Reference to its drafters and their intentions is a bootless quest. No one can read the minds of men long dead and determine what they meant when they used vague words. The records of the Constitutional Convention are so scanty that it is impossible to say for certain what the original intention was of the litigated parts of the document.

Those who plump for a Constitution of original intention are unable to state whose intention is to be determined. The Constitutional Convention met secretly in 1787 with 84 delegates named to attend; when the conclave ended its session only 39 were willing to sign the Constitution. Are those 39 the ones whose intention is to be found? Is Thomas Jefferson a "founding father"? Hardly: He was ambassador to France at the time. Or should we try to learn what the state legislators meant when they ratified the Constitution? Their names and surely their intentions have been lost in the mists of history.

Supreme Court justices routinely make law; they cannot avoid doing so if they are to perform their constitutional function. The criteria they use are their own. This may be a harsh, even an unpleasant, truth, but it is one that must be understood if one wishes to comprehend American constitutionalism. Theodore Roosevelt said it well (to the dismay of conservatives): "The decisions of the courts on economic and social questions depend upon their economic and social philosophy." Constitutional questions are "economic and social."

Some maintain that the Supreme Court is an undemocratic organ of government because the justices have a virtual life tenure and are not elected. The argument misses the point. Checks exist on their decisions, as witness the Sixteenth Amendment (authorizing a federal income tax) and Congress' power to regulate the Court's appellate jurisdiction. It is the quintessence of democracy to have somebody to block governmental behavior that transgresses constitutional limitations.

The fundamental dispute about judicial activism is over the nature of the good society. If law floats in a sea of ethics, as Chief Justice Earl Warren once stated, the task of the justices is to make ethical decisions. The Supreme Court defines national values and principles, for most of its constitutional decisions involve actions by state, rather than federal, officers.

The justices are not infallible but their work is indispensable to the smooth operation of the constitutional order. Americans have, in general, been well served by a Court that cannot escape being activist. As an authoritative faculty of political theory and of social ethics, the justices articulate principles of legally-concretized decency and thus at times hold the feet of other governmental officers to the fire of the enduring values of American constitutionalism.

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Judicial Activism: Con

by LINO A. GRAGLIA

The issue of "judicial activism" can be made concrete by noting a few of the more significant judicial interventions in the American political process in recent years. In the past three decades, the Supreme Court has decided for the nation as a whole issues literally of life and death, as in its judgments on abortion and capital punishment. It has determined issues of public morality, as in its ruling protecting pornography, and issues of public order, as in its verdicts limiting state control of street demonstrations and its pronouncements greatly increasing the protection of the criminally accused. The Court has invalidated all state provisions for prayer in public schools while also prohibiting nearly all forms of government aid to religious schools. It has disallowed most traditional legal distinctions on the basis of sex, legitimacy, and alienage. Finally—and the list could easily be extended—the Court has ordered that children be excluded from their neighborhood public schools because of their race and transported to distant schools in an attempt to increase school racial integration.

To understand the support for judicial activism, it is important to note that these decisions have not been random in their political thrust. Without exception, they reflect and further a particular political point of view, the view of, say, the American Civil Liberties Union. They have served to enact a particular policy agenda that, because it is opposed by a majority of the American people, could be achieved in no other way.

Judicial activism has made the Supreme Court our most important institution of government in regard to the decisions that determine the nature and quality of life in our society. This outcome has been possible, in a nation founded as an experiment in representative self-government, only because the American people have been and are being seriously misled as to the nature and source of constitutional law. They have been taught to believe, as Felix Frankfurter asserted, that constitutional decisions are the command of the Constitution, not merely the result of the judges' policy preferences. The fact is that the Constitution has very little to do with constitutional law and almost nothing to do with the Supreme Court's most controversial "constitutional" decisions.

The Constitution is a short and simple document, easily printed with all amendments on about fifteen pages, and devoted almost entirely to the structure of the national government. Except for the fact that the national government was to be one of enumerated powers, the Constitution places very few restrictions on federal law-making authority and even fewer on the residual powers of the states. The great bulk of constitutional cases involve state law, and nearly all of these purport to interpret a single sentence of the Fourteenth Amendment and, indeed, no more than four words, "due process" and "equal protection." No one should have any doubt that it is not these four words that are responsible for what the courts have done in the Constitution's name in the past thirty years.

The claim that the Constitution is the source of so-called constitutional decisions has grown more obviously untenable; thus, defenders of judicial activism have increasingly sought to justify decisions on other grounds, typically on the basis of supposed transcendent principles of morality or "natural law." Difficult issues of public policy arise, however, not because of any inability to discern the principle involved, but because we have many principles and they, like the interests they would protect, inevitably come into conflict. The abortion issue, for example, involves conflicting principles of respect for life and of individual liberty. The essence of self-government is that such conflicts are to be resolved, not by some supposed moral or intellectual elite, but according to the collective wisdom of the people.

In any event, if the discovery and application of moral principles is now to be the role of our judges, certain improvements in our present judicial system are obviously necessary. First, we clearly should not confine our selection of judges to lawyers, who, after all, are not by training and practice necessarily persons of exceptional ethical refinement and moral acuity. Second, we should provide our judges with the resources and facilities needed to pursue moral and philosophical investigations. Third, we should free them from the unseemly need to pretend to be interpreting the Constitution and to label their product "constitutional law." These obvious improvements are never suggested by defenders of judicial activism only because they know that goverment by philosopher-kings, much less by lawyer-kings, is not what the American people want or would accept.

Judicial activism—ultimately, public policy-making by majority vote of a committee of nine lawyers, unelected and holding office for life—is the very antithesis of the system of decentralized democratic government contemplated by the Constitution. The case against judicial activism is the case against tyranny.

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Bicentennial Gazette

Network of Scholars: Cumulative Listing

In order to assist Bicentennial program planners in locating specialists on the Constitution, Project '87 has compiled this directory of historians, political scientists, lawyers and others who have expressed interest in participating in such programs. The initial list appeared in the Fall 1984 issue of ***this Constitution****, with supplements in subsequent issues. This directory cumulates all previous listings and includes some additional entries. Planners should get in touch directly with those whom they would like to have participate in their programs.*

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Federal Bicentennial Agenda

"The American Experiment: Creating the Constitution" Exhibit at the National Archives

The American Experiment: Creating the Constitution," is a major exhibition celebrating the 200th anniversary of the Constitution which opened at the National Archives on October 24, 1986, and which will remain open through February 1989.

The centerpiece of "Creating the Constitution" is the permanent display of the original Constitution, Declaration of Independence, and the Bill of Rights. A number of other important eighteenth-century documents are also featured in the exhibition, presenting a view of the young country in which the Constitution was conceived, created, and ratified.

Among the highlights of the exhibition are:
The Articles of Confederation; a map dated 1783 delineating the boundaries of the United States as agreed to in the Treaty of Paris; the Virginia Plan written by James Madison in 1787; the Report of the Committee on the Western Territory by Thomas Jefferson which became the blueprint for the settlement and eventual statehood of the West.

This is one of two major exhibitions at the National Archives during the bicentennial period. The other, entitled "Living With the Constitution," will open in April of 1987 in the Circular Gallery of the Rotunda. This exhibition will trace the historical development of enfranchisement, school desegregation, and war powers through photographs, letters, and documents in the National Archives.

The exhibition will be on display in the Rotunda of the National Archives and will be free and open to the public. For more information, write NARA, Washington, DC 20408.

Bicentennial Commission Projects

Lists of projects sponsored by the Commission on the Bicentennial of the United States Constitution and of projects recognized by the Commission are available from the Commission offices at 736 Jackson Place, N.W., Washington, D.C. 20503. For additional information call (202) 872-1787 or (202) 653-9800.

THE NATIONAL ENDOWMENT FOR THE HUMANITIES
Special Initiative for the Bicentennial of the United States

The National Endowment For the Humanities Offers Matching Grants For Books on the United States Constitution

In commemoration of the Bicentennial of the Constitution, the National Endowment for the Humanities is offering matching grants of $500 to public libraries across the United States. The Endowment's grant, plus the $500 the library raises to match it, will provide $1,000 to help establish a Bicentennial Bookshelf of reference works and other books about the U.S. Constitution.

The Endowment asked constitutional scholars and specialists to recommend titles that might be included on the Bicentennial Bookshelf. Based on these suggestions, the Endowment recommends that libraries build their bookshelves on the Constitution around four major texts, newly revised and issued:

Congressional Research Service, Library of Congress, *The Constitution of the United States of America: Interpretation and Analysis*. Washington, D.C.: Government Printing Office, 1986. (Price to be announced).
Farrand, Max, ed. *The Records of the Federal Convention of 1787*. 4 vols., rev. ed. New Haven: Yale University Press, 1967, 1987, $180.
Kurland, Philip B., and Ralph Lerner, eds. *The Founders' Constitution*. 5 vols. Chicago: University of Chicago Press, 1987. $250 before March 31, 1987, $300 thereafter.
Levy, Leonard, ed. *The Encyclopedia of the American Constitution*. 4 vols. New York: Macmillan Publishing Co., 1986. $270 before December 31, 1986, and $320 thereafter.

These volumes should be complemented by other works, some of which libraries may already have in their collections, some of which they may wish to acquire. Libraries may wish to select titles from the NEH list also developed in consultation with constitutional experts, but other choices are acceptable.

For further information, write: National Endowment for the Humanities, Humanities Projects in Libraries, Room 420, Division of General Programs, 1100 Pennsylvania Avenue, N.W., Washington, D.C. 20506.

Around the States

Ohio Commission Outlines Plans

The Ohio Northwest Ordinance and the United States Constitution Bicentennial Commission was established by legislation in December 1985 to "promote, encourage and coordinate the celebration and commemoration of the Bicentennial of the signing of the Northwest Ordinance of 1787, which established civil government in the Northwest Territory." Chaired by Dr. Phillip R. Shriver, President of the Ohio Historical Society and President Emeritus of Miami University, the commission will work with local communities and organizations to develop projects commemorating the two-year observance of the signing of the ordinance and the settling of what was to become Ohio.

The commission will also coordinate Ohio's observance of the Bicentennial of the signing of the United States Constitution, adopted by Congress on September 17, 1787.

The planning packet distributed across Ohio includes a copy of the legislation forming the commission, a letter from Governor Richard F. Celeste, the goals of the commission, background on the Northwest Ordinance, tentative commemorative plans from several cities, and other information. Individuals or organizations wishing to receive a packet should contact James C. Miller, Executive Director, Northwest Ordinance-United States Constitution Bicentennial Commission, 1985 Velma Avenue, Columbus, Ohio, 43211; telephone: (614) 466-1500.

Knoxville-Knox County, Tennessee, Constitution Bicentennial Commission Announces Program

The Knoxville-Knox County [Tennessee] Constitution Bicentennial Commission was established on September 17, 1984, by action of the Mayor of Knoxville, Hon. Kyle Testerman, and the Executive of Knox County, Hon. Dwight Kessel. Dr. Milton M. Klein, Professor of History Emeritus at the University of Tennessee, chairs the Commission.

In furtherance of its charge, the Commission has initiated a quarterly *Newsletter*, which is distributed to community groups and individual Knoxvillians who desire to receive it, and has organized a Speakers' Bureau, available to community groups that want to hear talks on the coming Bicentennial or on issues concerned with the Constitution itself. The Commission will also make available to groups and individuals copies of the Constitution.

Under its own sponsorship, the Commission has initiated a series of public forums, conducted in the City-County Building, on a variety of constitutional issues. The first, held in October 1985, was broadly based and addressed the general subject: "Is democratic government under the Constitution alive and well today?" The editor of the *Knoxville News-Sentinel* spoke on the role of the press; the president-elect of the Tennessee Bar Association addressed the role of the courts; and the head of the University of Tennessee Political Science Department considered the role of the electoral process. Succeeding forums will treat some of the thirteen crucial constitutional issues identified by Project '87. One held in March 1986 considered the question of "The rights of the accused versus the rights of society under the Constitution," and the May forum considered the issue "Are women's rights adequately protected by the Constitution?"

For 1987, the Commission plans to run a series of informational essays in the Sunday edition of the local newspaper. From January to May, the column will be on the subject "Do You Know Your Constitution?" and from May 25 to September 17, the dates the Constitutional Convention was in session in 1787, the column will be on "This Week in Philadelphia: 1787." Graduate students in history, political science, and law from the University of Tennessee will prepare the material. On May 25, or thereabouts, a mock constitutional convention will be held in Knoxville to consider some of the structural changes proposed over the years by those suggesting constitutional amendment. The convention will utilize the material prepared by the Jefferson Foundation in Washington, D.C. Delegates will be chosen at the close of this convention to attend a similar statewide convention which is to be held in Nashville in September of 1987.

On September 17, 1987, the Commission plans a gala day, beginning with the naturalization ceremonies normally held in the fall at the Federal Courthouse.

For information, write to the Commission, Milton Klein, chair, 1101 McClung Tower, University of Tennessee, Knoxville, TN 37916.

Hawaii Committee for the Humanities Supports Projects Commemorating Bicentennial of U.S. Constitution

Two projects were recently supported by the Hawaii Committee for the Humanities (HCH) which commemorate the Bicentennial of the U.S. Constitution book in 1987 and which focus on "Understanding America", stressing the need for programs which further public knowledge of American history, culture and formative principles.

"The Development of the Constitution"

A grant of $13,957 was awarded to the History Department, University of Hawaii at Manoa to hold a series of seven panel presentations on the history and interpretation of the U.S. Constitution, the nature of constitutional development and the constitutional character of certain contemporary issues. The project is aimed at secondary school teachers of social studies and interested members of the community. The principal humanities scholar is Cedric Cowing and the project director is Herbert Margulies, both professors of American and Constitutional history at the University of Hawaii at Manoa.

"Historical and Philosophical Considerations for the United States and Hawaii State Constitutions"

A grant of $4,592 was awarded to the Hawaii Council on Legal Education for Youth to hold a week-long institute in Honolulu and a one-day program in Hilo to examine the historical and philosophical nature of constitutionalism, compare the U.S. and Hawaii Constitutions and discuss methods of constitutional amendment. The primary audience for the Institutes is public school teachers and interested members of the community. Stuart Gerry Brown, Professor Emeritus of American Studies at the University of Hawaii at Manoa, is the principal humanities scholar.

The Hawaii Committee for the Humanities also has a Humanities Speakers Bureau, "Ideas For Our Time," that provides small grants to cover expenses and a stipend for pre-selected speakers and topics. One of the current thematic areas is *"Commemorating the Biocentennial of the U.S. Constitution"*. Four presentations are offered under this theme:

"We the People . . .", a slide-lecture on the drafting of the American Constitution and its intellectual origins—by *Dr. A. Didrick Castberg*, professor of political science at the University of Hawaii at Hilo;

"The Constitution: How It Works For Us", a slide-lecture on the freedoms guaranteed by the Constitution and on historical challenges it has faced—by Dr. James McCutcheon, professor of history and American studies at the University of Hawaii at Manoa;

"The U.S. Constitution in the Pacific", a lecture examining the Constitution as an influential source of domocratic principles and ideals for Pacific Island peoples—by Dr. Norman Meller, Professor Emeritus of political science at the University of Hawaii at Manoa; and

"A Model for Nation Building", a lecture on how Asian nations have used the American Constitution as a model for their own governing documents—by Dr. Jon Van Dyke, professor of jurisprudence at the William S. Richardson School of Law.

For more information, contact: Hawaii Committee for the Humanities, 3599 Waialae Ave., room 23, Honolulu, Hawaii 96816; (808) 732-5402.

PUBLICATIONS

THE WRITING AND RATIFICATION OF THE U.S. CONSTITUTION: A BIBLIOGRAPHY

The Federal Judicial Center has published a 44-page bibliography on the Constitution, compiled by Russell R. Wheeler. Selections focus on the events and the ideas of the founding period; they are arranged under the following topics: bibliographies and general treatments, original texts and writings, works dealing with specific time periods, biographical treatments, political theory, specific parts of government, civil rights and liberties, calls for revisions, nineteenth and twentieth-century constitutional history. Individual copies are available without charge to teachers requesting on school letterhead. Please enclose a self-addressed mailing label, and send request to: Information Services, Federal Judicial Center, 1520 H Street, NW, Washington, DC 20005; telephone: (202) 633-6011.

IDAHO STATE HISTORICAL SOCIETY PUBLISHES HANDBOOK

Historical Celebrations: A Handbook for Organizers of Diamond Jubilees, Centennials, and Other Community Anniversaries by Keith Petersen is a basic, step-by-step approach to planning a successful anniversary celebration.

The handbook covers the key elements of a historical anniversary celebration, and includes extensive notes, bibliography, and addresses of over 30 organizations that can provide further assistance in specific interest areas. Among the key topics covered are project organization, fund raising, sample activities, publicity and case studies of successful small town celebrations.

The handbook was funded in part by the Association for the Humanities in Idaho and the Steele-Reese Foundation. The cost is $10.00, plus Idaho sales tax of $.50, and $2.00 for postage and handling. To order, contact the Idaho State Historical Society, 610 N. Julia Davis Drive, Boise, ID 83702-7695. For more information, contact Madeline Buckendorf at (208) 334-3863.

BORZOI BOOKS IN LAW AND AMERICAN SOCIETY

The Borzoi Books in Law and American Society are the result of a program in law and the humanities sponsored by the American Bar Association, with primary support from the National Endowment for the Humanities. The four-year program (1977–81) brought together leading lawyers, jurists, historians, philosophers and library scholars, serving as advisors and writers, to design a series of educational materials that would foster in American students a better appreciation of the role of law in our society. Before the books were published, they were tested in college classrooms throughout the country. The five volumes in law and history cover legal development from the first settlements to the Great Society. The books in philosophy deal with such issues as discrimination, morality and legal reasoning. The one volume on literature contains three essays that, taken together, seek to establish a framework for the study of law and the literary imagination. The following titles are included in the series: *Early American Law and Society* by Stephen Botein; *Law in the New Republic: Private Law and the Public Estate* by George Dargo; *Law in Antebellum Society: Legal Change and Economic Expansion* by Jamil Zainaldin; *Law and the Nation, 1865–1912* by Jonathan Lurie; *Ordered Liberty: Legal Reform in the Twentieth Century* by Gerald L. Fetner; *Discrimination and Reverse Discrimination* by R. Kent Greenawalt; *The Legal Enforcement of Morality* by Thomas Grey; *Legal Reasoning* by Martin Golding; *Law and American Literature* by Carl S. Smith, John McWilliams and Maxwell Bloomfield. The volumes may be ordered from Random House, 400 Hahn Road, Westminster, MD; telephone: 1-800-638-6440.

THE ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY

Edited by historian Michael Kammen, this paperback collection of documents contains five sections: the genesis of the Constitution, private correspondence of the founders, selected *Federalist* papers, selected Anti-Federalist writings, and completing and implementing the Constitution. The 407-page volume also contains an introduction by Kammen, a chronology, a brief bibliography, and "suggestions for special projects." It can be ordered for $6.95 in paperback from Viking-Penguin, 40 West 23 St., N.Y., N.Y. 10010-5201; telephone: (202) 337-5200.

WEST PUBLISHES POCKET-SIZE CONSTITUTION AND OTHER RESOURCES

The West Publishing Company has announced several publications for the Bicentennial of the Constitution. A pocket-size edition of the Constitution is available to individuals and to organizations that want to order quantities with the organization's name embossed on the cover. West is also offering a free resource manual for educators which contains the text of the Constitution and a variety of classroom activities suitable for junior high school through adult level education programs. The manual includes references to *The Guide to American Law*, West's twelve-volume encylopedia. For further information, write: West Publishing Company, 50 W. Kellogg Blvd., P.O. Box 64526, St. Paul, MN 55165; telephone: (612) 228-2500.

FOUR LITTLE PAGES

Four Little Pages is an original one-act musical play dealing with the events surrounding the Constitutional Convention of 1787 and the document produced by that Convention sitting in Philadelphia.

The 25-minute play is being presented by the National Park Service in 1986 and 1987 as a public/private venture involving the NPS, Department of the Interior and the CIGNA Corporation. The program is made possible through the cooperation of the Friends of Independence National Historical Park, Philadelphia, PA.

Four Little Pages is produced by Franklin S. Roberts Associates, which has created and produced plays and musicals for Independence National Historical Park, Valley Forge and other parks, as well as creating the National Park Service's national touring production of *We've Come Back for a Little Look Around* for the Bicentennial of American Independence.

The book and lyrics for *Four Little Pages* were written by David Chambers, a producer, director and teacher as well as a writer. He is currently Producing Director at the St. Louis Repertory Theatre. Mel Marvin wrote the score for the play.

For further information, contact V. Dave Dame, chief, Interpretation and Visitor Services, National Park Service, U.S. Dept. of the Interior, Washington, D.C. 20240; telephone: (202) 523-5270.

THE HUMANITIES AND THE CONSTITUTION

The National Federation of State Humanities Councils recently published *The Humanities and the Constitution: Resources for Public Humanities Programs on the Bicentennial of the U.S. Constitution*. The guide is designed to assist individuals and groups planning public humanities programs related to the Bicentennial of the Constitution.

The guide includes: a brief manual on planning state humanities council-supported projects; listings of programs and projects related to the Bicentennial of the Constitution currently being funded by state humanities councils; national agencies and organizations planning programs or producing materials related to the Bicentennial; a listing of state resources, including addresses of state humanities councils, state bicentennial commissions, and scholars; and, in the appendixes, Project '87's chronology of key dates in the history of the Constitution and its introductory bibliography of constitutional history, and a booklet on publicity.

While supplies last, copies are available at no charge by writing the National Federation of State Humanities Councils, 1012 14th Street, N.W., Suite 1207, Washington, DC 20005. Please allow 6-8 weeks for delivery.

ABA, ARCHIVES PUBLISH LECTURES

The ABA Commission on Public Understanding About the Law and the Constitution Study Group of the National Archives has published a book of lectures on constitutional topics. *The Blessings of Liberty: Bicentennial Lectures at the National Archives* includes lectures by public figures and scholars given as part of the Bicentennial '87 series at the Archives. Intended as a substantive resource for those planning Bicentennial programs, it considers topics like the Framers' philosophical influences *The Federalist* papers, the ratification debates, the branches of government, political parties, federalism, censorship and other First Amendment concerns, equal protection, and women and the Constitution.

Contributors to the book include historians James MacGregor Burns, Richard B. Morris, Robert Rutland and J. G. A. Pocock; legal scholars Robert Drinan and A. E. Dick Howard; and journalist Edwin Yoder. The book's epilogue contains remarks made by Chief Justice Warren E. Burger and Sen. Strom Thurmond at "The Constitution: Past, Present and Future," a March 1985 conference cosponsored by the Archives and the ABA Commission on Public Understanding About the Law.

The Bicentennial '87 lecture series is being funded by the District of Columbia Community Humanities Council. Other support has been provided by the Pfizer Foundation, the UPS Foundation and the ABA Commission on Public Understanding. Funds to publish *The Blessings of Liberty* were provided by the General Foods Fund, Inc. Each copy is $4.95. The book may be ordered from: Order fulfillment-468, ABA, 750 N. Lake Shore Dr., Chicago, IL 60611. Include product code no. 468-0005. Telephone: (312) 988-5555.

A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE

In *A Machine That Would Go Of Itself*, historian Michael Kammen examines the role of the Constitution as a symbol in American life from 1788 to the present. Kammen considers both the perceptions of the Constitution and the public's knowledge about the document and how American beliefs about the Constitution emerged. The book is available from Alfred A. Knopf Inc., 201 E. 50 St., N.Y., N.Y. 10022 at $29.95.

THE INFLUENCE OF THE SCOTTISH ENLIGHTENMENT ON THE UNITED STATES CONSTITUTION

The British Institute of the United States has published the report of the symposia conducted jointly with the Mentor Group in 1985. The report recounts the discussions that took place in several settings and included the Chief Justice of the United States, the Honorable Warren Burger, the Honorable Lord Cameron, Senator of the College of Justice in Scotland and Lord of Session, Neil MacCormick, Regius Professor of Law at the University of EdinBurgh, and Judge Robert Bork of the U.S. Court of Appeals for the District of Columbia Circuit. The report is available for $5.00 from the British Institute, 1333 New Hampshire Avenue, N.W., suite 400, Washington, D.C. 20036.

HISTORIES OF HOUSE AND SENATE TO BE AVAILABLE IN 1987

The United States Senate, by Richard A. Baker, and *The United States House of Representatives*, by James T. Currie are planned for publication in 1987 to celebrate the opening of the 100th Congress. For more information on these concise histories, contact Krieger Publishing Co., Inc. P.O. Box 9542, Melbourne, FL 32902-9542; telephone: (305) 724-9542.

NATIONAL ARCHIVES REISSUES *THE STORY OF THE CONSTITUTION*

As part of the celebration to commemorate the Bicentennial of the U.S. Constitution, the National Archives has reprinted the classic essay, *The Story of the Constitution*. Written by Sol Bloom, this popular history was first published in 1937 in honor of the 150th anniversary of the creation of the historic document. A new introduction by Daniel Elazar, director of the Center for the Study of Federalism at Temple University, sets the book in historical context and explains why it is a classic in constitutional studies.

The Story of the Constitution consists of 192 pages, 51 illustrations, and is 6 × 9″ in size. The book is available in paperback only, product No. 200046, and sells for $8.95. Orders may be sent to: STORY OF THE CONSTITUTION, Dept. 428 (NEPS), Room G-1—Cashier's Office, Washington, DC 20408.

ORGANIZATIONS AND INSTITUTIONS

CRADLE Plans SPICE II--*S*pecial *P*rograms *I*n *C*itizenship *E*ducation--With Focus on the Bicentennial

CRADLE, the Center for Research and Development in Law-Related Education located at Wake Forest University School of Law, Winston-Salem, NC, is inviting creative teachers from every state to apply for a unique program on the Constitution. SPICE II is providing the vehicle through which innovative ideas for teaching about the Constitution can be developed, implemented, evaluated and disseminated to other educators across the country.

Fifty teachers will be selected in January 1987 to participate in this program. Applicants are being nominated by state social studies and law-related education leaders in each state. During the Institute, March 6–16 at Wake Forest University, teachers will explore the multiple dimensions of creativity and teaching about the Constitution through presentations, discussions and interaction with representatives of varied disciplines and backgrounds. Faculty will include constitutional scholars from Wake Forest University, Fellows from the National Humanities Center, scholars identified through Project '87 publications, staff from the Center for Creative Leadership, and law-related education leaders and business executives trained in creative strategies.

During the Institute, teachers will begin to develop new, creative curricula which focus on (1) the fundamental legal doctrines, and the principles on which our legal system is based, and (2) fostering character development while developing among students an appreciation for our democratic system of government. Following the Institute, each teacher will receive support from a scholar/mentor team during the implementation and evaluation of each individual program. A three-day Institutionalization Training Seminar will be held at Hamline University School of Law, St. Paul, MN in August. The purpose of the Seminar is to familiarize teachers with each other's new curricula and to prepare them to train other teachers in the use of this new curricula on the Constitution.

SPICE II teachers will be the authors of a book which outlines their innovative activities and programs on teaching about the Constitution. CRADLE will edit and distribute this book to LRE leaders and other classroom teachers across the country during the 1987–88 school year. SPICE II teachers will use this book as the foundation for conducting teacher training and conference presentations. Each teacher will be responsible for training 25 other teachers in the use of the new curricula.

SPICE II teachers will receive $2,800 scholarships and are expected to provide $200 (7%) of their participation costs. Interested teachers with experience teaching about the Constitution should contact their state social studies coordinators or state law-related education project leaders. For more information, write: Julie Van Camp, Executive Director, CRADLE, Wake Forest University School of Law, Box 7206 Reynolda Station, Winston-Salem, North Carolina 27109.

Jefferson Meetings Planned Across the Country

The Jefferson Foundation is a non-profit organization devoted to stirring a national discussion on the Constitution and American government. It is a non-advocacy organization that takes no positions on the issues it studies. In 1984, citizens of Virginia and Illinois renewed their interest in the Constitution through participation in the Jefferson Meetings. Plans are now being made for Jefferson Meetings that will involve thousands of Americans, both adults and students.

The Jefferson Meeting brings from 50 to 150 people together for a one or two-day program of discussion and debate about the Constitution. Discussion begins in issue committees, each of which examines a particular topic, such as the electoral college method of electing the president, lengthening terms and limiting tenure of members of the House of Representatives, a single six-year presidential term, the item and legislative vetoes, judicial tenure and accountability, and Article V, which provides for the calling of a constitutional convention. In issue committees, delegates explore their issue in depth and eventually divide into groups that favor and oppose a proposed change in the Constitution. Members of these "pro" and "con" groups prepare brief speeches spelling out their points of view. During the plenary session, each committee's issue is called to the floor in turn. Speakers from the relevant committee begin discussion of a particular issue by making alternating "pro" and "con" speeches. These are followed by an open discussion involving all participants from all committees.

Jefferson Meetings are being planned and held across the country. The Indiana Jefferson Meeting in Indianapolis was held September 9–10, 1986. The Tennessee Jefferson Meeting was held in Nashville, September 19–21, 1986. In those two states, initial Jefferson Meetings will serve as springboards for a series of community Jefferson Meetings. Similar Meetings, convening delegates from across their respective states, are being planned in Nebraska, Ohio, Missouri, and Massachusetts.

Plans for a series of regional Jefferson Meetings are being made in North Carolina, Maryland, Arizona, Virginia, Illinois, and Hawaii. Plans for community Jefferson Meetings are currently being made in Hartford, Connecticut; Anchorage, Alaska; Concord, New Hampshire; Charleston, West Virginia; Miami, Florida; Newark, Delaware; Corvallis, Oregon; Portland, Oregon; Albuquerque, New Mexico; El Paso, Texas; and in Los Angeles, San Diego, and Sacramento, California.

The Jefferson Foundation has prepared a Guide for Teachers that allows teachers to organize Jefferson Meetings in secondary school and college classrooms and a Guide for Communities that enables planners to turn local initiative into concrete plans for a Jefferson Meeting. Issue Discussion Guides on the issues listed above are also available (See ***this Constitution***, Spring 1986, No. 10, page 46 for more details). New Discussion Guides on a national initiative and referendum and political action committees will be published this fall.

For more information on The Jefferson Meeting on the Constitution, help in planning a Meeting, or assistance in making contact with Bicentennial planners, contact Dick Merriman, Director, The Jefferson Foundation, 1529 18th Street, N.W., Washington, D.C. 20036; (202) 234-3688.

To learn more about specific Meetings, become involved in planning, or apply to participate, please contact the appropriate person listed below.

ARIZONA
Ms. Ellie Sbragia
Arizona Center for Law-Related Education
Arizona Bar Foundation
363 N. First Avenue
Phoenix, AZ 85003

HAWAII
Mr. George Dyer, Jr.
Suite 1520
Central Pacific Plaza
220 S. King Street
Honolulu, HI 96813

ILLINOIS
Ms. Carolyn Pereira
Constitutional Rights Foundation
1 Quincy Court
220 S. State Street
Chicago, IL 60604

Ms. Cheryl Niro
Illinois Committee to Commemorate the U.S. Constitution
75 East Wacker Drive
Suite 2100
Chicago, IL 60601

INDIANA
Mr. Ken Gladish
Indiana Committee for the Humanities
1500 N. Delaware Street
Indianapolis, IN 46202

MARYLAND
Ms. Norma Rose
Maryland Bar Association Committee on the Bicentennial
10691 Rain Dream Hill
Columbia, MD 21044

MASSACHUSETTS
Dr. Laura Roberts
Museum of Our National Heritage
P.O. Box 519
Lexington, MA 02173

MISSOURI
Mr. Raymond Pisney
Missouri Historical Society
Jefferson Memorial Building, Forest Park
St. Louis, MO 63112-1099

NEBRASKA
Ms. Midge Irvin
2929 Bonacum Drive
Lincoln, NE 68502

Ms. Sally Knudsen
#11 Bishop Square
Lincoln, NE 68502

NORTH CAROLINA
Mr. Rob Sikorsky
North Carolina Commission on the Bicentennial of the U.S. Constitution
The Jordan House
532 N. Wilmington
Raleigh, NC 27604

OHIO
Dr. Gary Ness
Ohio Historical Society
1985 Velma Ave.
Columbus, OH 43211

TENNESSEE
Mr. Robert Cheatham or Mr. Tony Cavender
Tennessee Committee for the Humanities
P.O. Box 24767
Nashville, TN 37202

VIRGINIA
Virginia Jefferson Association
P.O. Box 1463
Richmond, VA 23212

NORTHERN CALIFORNIA
Dr. Anne Cowden
Center for California Studies
California State University, Sacramento
6000 J Street
Sacramento, CA 95819-2694

ALBUQUERQUE
Professor Alan Reed
1404 Ridgecrest Place, S.E.
Albuquerque, NM 87108

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Alaska Institute for Research and Public Service
University of Alaska
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University of Charleston
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Suite 411
1880 Century Park East
Los Angeles, CA 90067

MIAMI
Mr. Terence Conner
Morgan, Lewis & Bockius
3200 Miami Center
100 Chopin Plaza
Miami, FL 33131

NEWARK, DELAWARE
Dr. Claudia Bushman
Delaware Heritage Commission
3rd Floor, Carvel State Office Building
820 N. French Street
Wilmington, DE 19715-0390

PORTLAND, OREGON
Ms. Marilyn Cover
10015 S. W. Terwilliger Blvd.
Portland, OR 97219

SAN DIEGO
Professor Richard Funston
Department of Political Science
San Diego State University
San Diego, CA 92182-0382

Bicentennial Competition Is Run by Center for Civic Education

From 1987 through 1991, the Center for Civic Education will conduct a National Bicentennial Competition on the Constitution and Bill of Rights; the program has been officially recognized by the Commission on the Bicentennial of the United States. The competition will involve classes in elementary through high schools, which will study specially prepared curriculum units, and then compete as a team with each other through a multiple-choice test and a hearing on a fundamental constitutional issue. Classes will compete for the title of state champions and each state's winning class will then participate in the national contest. The project will be field-tested in 1986. For further information, write: Charles N. Quigley, Center for Civic Education, 5115 Douglas Fir Rd., suite I, Calabasas, CA 91302; telephone (818) 340-9320.

ABA Plans Television Series, Will Recognize Bicentennial Projects

The American Bar Association has finalized plans for its public television series with KQED-TV, San Francisco, on the U.S. Constitution to be narrated by ABC World News Tonight Anchor Peter Jennings. The four-part series, *WE THE PEOPLE*, with opening remarks by President Reagan, is being underwritten by Merrill Lynch & Co., Inc. and dozens of law firms nationwide.

The four one-hour programs are slated to cover the following topics: "Why a Constitution?" "Rights of the Accused," "Judicial Power and Equality," and "Conscience, Expression and the Political Process."

Emphasizing the importance of the Constitution in Americans' everyday lives, the series will be filmed on location at sites throughout the country using a current affairs and news documentary approach.

During late 1986 and throughout 1987, Merrill Lynch will also sponsor Ratification Celebrations in all 50 states. That celebration will salute each state for its ratification of the Constitution or its entrance into the Union. The first event will be a Ratification Ball held in Delaware, which on Dec. 7, 1787, became the first state to ratify the Constitution.

The American Bar Association, through its Commission on Public Understanding, will also issue certificates of recognition to worthwhile bicentennial projects aimed at the general public. Projects receiving these certificates will be able to display the ABA logo and words to the effect that the "American Bar Association has recognized this project as making a valuable contribution to celebrations of the Constitution's bicentennial."

Applications are available from the ABA Commission. Separate applications for projects relating to school-age youth are available from the ABA Special Committee on Youth Education for Citizenship. The Youth Education Committee has developed its own criteria for evaluating projects.

For further information, contact: Robert Peck, ABA, Commission on Public Understanding About the Law, 750 North Lake Shore Drive, Chicago, IL 60611; telephone: (312) 988-5725.

West Point Holds SCUSA Conference on Constitution

The Student Conference on United States Affairs (SCUSA) has been hosted annually since 1949 by the United States Military Academy to bring together an outstanding group of undergraduates for four days of discussions on major issues of American public policy. In 1986, the conference theme was "The U.S. Constitution: A Bicentennial Reappraisal." Students met from November 19 to November 22 at West Point in roundtable and plenary sessions with the following scholars on these topics:

Free Speech: Dr. Lawrence Baum, Ohio State, Dr. Doris Marie Provine, Syracuse;

The Right to Bear Arms: Dr. Landis Jones, Louisville, Dr. Ronald Weber, Louisiana State;

Freedom of Religion: Dr. Karen O'Connor, Emory, Dr. Sheldon Goldman, Massachusetts;

Equal Protection of the Law: Dr. Charles Bullock, Georgia, Dr. Charles Johnson, Texas A&M;

Due Process vs. Law and Order: Dr. Jay Casper, Northwestern, Dr. J. Woodford Howard, Johns Hopkins;

Individual Choice v. Social Norms: Dr. Elliot Slotnick, Ohio State, Dr. Joel Grossman, Wisconsin;

Separation of Powers: Fiscal Responsibility: Dr. William O. Jenkins, GAO;

Separation of Powers : Use of Force: Dr. Louis Fisher, Library of Congress;

Separation of Powers: Foreign Policy: Dr. Richard Pious, Barnard;

Historical Society of Philadelphia To Offer Recorded Telephone Messages on Constitution

The Historical Society of Pennsylvania, in conjunction with AT&T, will sponsor a series of recorded telephone messages–"History Repeats Itself"–as a public service to the American people during the year-long 1986–87 observances of the 200th anniversary of the United States Constitution.

The Society, which owns the original first and second drafts of the Constitution in addition to other magnificent resources on American history, is intent on providing information to interested members of the public. In addition, from June 18 through Dec. 14, many of the documents, prints, paintings, and artifacts relating to the Constitution will be on display at the Historical Society in an exhibition entitled, "A More Perfect Union: The American People and Their Constitution."

"History Repeats Itself" will provide a central national source of information on the Constitution and the Bicentennial celebration for the general public. A changing series of taped messages will include information on scheduled 1986–87 bicentennial programs, events, and exhibitions across the country. The message will also provide highlights, historical facts, and anecdotes illustrating the human dimension of the events surrounding the adoption of the Constitution in Philadelphia in 1787.

The Historical Society would like to know about events being planned for the Bicentennial of the Constitution to include in this nationwide, toll-free tape. Information can be sent to: HISTORY REPEATS ITSELF, The Historical Society of Pennsylvania, 1300 Locust Street, Philadelphia, PA 19107.

Federalism: Dr. William Mishler, SUNY-Buffalo, Dr. Marian Lief Palley, Delaware;
Who Governs? Political Participation: Dr. Peggy Conway, Maryland, Dr. Walter Stone, Colorado;
Judicial Activism: Dr. Bradley Cannon, Kentucky, Dr. David O'Brien, Virginia;
Social Responsibility: Dr. Arnold Vedlitz, Texas A&M, Dr. Edward Jennings, Missouri;
Economic Stewardship: Dr. Paul Quirk, Pennsylvania, Dr. William Keech, North Carolina.

For further information, contact: Captain John Shephard, Department of Social Sciences, West Point, N.Y. 10996-1798; telephone: (914) 938-3782.

School House Global Enterprises Creates Constitution Materials for Grades 5–8

School House Publishers has announced the availability of a United States Constitution Project for Students, consisting of a 17" × 22" worksheet that depicts the signers of the Constitution, their state flags and year of ratification. On the reverse side, the worksheet contains a text dealing with the history of the Constitutional Convention and a summary of the Constitution, written on a fifth grade level. A Teacher's Guide, a Constitution Crossword Puzzle and a state flag identification chart accompany the worksheet. One set of thirty-five worksheets and accompanying materials is available for $15.95 from School House Global Enterprises, Inc., 217 Inverness, Ft. Washington, MD 20744; telephone: (301) 292-7766.

Old Sturbridge Village Presents Constitution in the 1830s

Old Sturbridge Village, a living history museum re-creating a rural New England community, will present a year-long series of public programs showing how the Constitution was taught, understood, remembered and used as a symbol and model in the public life of rural 1830s New Englanders.

OSV's public programs will focus on three issues that concerned New Englanders in the 1830s: the Constitution and the economy, freedom of religion, and antislavery and the Constitution. To illuminate these themes, OSV will offer three half-hour scripted dramatizations (each repeated on six occasions), three debates (to be presented five times each), monthly meetings of a debating society and an antislavery society, an antislavery fair, a videotape, and one-day conferences for lawyers, government officials, and members of local historical societies and women's voluntary associations.

Some of these activities will begin during the winter of 1986–87, but most will be concentrated between April and October of 1987. During those months, at least one Constitution-related event will take place each Saturday. Visitors who attend on other days will be able to see a small exhibit on the perception of the Constitution in 1830s New England. A flyer describing the Bicentennial and the range of OSV's activities for it is available. For more information, write: OSV, 1 Old Sturbridge Village Rd., Sturbridge, MA 01566; telephone: (617) 753–0518.

"Living History" Musicals for Grades K-6

We're going to write a new Constitution for our young and struggling nation
To replace the inadequate articles of Confederation.
Our states have too much power so it's our intent
To make a stronger federal government.
The world thinks our country is not too strong.
We must prove to them that they are wrong.

Oh Mister Hamilton, just listen to me. Your plan reminds me of royalty.
Oh, we fought the Revolution for our liberty
And each state wants its sovereignty.
We don't want all that power vested in one place
For we want rulers whom we can replace.
Other nations think without a king we're bound to fail.
But we'll show them democracy will prevail.

"Federal power!" "States' rights!" "Strong central government expedites."
"That sounds too much like a monarchy. We want individual liberty."
"We need to make our nation strong."
"At the states' expense that would be wrong. States' rights!"
"Centralize!" "I guess we need to compromise!"

These three verses come from a scene taken from the musical ***We All Are a Part of It: U.S.A. 1776–1840,*** developed by Jean Lutterman. The scene, one of ten from the musical, deals with the controversy and discussion between the Federalists and the Anti-Federalists at the Philadelphia Convention in 1787, both in dialogue and in song.

The play is one of three of the "Living History" project, the result of a 1978 grant from the National Endowment for the Humanities which funded the development of three historical musicals and teachers' guides. Project director-composer Jean Lutterman, music teacher at Norwood, worked with research director Richard Ewing, and with a drama consultant, art and dance teachers, and the classroom teachers and students, K-6, to develop the "LIVING HISTORY" materials.

The three musicals, ***We All Are A Part Of It, 1776–1840***; ***Land of Freedom, 1840–1900***; and ***Twentieth Century U.S.A.*** divide U.S. history into three periods. The intention of the project is that teachers use the musicals and teachers' guides to enhance their social studies and music classes. It is up to the individual teachers or schools whether they choose to perform the musicals in their entirety or to use them as resources for study units of specific periods, ethnic groups, or special events. The musical dramas, along with the historical information, bibliographies and film lists, and creative arts activities suggested in the teachers' guides, can provide materials for teachers to put together a vast variety of programs or study units which integrate music and social studies.

Introductory offer: Full Score, which includes dialogue and songs with piano and some Orff instrumental accompaniments; 25 Student Copies, which contain vocal lines and dialogue; Cassette of Children's Performance and Accompaniments; and Teachers' Guide at $79.95 per set. Price includes Performance Rights for the school.

Demonstration Kit: Student Copy and Cassette —$7.95.

Additional Student Copies are available at $2.00 per copy; additional Full Scores at $9.95; and additional Teachers' Guides at $14.95.

For further information, write to Norwood School Living History, 8821 River Road, Bethesda, Maryland, 20817; telephone: (301)-365-2595.

The lyrics from *We All Are A Part of It* are printed by permission of The Norwood School, 8821 River Road, Bethesda, Maryland, 20817, Copyright 1985.

New England and the Constitution

How do we understand New England's divided response to the Constitution and its turbulent experience of Revolution? *New Enalgnd and the Constitution* explores this question through political, social, and intellectual history. Combining readings in contemporary sources and recent scholarship with musical and theatrical performances, the program seeks to evoke and to analyze the ideals, the passions, and the conflicts of America's Revolutionary age, as enacted in the region. Out of that experience and the subsequent contests for control of the new nation would emerge a distinctive New England consciousness, from which a regional identity would take shape.

"New England and the Constitution" formally began on August 24 and 25, 1986 with an Institute for librarians and scholars at Brownsville, Vermont. The Institute introduced participants to the various elements of the project; in addition, it included seminars and workshops which examined themes and topics of the project in depth.

In the fall of 1986 and throughout 1987, sixty-one libraries will serve as local sponsors of a six-part reading and discussion series on life and thought in New England in the early years of the nation. The series will include readings in primary and secondary works on a range of topics: Shays' Rebellion and the Gathering Crisis; The Transformation of New England Society, 1776–1800; The Creation of the Constitution; New England Responds to the Constitution; Women and the Family in the New Nation; The Emergence of a New England Consciousness. Each series will be open to twenty-five participants.

The Norumbega Harmony of Boston will present twelve lecture/concerts throughout New England in the winter and spring of 1987. Their program, "Political and Religious Songs of Federal New England," will offer audiences an opportunity to experience first hand the powerful structural connections between religion and politics which existed in post-Revolutionary New England.

"New England and the Constitution" is sponsored by the New England Library Association, and the New England Foundation for the Humanities. It is funded by the National Endowment for the Humanities. For further information, contact Leah B. Glasser, New England and the Constitution, One Woodbridge St., South Hadley, MA 01075.

Subscription Information
1987–1988

Subscriptions received by June 1, 1988 will include five issues, beginning with issue no. 14 (Spring, 1987) and ending with issue no. 18 (Spring, 1988). Publication of ***this Constitution*** will conclude with issue no. 18.

Individual copies of issue no. 13 (Winter, 1986) through issue no. 17 (Winter, 1987) can be purchased for $4.00 each. Issue no. 18 (Spring, 1988)— an expanded issue — can be purchased for $6.00. Issue nos. 1–12 are out of print.

Contact Project '87 for information on ordering 10 or more copies of one issue.

Orders must be prepaid; purchase orders cannot be accepted. All orders should be sent and made payable to: Project '87, 1527 New Hampshire Avenue, N.W., Washington, D.C. 20036, ATTN: Publications.

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Noted political scientist James MacGregor Burns, co-chair of *Project '87*, has written a special preface that unites the themes of the book. Contributors include:

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- James Oliver Horton
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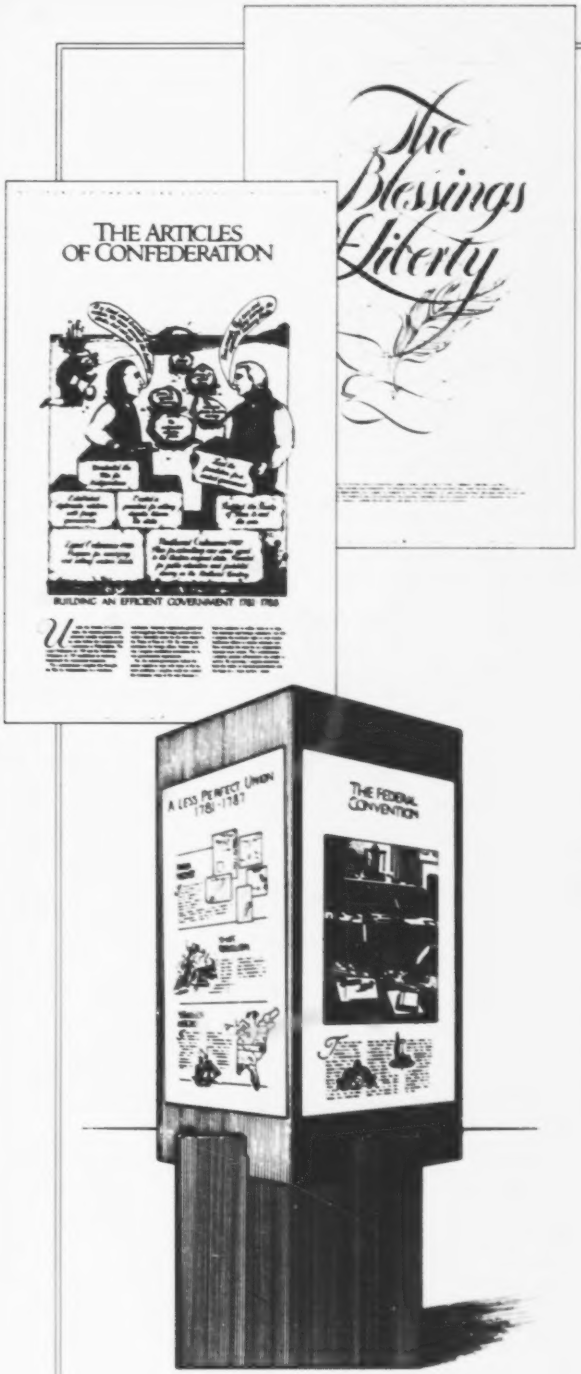
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To Ourselves and Our Posterity

continued from inside front cover

August 7, 1786: The Congress of the Confederation considers a motion offered by Charles Pinckney of South Carolina to amend the Articles of Confederation in order to give Congress more control over foreign affairs and interstate commerce. Because amendments to the Articles require the unanimous consent of the states, an unlikely eventuality, Congress declines to recommend the change.

September 11-14, 1786: ANNAPOLIS CONVENTION. New York, New Jersey, Delaware, Pennsylvania and Virginia send a total of twelve delegates to the conference which had been proposed by Virginia in January to discuss commercial matters. (New Hampshire, Massachusetts, Rhode Island and North Carolina send delegates but they fail to arrive in time.) The small attendance makes discussion of commercial matters fruitless. On September 14, the convention adopts a resolution drafted by Alexander Hamilton asking all the states to send representatives to a new convention to be held in Philadelphia in May of 1787. This meeting will not be limited to commercial matters but will address all issues necessary "to render the constitution of the Federal Government adequate to the exigencies of the Union."

February 4, 1787: THE END OF SHAYS' REBELLION. General Benjamin Lincoln, leading a contingent of 4,400 soldiers enlisted by the Massachusetts governor, routs the forces of Daniel Shays. A destitute farmer, Shays had organized a rebellion against the Massachusetts government, which had failed to take action to assist the state's depressed farm population. The uprisings, which had begun in the summer of 1786, are completely crushed by the end of February. The Massachusetts legislature, however, enacts some statutes to assist debt-ridden farmers. The disorder fuels concern about the need for an effective central government.

February 21, 1787: The Congress of the Confederation cautiously endorses the plan adopted at the Annapolis Convention for a new meeting of delegates from the states "for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein."

May 25, 1787: OPENING OF THE CONSTITUTIONAL CONVENTION. On May 25, a quorum of delegates from seven states arrives in Philadelphia in response to the call from the Annapolis Convention, and the meeting convenes. Ultimately, representatives from all the states but Rhode Island attend. Of the 55 participants, over half are lawyers, and 29 have attended college. The distinguished public figures include George Washington, James Madison, Benjamin Franklin, George Mason, Gouverneur Morris, James Wilson, Roger Sherman and Elbridge Gerry.

May 29, 1787: VIRGINIA PLAN PROPOSED. On the fifth day of the meeting, Edmund Randolph, a delegate from Virginia, offers 15 resolutions making up the "Virginia Plan" of Union. Rather than amending the Articles of Confederation, the proposal describes a completely new organization of government, including a bicameral legislature which represents the states proportionately, with the lower house elected by the people and the upper house chosen by the lower body from nominees proposed by the state legislatures; an executive chosen by the legislature; a judiciary branch; and a council composed of the executive and members of the judiciary branch with a veto over legislative enactments.

June 15, 1787: NEW JERSEY PLAN PROPOSED. Displeased by Randolph's plan which placed the smaller states in a disadvantaged position, William Patterson proposes instead only to modify the Articles of Confederation. The New Jersey plan gives Congress power to tax and to regulate foreign and interstate commerce and establishes a plural executive (without veto power) and a supreme court.

June 19, 1787: After debating all the proposals, the Convention decides not merely to amend the Articles of Confederation but to devise a new national government. The question of equal versus proportional representation by states in the legislature now becomes the focus of the debate.

June 21, 1787: The Convention adopts a two-year term for representatives.

June 26, 1787: The Convention adopts a six-year term for Senators.

July 12, 1787: THE CONNECTICUT COMPROMISE (I). Based upon a proposal made by Roger Sherman of Connecticut, the Constitutional Convention agrees that representation in the lower house should be proportional to a state's population (the total of free residents, "excluding Indians not taxed," and three-fifths of "all other persons," i.e., slaves).

July 13, 1787: NORTHWEST ORDINANCE. While the Constitutional Convention meets in Philadelphia, the Congress of the Confederation crafts another governing instrument for the territory north of the Ohio River. The Northwest Ordinance, written largely by Nathan Dane of Massachusetts, provides for interim governance of the territory by congressional appointees (a governor, secretary and three judges), the creation of a bicameral legislature when there are 5,000 free males in the territory, and, ultimately, the establishment of three to five states on an equal footing with the states already in existence. Freedom of worship, right to trial by jury, and public education are guaranteed, and slavery prohibited.

July 16, 1787: THE CONNECTICUT COMPROMISE (II). The Convention agrees that each state should be represented equally in the upper chamber.

August 6, 1787: The five-man committee appointed to draft a constitution based upon 23 "fundamental resolutions" drawn up by the convention between July 19 and July 26 submits its document which contains 23 articles.

August 6-September 10, 1787: THE GREAT DEBATE. The Convention debates the draft constitution.

August 16, 1787: The Convention grants to Congress the right to regulate foreign trade and interstate commerce.

August 25, 1787: The Convention agrees to prohibit Congress from banning the foreign slave trade for twenty years.

August 29, 1787: The Convention agrees to the fugitive slave clause.

September 6, 1787: The Convention adopts a four-year term for the president.

September 8, 1787: A five-man committee, comprising William Samuel Johnson (chair), Alexander Hamilton, James Madison, Rufus King and Gouverneur Morris, is appointed to prepare the final draft.

September 12, 1787: The committee submits the draft, written primarily by Gouverneur Morris, to the Convention.

September 13-15, 1787: The Convention examines the draft clause by clause and makes a few changes.

September 17, 1787: All twelve state delegations vote approval of the document. Thirty-nine of the forty-two delegates present sign the engrossed copy, and a letter of transmittal to Congress is drafted. The Convention formally adjourns.

September 20, 1787: Congress receives the proposed Constitution.

September 26-27, 1787: Some representatives seek to have Congress censure the Convention for failing to abide by Congress' instruction only to revise the Articles of Confederation.

September 28, 1787: Congress resolves to submit the Constitution to special state ratifying conventions. Article VII of the document stipulates that it will become effective when ratified by nine states.

October 27, 1787: The first *Federalist* paper appears in New York City newspapers, one of 85 to argue in favor of the adoption of the new frame of government. Written by Alexander Hamilton, James Madison and John Jay, the essays attempt to counter the arguments of Anti-Federalists, who fear a strong centralized national government.

December 7, 1787: Delaware ratifies the Constitution, the first state to do so, by unanimous vote.

December 12, 1787: Pennsylvania ratifies the Constitution in the face of considerable opposition. The vote in convention is 46 to 23.

December 18, 1787: New Jersey ratifies unanimously.

January 2, 1788: Georgia ratifies unanimously.

January 9, 1788: Connecticut ratifies by a vote of 128 to 40.

February 6, 1788: The Massachusetts convention ratifies by a close vote of 187 to 168, after vigorous debate. Many Anti-Federalists, including Sam Adams, change sides after Federalists propose nine amendments, including one which would reserve to the states all powers not delegated to the national government by the Constitution.

March 24, 1788: Rhode Island, which had refused to send delegates to the Constitutional Convention, declines to call a state convention and holds a popular referendum instead. Federalists do not participate, and the voters reject the Constitution, 2708 to 237.

April 28, 1788: Maryland ratifies by a vote of 63 to 11.

May 23, 1788: South Carolina ratifies by a vote of 149 to 73.

June 21, 1788: New Hampshire becomes the ninth state to ratify, by a vote of 57 to 47. The convention proposes twelve amendments.

June 25, 1788: Despite strong opposition led by Patrick Henry, Virginia ratifies the Constitution by 89 to 79. James Madison leads the fight in favor. The convention recommends a bill of rights, composed of twenty articles, in addition to twenty further changes.

July 2, 1788: The President of Congress, Cyrus Griffin of Virginia, announces that the Constitution has been ratified by the requisite nine states. A committee is appointed to prepare for the change in government.

July 26, 1788: New York ratifies by vote of 30 to 27 after Alexander Hamilton delays action, hoping that news of ratification from New Hampshire and Virginia would diminish Anti-Federalist sentiment.

August 2, 1788: North Carolina declines to ratify until the addition to the Constitution of a bill of rights.

September 13, 1788: Congress selects New York as the site of the new government and chooses dates for the appointment of and balloting by presidential electors, and for the meeting of the first Congress under the Constitution.

September 30, 1788: Pennsylvania chooses its two senators, Robert Morris and William Maclay, the first state to do so. Elections of senators and representatives continue through August 31, 1790, when Rhode Island concludes its elections.

October 10, 1788: The Congress of the Confederation transacts its last official business.

January 7, 1789: Presidential electors are chosen by ten of the states that have ratified the Constitution (all but New York).

February 4, 1789: Presidential electors vote; George Washington is chosen as president, and John Adams as vice-president.

March 4, 1789: The first Congress convenes in New York, with eight senators and thirteen representatives in attendance, and the remainder en route.

April 1, 1789: The House of Representatives, with 30 of its 59 members present, elects Frederick A. Muhlenberg of Pennsylvania to be its speaker.

April 6, 1789: The Senate, with 9 of 22 senators in attendance, chooses John Langdon of New Hampshire as temporary presiding officer.

April 30, 1789: George Washington is inaugurated as the nation's first president under the Constitution. The oath of office is administered by Robert R. Livingston, chancellor of the State of New York, on the balcony of Federal Hall, at the corner of Wall and Broad Streets in New York City.

July 27, 1789: Congress establishes the Department of Foreign Affairs (later changed to Department of State).

August 7, 1789: Congress establishes the War Department.

September 2, 1789: Congress establishes the Treasury Department.

September 22, 1789: Congress creates the office of Postmaster General.

September 24, 1789: Congress passes the Federal Judiciary Act, which provides for a chief justice and five associate justices of the Supreme Court and which establishes three circuit courts and thirteen district courts. It also creates the office of the Attorney General.

September 25, 1789: Congress submits to the states twelve amendments to the Constitution, in response to the five state ratifying conventions that had emphasized the need for immediate changes.

November 20, 1789: New Jersey ratifies ten of the twelve amendments, the Bill of Rights, the first state to do so.

November 21, 1789: As a result of congressional action to amend the Constitution, North Carolina ratifies the original document, by a vote of 194 to 77.

December 19, 1789: Maryland ratifies the Bill of Rights.

December 22, 1789: North Carolina ratifies the Bill of Rights.

January 25, 1790: New Hampshire ratifies the Bill of Rights.

January 28, 1790: Delaware ratifies the Bill of Rights.

February 24, 1790: New York ratifies the Bill of Rights.

March 10, 1790: Pennsylvania ratifies the Bill of Rights.

May 29, 1790: Rhode Island ratifies the Constitution, by a vote of 34 to 32.

June 7, 1790: Rhode Island ratifies the Bill of Rights.

July 16, 1790: George Washington signs legislation selecting the District of Columbia as the permanent national capital, to be occupied in 1800. Philadelphia will house the government in the intervening decade.

December 6, 1790: All three branches of government assemble in Philadelphia.

January 10, 1791: Vermont ratifies the Constitution.

March 4, 1791: Vermont is admitted to the Union as the fourteenth state.

November 3, 1791: Vermont ratifies the Bill of Rights.

December 15, 1791: Virginia ratifies the Bill of Rights, making it part of the United States Constitution.

Three of the original thirteen states did not ratify the Bill of Rights until the 150th anniversary of its submission to the states. Massachusetts ratified on March 2, 1939; Georgia on March 18, 1939; and Connecticut on April 19, 1939.

Project '87

The American Constitutional Bicentennial

Project '87 is a joint undertaking of the American Historical Association and the American Political Science Association. It is dedicated to commemorating the Bicentennial of the United States Constitution by promoting public understanding and appraisal of this unique document.

The Project is directed by a joint committee of historians and political scientists which is chaired by two scholars of international reputation—Professor Richard B. Morris of Columbia University and Professor James MacGregor Burns of Williams College. Warren E. Burger, retired Chief Justice of the United States, serves as Honorary Chairman of Project '87's Advisory Board.

The implementation of Project '87 has been divided into three distinct but interrelated stages. Stage I, devoted to research and scholarly exchanges on the Constitution, has been underway for the past several years. The Project has awarded fifty-one research grants and fellowships and supported five major scholarly conferences dealing with various aspects of the Constitution. Activities in connection with Stage II—teaching the Constitution in schools and colleges—began in 1980, and Project '87 is now implementing Stage III, programs for the public designed to heighten awareness of the Constitution and to provoke informed discussion on constitutional themes.

It is the hope and expectation of the Project's governing committee that, through its activities and those of others, both students and the public alike will come to a greater awareness and comprehension of the American Constitution.

Core support for Project '87 comes from the William and Flora Hewlett Foundation. Additional grants for specific programs have been provided by the National Endowment for the Humanities, which funds the magazine, and by the Andrew W. Mellon Foundation, the Lilly Endowment, Inc. of Indianapolis, Indiana, the Rockefeller Foundation, the Ford Foundation, CSX Corporation, the Exxon Education Foundation and the AT&T Foundation.

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